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THE SEPARATION OF CHURCH AND DATE: DESTABILIZING TRADITIONAL RELIGION-BASED LEGAL NORMS ON SEXUALITY

BRUCE MACDOUGALL[†]

I. INTRODUCTION

The recent case of *Hall v. Powers*[1] has brought into sharp focus the conflict between the constitutional guarantees for religion and for non-discrimination on the basis of sexual orientation. The case arose out of the desire of a student, Marc Hall, attending a Roman Catholic school in Ontario, to take his boyfriend to his high school prom. Because the boyfriend was not a student at the school, Hall was required to submit the name of his date to the school for approval. Hall had been attending that and other publicly-funded Catholic schools since he started school.[2] The principal denied Hall permission to attend the prom with his boyfriend. The principal reasoned that "interaction at the Prom between romantic partners is a form of sexual activity and that, if permission were granted to Mr. Hall to attend the prom with his boyfriend as a same-sex couple, this would be seen both as an endorsement and condonation of conduct which is contrary to Catholic church teachings." The school board refused to reverse the principal's decision. Hall thereupon sought an interlocutory injunction restraining the defendants from preventing his attendance at the prom with his boyfriend. At the eleventh hour, just before the prom was to begin, R. MacKinnon J. granted the injunction. The decision was attended by a great deal of media attention.[3] It was perceived as being of great significance not just to Hall, but to all gays and lesbians and to various religion-run institutions.[4] Very much in issue was the legal status of gays and

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[1] *Hall (Litigation guardian of) v. Powers*, 59 O.R. (3d) 423, [2002] O.J. No. 1803 (S.C.J.) (QL) at para. 4 [*Hall*].

[2] Catholic schools in Ontario are financed through the public purse because of their special status under s. 93 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[3] *E.g.*, Shannon Kari, "Teen's gay date on prom night becomes a constitutional issue" *The Vancouver Sun* (7 May 2002) A3; Graeme Smith, "Gay teen wins prom fight" *The Globe and Mail* (11 May 2002) A1.

[4] On the issue of the legal place of teachers in religion-run institutions, see Hilary M.G. Paterson, "The Justifiability of Biblically Based Discrimination: Can Private Christian Schools Legally Refuse to Employ Gay Teachers?" (2001) 59 U.T.Fac. L. Rev. 253.

lesbians in society, especially in the context of a "conflict" with a religious interest.

The *Hall* case is one of the latest in an extraordinary line of cases on sexuality, particularly sexual orientation, in Canada in the past decade, some of which are dealt with in the articles in this special edition of the U.B. C. Law Review. Even though the decision of R. MacKinnon J. was, of course, only with respect to an interlocutory injunction, the case serves to bring into focus issues that have been developing for the past ten years on just what it means to give constitutional equality protection to gays and lesbians and how that protection can "fit" with other constitutional guarantees. The deep-seated traditional norms, many of them religion-based, that lay in the background in the other cases and were there only indirectly raised, come to the fore in *Hall*: the relationship between children and homosexuality, and between religion and homosexuality, the conflict between equality and other constitutional guarantees, the legal characterization of homosexuality (an issue of morals or of equality?), the meaning of equality. In this paper I will explore some of these facets and the tension they generate.

The legal situation of gays and lesbians is based largely on an important series of cases from the Supreme Court of Canada in the past decade. The principle of including gays and lesbians in the scope of s. 15 of the *Canadian Charter of Rights and Freedoms*[5] was established in the case of *Egan*[6]; although in that case, the majority denied access to benefits to a same-sex couple, mainly on the basis that it would cost too much. The principle of inclusion in discrimination protection was emphasized again in the case of *Vriend*[7] where the court held that protection under s. 15 meant that provincial human rights legislation, in that case Alberta's, must protect against discrimination on the basis of sexual orientation if it is to provide protection at all. That case was interesting because of certain parallels with later cases, including the *Hall* case. In *Vriend*, an instructor at a religion-run college was dismissed because of his homosexuality. The issue of the conflict between sexual orientation and religion, arising in the education context, was in the background, though the court did not have to address it specifically. In the case of *M. v. H.*,[8] the Supreme Court of Canada revisited the issue of benefits to same-sex couples which had been treated somewhat dismissively in *Egan*. This time, the Supreme Court of Canada was much more sympathetic and essentially analogized same-sex couples to opposite-sex couples in terms of entitlement to benefits. Significantly, perhaps, the cost of the benefits in that case was to be borne privately, not by the state, which would have been the

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[5] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[6] *Egan v. Canada*, [1995] 2 S.C.R. 513.

[7] *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[8] *M. v. H.*, [1999] 2 S.C.R. 3.

case had the decision in *Egan* been different. The issue of the conflict between sexual orientation issues and religion, in the background in *Vriend*, re-emerged in another education context at the Supreme Court of Canada in *Trinity Western*.[9] The trend in the previous Supreme Court of Canada cases[10] to expand protection for sexual orientation was halted as the majority of the court decided that it was acceptable for a religion-based university to require that its incoming students, studying for teaching jobs in the public education system, make a declaration condemning homosexuality. While the Supreme Court of Canada reiterated its position that it is inappropriate to discriminate against gays and lesbians, it also took the narrow position that a student making such a condemnatory statement had not committed a discriminatory *act* such as to make him or her potentially biased against homosexual students. Again the Supreme Court of Canada did not have to deal expressly with the conflict between religion and sexual orientation in this case because of the way the case arose.

Two cases, one recently heard by the Supreme Court of Canada, and the other headed that way, more directly involve the issue of sexual orientation and religion – or at least established traditions based on religion. The *Chamberlain* case[11] raises the issue of the extent to which religious motivations can be the basis for a school board's exclusion of materials about homosexuality from those available to students in the classroom or in the school library. The other case raises the question of whether the refusal to recognize same-sex marriage is contrary to s. 15 of the *Charter*. The British Columbia Supreme Court has said that such a refusal is constitutionally justifiable while the Superior Courts of Ontario and Quebec have said it is not.[12] While the courts in both the *Chamberlain* and the same-sex marriage cases might be able to avoid tackling the religion issue directly, if the *Hall* case gets to the Supreme Court of Canada, it will directly posit the issue.

I suggest, then, that in the context of the cases on sexual orientation, the jurisprudence in the past decade has tended towards a sharpening of focus in the tension between the goal of sexual orientation equality and certain religious views. Though those religious views can hardly be said to have changed, the legal and social position of minority sexualities, particularly homosexuality, has changed. Opposition to equality for homosexuals and

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[9] *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772.

[10] See also *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 [*Little Sisters*], where the Supreme Court of Canada held that differential treatment of gay and lesbian material by customs officials constituted a breach of s. 15.

[11] *Chamberlain v. Surrey School District No. 36* (2000), 191 D.L.R. (4th) 128, 2000 BCCA 519, rev'd 2002 SCC 86.

[12] *EGALE Canada v. Canada (Attorney General)* (2001), 95 B.C.L.R. (3d) 122, 2001 BCSC 1365; *Halpern v. Canada (Attorney General)*, [2002] O.J. No. 2714 (S.C.J.) (QL); *Hendricks c. Québec (Procureur général)*, [2002] J.Q. No. 3816 (C.S.) (QL).

homosexuality could, before the 1990s, be characterized as just a "traditional" values approach without any particular religious connotation, much as incest or bigamy might still be seen.[13] There were known Christian (and other religious) stances against homosexuality, but those religious values were probably interpreted more as bolstering accepted norms rather than being at their very heart. The interest of particular (conservative) religious groups in issues of sexuality became clear from the start, however, when certain of those groups intervened in cases involving homosexuality and other issues of sexuality.[14] Such Intervenors did not originally need to make specifically religious arguments in order to attempt to thwart equality for homosexuals; however, as litigation and legislation have moved Canadian law to a fuller conception of equality for gays and lesbians, the religious underpinning of the remaining barriers to equality have become clear. Thus, in the marriage cases, for example, the arguments against allowing same-sex marriage are essentially religious in nature.[15] In *Hall*, too, the religious nature of the opposition to equality is readily apparent, but, by now, however, the idea that an anti-homosexual position represents the "norm" or the "status quo" in the legal system can no longer be maintained.

The conflict with constitutional religion guarantees might be thought to represent a formidable barrier to the further extension of the ideal of equality for gays and lesbians or for other minority sexualities. I argue, however, that this situation in fact represents an advance for gay and lesbian equality precisely because it underlines the *religious* nature of the anti-homosexual rhetoric. A court, to give credence to such arguments, must directly side with exclusionary religious arguments that trump the more general constitutional value which is equality. Furthermore, the court challenges to traditional legal views on sexuality affect the religious position in that that position must be

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[13] E.g. *Canada (Attorney General) v. Mossop* (1990), 71 D.L.R. (4th) 661 at 673-74 (F.C.A.), per Marceau J.A.; *R. v. Duvuvier, Kowalchuk and Hollingsworth* (1990), 75 O.R. (2d) 203 (H.C.J.). See Bruce MacDougall, *Queer Judgments: Homosexuality, Expression and the Courts in Canada*, (Toronto: U Toronto Press, 2000) at 123-29. The situation changed with a series of cases beginning with: *Veysey v. Correctional Service of Canada* (1990), 43 Admin. L.R. 316 (F.C.A.); *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (S.C.).

[14] There have been religious intervenors in many of the gay and lesbian cases: *Egan, Vriend, EGALE, M. v. H., Trinity Western, Chamberlain* (CA), *Hendricks*. Note especially para. 25 of *Egan* where La Forest J. approved the concept of family offered by counsel for the Inter-Faith Coalition on Marriage and the Family.

[15] See generally *Halpern, supra* note 12; *Hendricks, supra* note 12 at para. 25. As I said in "The Celebration of Same-Sex Marriage" (2000-01) 32 Ottawa L. Rev. 235 at 247: "One of the difficulties in changing the definition of marriage is that it is an institution that, for many people, still carries with it strong *religious* connotations which argue against its opening up to same-sex couples. Not surprisingly, those who argue against any admission of same-sex couples to marriage tend to have conservative religious connections." Despite claims to the contrary there are no arguments against same-sex marriages that are not essentially religious in nature. The arguments from tradition, definition and morality are, in fact, all religiously rooted.

particularized for the court, rendering it no longer monolithic. It becomes apparent that there is an indeterminate quality to the character of much religious teaching, especially on sexuality issues, even within a given denomination. This was evident in *Hall* in the conflicting evidence of the Roman Catholic church teachings.[16] Those who argue for the "religious" position in many cases will have difficulty saying just what that religious position is. On the other hand, the equality position will usually be straightforward.

Another development to note is that the controversy that attended gay and lesbian issues only a decade ago is now beginning to turn to other issues of sexuality. No doubt much of the litigation in those areas will follow the pattern of the gay and lesbian cases and those cases will be relied on. The early cases in each new category of sexuality will tend to be ones of definition or assignment of status; the later cases will tend to be about place in institutions and social participation. As *Hall* deals to a certain extent with the issue of childhood homosexuality, so other issues of sexuality and children are being debated, most controversially recently in the *Sharpe* case.[17] As gay and lesbian unions are being legally recognized, so rules respecting other forms of unions, polygamous, incestuous, and so on will be re-examined. As cases like *Egan* open s. 15 to protect against discrimination on the basis of sexual orientation, meaning gays and lesbians, so its scope will be challenged by others such as transsexual and other transgendered persons.[18] As some religious institutions are deemed to be government actors, and thereby made subject to constitutional norms like s. 15 of the *Charter*, so other "private" institutions and organisations will face the same treatment and teachings and attitudes about sexuality in those institutions will be challenged. Not long ago, gays and lesbians could be lumped in with other "deviant" or "unnatural"

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[16] What would a court make of the current Anglican teaching on homosexuality given the active debate in that church about the blessing of same-sex unions? *e.g.* Michael Valpy, "Anglican rift looms over same-sex unions" *The Globe and Mail* (12 June 2002) A1, A6. Further, see the conflicting religious views on marriage detailed by Blair J. in *Halpern, supra* note 12. Of course, this is not just a problem for religions in Canada. See e.g. Ingrid Lund-Andersen, "The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?" in Robert Wintemute & Mads Andenæs, eds., *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001) 417.

[17] *R. v. Sharpe*, [2001] 1 S.C.R. 45.

[18] See especially the appeal from *Nixon v. Vancouver Rape Relief Society (c.o.b. Rape Relief and Women's Shelter)*, 2001 BCHRT 1, not a constitutional case, but nonetheless exemplifying the emergence of these issues. The decision of the B.C. Human Rights Tribunal explores to a limited extent the relevance of s. 15 jurisprudence in a human rights context. On transgender and the law in other jurisdictions, see Andrew N. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London and Sydney: Cavendish, 2002) and Stephen Whittle, "Sex: Has It Any Place in Modern Marriage?" in Wintemute & Andenæs, *supra* note 16, 693.

sexualities,[19] all as a group, the members of which would be treated more or less the same, with respect to their deviance. The broad brush approach no longer works and courts (and legislatures) will now have to consider the position of the various alternative sexualities in the post-*Charter* world. The legal response to issues involving gays and lesbians will not necessarily presage the answers that will be forthcoming for issues involving other sexualities. The tension with religious positions will, however, I suggest, be similar.

With the *Hall* case providing a focal point in the rest of this paper, I will comment on the following issues that arise out of the litigation on sexual orientation equality and the challenge that litigation and equality presents to established religion-based norms: 1) the scope of equality and whether it extends to purely celebratory issues such as a high school prom; 2) whether a case about gays and lesbians should really be characterized as one of morality or of equality; 3) the tension between constitutional protections of religion and sexual orientation; 4) the concern that decisions in favour of plaintiffs like Hall will open the floodgates to similar claims from other "deviant" sexualities who claim similar positions. In many respects, these issues overlap and, therefore, the divisions that I use are for ease of exposition rather than because the issues themselves demand it. There is a principled response to each of these issues that should be borne in mind by judges and legislators who are called on to decide such issues. The question of how situations involving other sexuality issues should be addressed is, however, more complex. While they will certainly raise similar issues, whether the response should be the same is another question.

II. THE ISSUE OF CELEBRATION AS AN ELEMENT OF EQUALITY

Many of the recent cases, including *Hall*, can be assessed as part of a legal discourse about the meaning and content of equality. The Supreme Court of Canada has stressed the importance of the equality guarantee in s. 15. In *Law*,[20] Iacobucci J. said:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[21]

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[19] See text accompanying notes 44-48. A wonderful exposé of this is in Philip Girard, "From Subversion to Liberation: Homosexuals and the Immigration Act, 1952-1977" (1987) 2 C.J.L.S. 1.

[20] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

[21] *Ibid.* at para. 51.

The Supreme Court of Canada and other courts have breathed life into the equality section of the *Charter*. Equality is to be widely construed and limited only with great hesitation. While the *Law* case and other decisions at the Supreme Court of Canada[22] have dealt with s. 15 by defining discrimination, setting out the purpose of s. 15 or giving a legal test for whether s. 15 is breached, they have not actually expressly considered or described the *contents* of equality. Elsewhere I have suggested that in order for there to be *real* legal equality for the members of a given group, the state must show towards the members of the particular group compassion, condonation and celebration.[23] Absent any one of those elements and the members of the group might have partial equality but not complete legal equality. For members of certain groups, that absence might not be legally impermissible, either because of s. 1 issues or because the group is not comprehended in s. 15. While I argue that discourse about equality for gays and lesbians is now largely at the site of celebration, for members of many other sexual minorities it is not, and it is possible that equality for them will not extend this far. They will not, therefore, be *fully* legally equal.

Compassion is the bare principle that the members of the group should not be discriminated against just because of their membership in the group. That point is widely conceded to gays and lesbians. Even mildly conservative religions agree that gays and lesbians should be shown compassion. It was in fact pointed out in *Hall* that the Roman Catholic church's Catechism calls for "compassion" for homosexuals.[24] It was confirmed in *Egan* and *Vriend* that since the *Charter* applies to gays and lesbians so should human rights legislation. Whether compassion should be shown for other groups is more debatable: it might be agreed, for example, that it should be shown towards transgendered persons, marking a first step for that group towards legal equality, but not perhaps for those of Sharpe's sexual inclination, who might continue to be lawfully discriminated against in many contexts, particularly education.

Condonation is the involvement or the engagement by the state (or some other authority) with the members of the group not just to protect them from discrimination but to offer them something of benefit. Condonation implicates the state in the activities of the members of the group. The state is not just a defender of the *existence* of the members of the group in the way it is with compassion, but the state actually fosters the *activities* of the members of the group in some way, without necessarily approving of, or blessing, the members of the group or their activities. The cases of *M. v. H.* and *Egan* addressed this aspect of equality. Gays and lesbians and their relationships are, as a result of *M. v. H.*, condoned by the state. Such condonation can take the

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[22] See those cases cited in *Law*.

[23] MacDougall, *supra* note 15 at 252-60.

[24] *Hall*, *supra* note 1 at para. 23; see also *Hendricks*, *supra* note 12 at para. 27.

form of passive, but not necessarily active, encouragement of same-sex relationships. The state might provide benefits to same-sex couples, but not actively promote the creation of such relationships, as it might encourage people of the opposite sex to marry. Sometimes the benefits will come in a different guise than those in other (heterosexual) situations, *e.g.* a different programme, a "registered partnership" rather than a marriage. Sometimes the qualifications will be different, *e.g.* no instant benefits for same-sex couples through marriage but rather a requirement that the couple reside together for a year or two. Still, the state is engaged in some way. In Canada, at least, gays and lesbians have access to most of the sorts of benefits available to heterosexuals, especially once the immigration rules are changed. Other sexual minorities may not be so "condoned." The availability of state support for the particular benefits of importance to transgendered persons, for example, will vary from province to province.[25] Some religions have had difficulty (to say the least) with expansion of this aspect of equality even to gays and lesbians. Any involvement by the state, implicating it in gays' and lesbians' doing something (like forming relationships or adopting children), is frowned upon.[26] The particular religion might defend *being* homosexual (compassion) but not *doing* homosexual things (condonation). In *Hall*, the school principal denied permission to Hall to bring his date to the prom because the principal reasoned, "this would be seen as ... condonation of conduct which is contrary to Catholic church teachings."[27] At least in the principal's mind, homosexuals merited equality no further than the level of compassion.

The final field of discourse about equality, and the one, in Canada, in which most legal controversies with respect to homosexuality now arise is in the context of celebration. Here, the state does not just tolerate or facilitate the members of a particular group, as in compassion or condonation – it also celebrates them. Gays and lesbians are treated in a positive way. The "benefits" at this level are not so much tangible ones as symbolic ones or supportive ones in the sense of fostering the members of the *group* and encouraging the group's flourishing as an integrated and *valued* part of the society. There have been judicial statements recognising the importance of symbolic issues in the equality context. For example, Binnie J. in the *Little Sisters* case said:

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[25] See Lori Johnson, "The Legal Status of Post-operative Transsexuals" (1994) 2 Health L. J. 159; and, Shauna Labman, "Left in Legal Limbo: Transsexual Identity and the Law" (2001) 7 Appeal 66.

[26] See Bruce MacDougall, "A Respectful Distance: Appellate Courts Consider Religious Motivation of Public Figures in Homosexual Equality Discourse – The Cases of *Chamberlain* and *Trinity Western University*" (2002) 35 U.B.C. L. Rev. 511 at 532-33.

[27] *Hall*, *supra* note 1 at para. 4.

> When Customs officials prohibit and thereby censor lawful gay and lesbian erotica, they are making a statement about gay and lesbian culture, and the statement was reasonably interpreted by the appellants as demeaning gay and lesbian values. The message was that their concerns were less worthy of attention and respect than those of their heterosexual counterparts.[28]

Similarly, in *Halpern*, LaForme J. said:

> There are distinct and profound benefits in marriage, which as I noted previously are not satisfied merely by providing equivalent economic benefits, rights and obligations through some other means. Simply put, such alternative methods do not have the same meaning or significance as access to them by right of entry to a basic social and cultural institution.[29]

I argue that current issues of same-sex marriage, gay and lesbian content in schools, and gay participation in school activities are largely issues of celebration. R. MacKinnon J. agreed with this characterization of the issue in *Hall* and said: "The Prom is not a transition into marriage or pre-married life. Rather, it is clearly a celebratory cultural and social event of passage from high school."[30] Though the principal characterized the *Hall* case as involving an issue of condonation, I agree with the judge that it is at least as much an issue of celebration, because of the powerful positive message about gays and lesbians sent out by virtue of same-sex couples' inclusion in one of society's rites of passage. If these celebratory issues are resolved in favour of gays and lesbians, then the courts, evidently important organs of the state, are essentially saying that the members of the group and what they stand for (homosexuality) are in fact *good*. Here, conservative religions draw the line, for their view is that homosexuality is something shameful, not to be celebrated. It is *bad*, not good. In *Hall*, the church certainly did not want to be seen to be condoning homosexuality, let alone celebrating it.

Aside from those who argue from the position of "tradition", there are those who would argue that members of a particular group should not involve the state in their identity or their celebration.[31] Such involvement, it might be argued, signifies a kind of submission to the state and an assimilation of gays and lesbians in traditions that should be challenged not adopted. The state should just be a protector but should not get involved in the lives of gays and lesbians. This position, however, ignores the fact that the state *is* very much involved in a celebratory way in heterosexual lives and that heterosexuals to a

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[28] *Little Sisters*, *supra* note 10 at para. 123.

[29] *Halpern*, *supra* note 12 at para. 376.

[30] *Hall*, *supra* note 1 at para. 25.

[31] A good summary of "progressive" arguments against same-sex marriage (and state involvement in them) is in William N. Eskridge, Jr., "The Ideological Structure of the Same-Sex Marriage Debate (And Some Postmodern Arguments for Same-Sex Marriage)" in Wintemute & Andenæs, *supra* note 16, 113. See also Nitya Duclos, "Some Complicating Thoughts on Same-Sex Marriage" (1991) 1 Law & Sexuality 31.

great extent obtain their privileged position from that involvement. The enormous amount of content in schools which sends a positive heterosexual message, the state involvement in heterosexual relationships, and so on, may be so pervasive and so taken for granted that it may seem simply natural. It may not be seen as state "celebration" at all. The celebration and the state aspects of a particular institution may be obscured by familiarity.

A court, in a case like *Hall*, must wrestle with the question of whether for this particular minority, gays and lesbians, full equality, including celebration, is legally necessary. There can be few events more significant in the social life of a young Canadian person today than the rite of passage which is the high school prom. In some ways this is a substitute for the more venerable rites of passage from youth to adulthood that occur in other societies. But is such an event something about which s. 15 of the *Charter* has anything to say? It is not really one of the "benefits" of education. *Hall* was not being deprived of instruction or of the things of necessity to survive as a student. Furthermore, the school board had not discriminated against him in the sense of excluding gay and lesbian students from their institutions. Nonetheless, the case brings into focus how inclusion in a purely celebratory event is vital to give the individual a sense that he has worth and has been treated equally. R. MacKinnon J. emphasized the comparability of Hall's position with the position of others who wanted to bring a date of the opposite sex. He said: "The cultural and social significance of a high school Prom is well-established. Being excluded from it constitutes a serious and irreparable injury to Mr. Hall as well as a serious affront to his dignity."[32] Equally injurious would be a situation where the school set up a separate "alternative" prom for those who were not opposite-sex couples. Such "separate-but-equal" institutions are a lot more separate than they are equal.

Furthermore, the judge rightly took to task the church's condemnation of doing (but not being) - that it was acceptable for Hall to *be* gay but not for him to *do* anything gay. As Cory and Iacobucci JJ. said in *Egan*:

> Sexual orientation is more than simply a "status" that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner. The *Charter* protects religious beliefs and religious practice as aspects of religious freedom. So, too, should it be recognized that sexual orientation encompasses aspects of "status" and "conduct" and that both should receive protection. Sexual orientation is demonstrated in a person's choice of a life partner, whether heterosexual or homosexual. It follows that a lawful relationship which flows from sexual orientation should also be protected.[33]

And, as L'Heureux-Dubé J. said in dissent in *Trinity Western*: "The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as *per* Madam Justice Rowles: 'Human rights law

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[32] *Hall*, *supra* note 1 at para. 53.

[33] *Egan*, *supra* note 6 at para. 175.

states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person...'".[34] However logical the church might find such an approach to membership in a group, it clearly cannot be imported into the Canadian legal system as the basis for a decision in an equality case. It would negate any aspect of condonation or celebration to the members of the group.

A further aspect of celebration that is important for a group to achieve *full* equality is that a member of the group not be criticized for legally defending the equality position. In order to be treated as equal and worthy, a court should consider the sense of worth the member of the particular group is accorded in and by the court itself. Courts have not always made members of minorities, particularly sexual minorities, feel they are truly worthy of the courts' time. They are met with a certain scepticism or cynicism. I criticized the Court of Appeal judge in *Chamberlain* for this.[35] In that case Mackenzie J.A. said: "Sexual orientation issues raise strong emotions and Mr. Chamberlain must have known that by advancing these three books for status as recommended learning resources for the Surrey School District he was inviting a confrontation before the Board. The views of Board members and some parents on issues of sexual orientation were well-known."[36] Mackenzie J.A. to a certain extent blamed the petitioners for "the anticipated confrontation." Such a judicial approach clearly colours how a plaintiff will feel about his or her equality claim being treated fairly by the court. In *Hall*, R. MacKinnon J. was careful not to accept a characterization of Hall's action as that of a trouble-maker or a publicity hound: "He has not, in the words of the Board, 'decided to make his homosexuality a public issue'. Given what I have found to be a strong case for an unjustified s. 15 breach, he took the only rational and reasonable recourse available to him. He sought a legal ruling."[37] Criticizing a person for making his status public would hardly be a celebration of that status.

III. THE ISSUE OF CHARACTERIZATION

Important to the issue of equality is the issue of the way a particular legal issue with respect to a sexual minority, such as gays and lesbians, is characterized. The cases in the past decade or so mark the beginning of a shift

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[34] *Trinity Western*, *supra* note 9 at para. 69. And, in *Chamberlain* at the B.C.S.C., Saunders J. said at para. 82: "The protection of the *Charter* is not intended to be hollow. Where a defining characteristic of a person is his or her conduct and the conduct is not unlawful, s.15 of the *Charter* protects equality rights for that person complete with his or her conduct. I conclude that s.76 does not protect a decision based on religious views as to homosexual conduct." *Chamberlain v. Surrey School District No. 36*, [1998] B.C.J. No. 2923 (S.C.) (QL).

[35] Bruce MacDougall, *supra* note 26 at 511.

[36] *Chamberlain*, *supra* note 11 at para. 57.

[37] *Hall*, *supra* note 1 at para. 59.

in characterization for issues involving homosexuality. What is perhaps most striking is that these issues of relevance to gays and lesbians are thought of as *equality* issues at all. The idea that matters affecting women, gays and lesbians, transgendered persons and so on, even child sexuality, could be equality issues rather than morality issues is evidence of the sea change in legal perception made in large part by the *Charter* and the way courts have adjudicated cases decided under it.

In my recent study of gays and lesbians in Canadian courts in the forty-year period from 1960-2000, it was clear that before the coming of the *Charter* gays and lesbians appeared in court cases in the criminal, family law or labour context.[38] In the criminal context, the courts were adjudicating whether the gay or lesbian (usually the gay) person had committed a criminal (*i.e.* anti-social) act. In the family law and labour contexts, the issue was usually whether the person was "fit" to be a custodial parent or an employee. Gays and lesbians appeared to be judged. Often they were judged not fit or socially acceptable. The idea of homosexuality as an issue of equality did not arise. Although its actual result can be criticized, *Egan* made it clear that including sexual orientation under s. 15 provided a tool for gay and lesbian issues to be characterized not as moral or fitness issues, but as equality issues, in a legally-meaningful way. It is my position that cases on issues of homosexuality cannot (or should not) now be characterized as having any "morality" aspect at all. Once it is established that s. 15 applies to a particular group, it is not permissible for the court to inquire into the suitability of that group or members of it to have protection for equality purposes. The *Charter* does not speak about morality in s. 15. Even an inquiry under s. 1 is not about morality – certainly not about the "morality" of a group, per se, protected under s. 15.

The *Charter* introduces a whole new language into certain legal inquiries in Canada. The language of morality – such as Patrick Devlin's view that homosexuality is a "pure point of morals"[39] – is out of place. True, certain statutes demand consideration of morality, as in *Chamberlain*. Even there, however, a *religious* interpretation of morality has no place.[40] I argued in the last section that gays and lesbians should not be treated by the courts as

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[38] MacDougall, *supra* note 13.

[39] Patrick Devlin, *The Enforcement of Morals*, (London: Oxford U Press, 1965) at 92. See MacDougall, *supra* note 26 at 527.

[40] Even Mackenzie J.A. recognized limits to a religious interpretation of morality. In *Chamberlain*, *supra* note 11 at para. 14, he said:

> The extension of this cultural or moral norm beyond its religious origins highlights the distinction between religion and morality. A moral proposition may originate from a religious insight but religion is more than morality and moral positions are not necessarily derived from religion. S. 76(2) emphasizes this distinction by mandating teaching of "the highest morality" while prohibiting teaching of any "religious dogma or creed."

troublemakers for raising issues related to their equality. They are made no more welcome by the court if they are expected by the court to engage in a debate about the morality of their existence.

In various ways those arguing cases involving gay and lesbian issues can still make characterizations of the cases involving homosexuality as morally-laden – although that might be done avoiding direct appeals to "morality."[41] In the eyes of many religions, of course, issues involving sexuality are in fact still primarily issues of morality. A court should, however, avoid importing religious values into a case in which such an importation re-introduces a morality element to the case. For example, judicial statements like that of La Forest J. in *Egan* are out of place: "... marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions."[42] Such an attitude improperly makes a current legal equality issue depend on a *religious* tradition.

In *Hall*, the court noted that the Roman Catholic church's Catechism declares that homosexuality is contrary to natural law and can under no circumstances be approved. The Catechism states that "homosexual acts are intrinsically disordered." Such acts are matters of sin. The reaction of the church is typical of many situations where the issue of homosexuality is presented as a moral issue of sex practices about which judgments may be made. Courts should be careful that a "morality" characterization about a gay or lesbian equality issue not be affected indirectly by way of assumptions about, for example, the sexual practices of gays and lesbians. Traditionally, it is true, mention of homosexuality conjured primarily notions of unnatural sex. Thus Hall's going to the prom with his boyfriend conjured immediately (for the church at least) sexual acts of which the church does not approve. The same was not true for heterosexual couples at the prom.

Assertions or expectations such as this fit into a long tradition of assumptions that have been made about homosexuals and homosexuality, even when those assumptions are not specifically posited for the court's consideration.[43] Until recently, courts have tended to accept such assumptions. One assumption about homosexuality and homosexuals is the acceptance of the notion that homosexuals are abnormally obsessed with sex. In *Little Sisters*, Smith J. said without any consciousness of a double-standard that: "Since homosexuals are defined by their homosexuality and their art and

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[41] See MacDougall, *supra* note 26 at 526-31. Chai R. Feldblum notes how many legislators in the U.S., during debate on the Defense of Marriage Act, used "morality" arguments against same-sex marriage, knowing that "religion" arguments were constitutionally impermissible. Chai R. Feldblum, "The Limitations of Liberal Neutrality Arguments in Favour of Same-Sex Marriage" in Wintemute & Andenæs, *supra* note 16, 55. Feldblum argues that the same-sex marriage debate *is* a morality debate.

[42] *Egan*, *supra* note 6 at para. 21.

[43] MacDougall, *supra* note 13 at 77-87.

literature is permeated with representations of their sexual practices, it is inevitable that they will be disproportionately affected by a law proscribing the proliferation of obscene sexual representations."[44] In *Vriend,* McClung J.A., writing for the majority at the Court of Appeal, knew nothing about the sexual practices of Vriend, who lost his job because he was gay, however, McClung J.A. felt comfortable saying: "I am unable to conclude that it was a forbidden, let alone a reversible, legislative response for the Province of Alberta to step back from the validation of homosexual relations, including sodomy, as a protected and fundamental right, thereby, 'rebutting a millennium of moral teaching'."[45] Furthermore, the judge associated homosexuality with unnatural sexual practices – the only way to explain how the judge thought it was relevant to say: "It is pointless to deny that the Dahmer, Bernardo and Clifford Robert Olsen prosecutions have recently heightened public concern about violently aberrant sexual configurations and how they find expression against their victims."[46] The link made between unnatural sex and homosexuality has surfaced in child custody cases. In *Saunders v. Saunders,* where a father in a homosexual relationship sought access to his child,[47] Wetmore Co. Ct. J. said: "Surely it cannot be argued the exposure of a child to unnatural relations is in the best interests of that child of tender years."[48] R. MacKinnon J. rightly rejected such a characterization in *Hall*, saying: "Though dancing can be sexually expressive, it is not necessarily so. It cannot fairly be equated with having sex."[49]

The other response to sex and homosexuality one finds in some cases, and again reflected in the church's position in *Hall*, is to *desexualize* homosexuals. The sex in homosexual is censored so that homosexuals are expected somehow to easily eliminate homo-sex as an important part of their lives. People might be homosexual, but they can legitimately be expected not to engage in homosexual activity. Mr. Hall for example could be homosexual but was expected by the church not to *do* anything about his sexual orientation. Likewise, in *Trinity Western*, even homosexual students, we suppose, were expected to abjure from any homosexual activity. One variation on this is to analogize same-sex relationships to "just" friendships. In *Egan*, for example, the judge said: "The plaintiffs as a homosexual couple, just as a bachelor and a spinster who live together or other types of couples who live together do not

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[44] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (1996), 131 D.L.R. (4th) 486 at 524 (B.C.S.C.), aff'd [1988] B.C.J. No. 1507 (CA) (QL), rev'd in part *Little Sisters*, *supra* note 10.

[45] *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595 at 609 (Alta. C.A.).

[46] *Ibid.* at 611.

[47] *Saunders v. Saunders* (1989), 20 R.F.L. (3d) 368 (B.C. Co. Ct.).

[48] *Ibid.* at 370-71.

[49] *Hall, supra* note 1 at para. 49.

fall within the traditional meaning of the conjugal unit or spouses."[50] La Forest J. likewise said that gays and lesbians, as couples, were just like other couples "such as brothers and sisters or other relatives, regardless of sex, and others who are not related, whatever reason these other couples may have for doing so and whatever their sexual orientation."[51] The pinnacle of such desexualization of homosexuality, in recent times, must be in *Re Layland and Minister of Consumer and Commercial Relations* where Southey J. said:

> The law does not prohibit marriage by homosexuals, provided it takes place between persons of the opposite sex. Some homosexuals do marry. The fact that many homosexuals do not choose to marry, because they do not want unions with people of the opposite sex, is the result of their own preferences, not a requirement of the law.[52]

It is inappropriate for a court in Canada today to accept such attitudes to any extent. While not directly using the language of morality, such arguments or attitudes indirectly do so by problematizing homosexuality. This is inconsistent with the characterization of homosexuality by the *Charter* as a matter of equality. While a sectarian school board might make such arguments, they are correctly rejected by the courts as was done in *Hall*.

IV. THE ISSUE OF RELIGION VERSUS EQUALITY

Very much connected to the previous two issues is a third issue, explicit in *Hall*, namely, the resolution of a conflict between different protections in a constitutional rights document like the *Charter*. What is the appropriate response when a case creates a conflict between equality of sexual orientation and equality of religion or between a right to equal protection (on the basis of sexual orientation) on the one hand and a freedom (of religion or religious expression) on the other? One approach, of course, is to have the case characterized in such a way that there is no such conflict. This often works. Thus the *Trinity Western* case was argued as a case about the interpretation of education law and the capacity of the B.C. Teachers Federation, a case, that is, about administrative law. The *Vriend* case was framed very much as a question of the scope given over to a government enacting human rights legislation. The same-sex marriage issue was framed in the B.C. case as a question about the jurisdictional issue of marriage or a basic question of the common law definition of marriage. Such responses in those cases were largely appropriate. It was not necessary to address the tension between

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[50] *Egan v. Canada* (1991), 87 D.L.R. (4th) 320 at 332-33 (F.C.T.D.).

[51] *Egan, supra* note 6 at 535.

[52] *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 104 D.L.R. (4th) 214 at 223 (Ont. Ct. Gen. Div.). Greer J. dissented, saying at 231 that because of the restriction: "The message [the applicants and others who wish to marry a person of the same sex] receive must surely give them the perception that they are inferior persons in our society."

religion and equality, however much in the background, to resolve the particular dispute in those cases. This conflict however is at the heart of the issue in a case like *Hall*. It was also more central in the *Hendricks* same-sex marriage case where, typical of the religion submissions, Abdalla Idris Ali, Director of the Centre of Islamic Education in North America, said that a redefinition of marriage to include same-sex unions "would be directly contrary to, and invalidate our religious beliefs." As a result, he said, "It would become harder for Muslims to participate in Canadian society if that society insisted on acceptance of unions that our religion teaches are an affront to Allah."[53]

One resolution to this issue is to take what might be characterized as a historical approach – one constitutionally protected interest should not be impinged upon by a later constitutional protection. Those interests whose constitutional protection arises subsequent to the first, would be subject to the earlier existing protections, absent a specific override. There is a some basis for such an argument in the context of religion and equality in the provisions of s. 93 of the Constitution Act which entrench certain rights for certain sectarian schools. Furthermore, s. 29 of the *Charter* provides:

> Nothing in this *Charter* abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

The school board in *Hall* not surprisingly argued for its special position on the basis of these provisions. R. MacKinnon J. however rejected a carte blanche for the Catholic school board on the basis of the special constitutional position for sectarian schools. He took what I call the second approach to this conflicts question which avoids the hierarchy or the tyranny of age. The judge facilitated space for all the constitutional protections. R. MacKinnon J. concluded that the constitutional protection for sectarian schools does not permit such schools to do as they please and to ignore other fundamental constitutional precepts. Religious protection should be interpreted in light of other factors in society today, especially those values embodied in the constitution. Lemelin J. took that approach in the *Hendricks* case where she said:

> Nul ne conteste que les religions ont joué un rôle important dans le mariage, leurs croyances et leurs rites ont présidé à l'encadrement de l'institution. La sécularisation du mariage oblige le législateur à tenir compte que l'institution est civile et ne peut être définie que par la religion. Nous ne vivons plus dans la communauté homogène du siècle dernier. Le multiculturalisme, les croyances religieuses la laïcisation de plusieurs institutions témoigne de l'ouverture de la société canadienne. L'État doit s'assurer du respect de chaque citoyen mais aucun groupe ne peut imposer ses valeurs ou définir une institution civile.[54]

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[53] *Hendricks*, *supra* note 12 at para. 29.

[54] *Hendricks*, *supra* note 12 at para. 164.

There should, therefore, be an accommodation. In part this is achieved by holding that a matter is not a religious matter just because the church or its representatives say so. Religion, in the constitutional protection sense, especially in the context of sectarian schools, should be interpreted narrowly to include basic religious teaching or services, and not to the running or functioning of the school. As R. MacKinnon J. said in *Hall*, the prom was not really a religious issue: "It is important to note that the prom in question is not part of a religious service (such as a mass), is not part of the religious education component of the Board's activity, is not held on school property, and is not educational in nature."[55] Following earlier authority, that s. 93 acted to freeze the protected rights of Catholic schools as of 1867,[56] R. MacKinnon J. said that there was no explicit statutory right of either Catholic Boards or common school Boards in 1867 to hold school dances or to control those who could or could not attend those dances.[57] Furthermore, R. MacKinnon J. noted that:

> In 1867, homosexual activity was viewed both as a crime and as a sickness. Today it is viewed as neither. Canadians' understanding of human behaviour and of its people has changed over the last 135 years.[58]...The proper approach is to look at the rights as they existed in 1867 but then to apply 2002 common sense. In 2002, a School Board's legal authority (whether public or separate) is part of our provincial public educational system which is publicly funded by tax dollars and publicly regulated by the province.[59]

I have said in another context that a Canadian ideal is to do what is necessary to include and to accommodate. Where there is a conflict between constitutional protections, there should be an effort to resolve the conflict by including and accommodating:[60]

> There is a general consensus that an appropriate Canadian approach in human rights cases is to be as inclusive and as accommodative as possible. An inclusive approach is one which is receptive to those who are different from the majority. An inclusive approach accepts difference; it does not have a single model person as the ideal but is open to including as many different backgrounds or characteristics as possible. An accommodative approach resolves disputes by

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[55] *Hall*, *supra* note 1 at para. 26.

[56] *Reference Re Bill 30, An Act to Amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148. See also *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Ontario English Catholic Teachers' Association v. Dufferin-Peel Roman Catholic Separate School Board*, [1999] O.J. No. 1382 (C.A.) (QL); *Protestant School Board of Greater Montreal v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377.

[57] *Hall*, *supra* note 1 at para. 40.

[58] *Ibid.* at para. 41.

[59] *Ibid.* at para. 43.

[60] MacDougall, *supra* note 13 at 129-35.

> preferring compromise and accommodation instead of resorting to conflict, which will result in a winner and a loser. It comprehends all individuals and groups and does not engage in the practice of having a dominant group make concessions to a minority group.[61]

The *Charter* can be seen as an important document in assisting with this inclusiveness-accommodation. This non-hierarchical approach is consistent with what Lamer C.J.C. said in *Dagenais v. CBC*:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.[62]

The accommodation is important because, without it, the constitutional protection for gays and lesbians could be meaningless in some situations. As R. MacKinnon J. said in *Hall*: "If individuals in Canada were permitted to simply assert that their religious beliefs require them to discriminate against homosexuals without objective scrutiny, there would be no protection at all from discrimination for gays and lesbians in Canada because everyone who wished to discriminate against them could make that assertion."[63]

An important aspect of the conflicts between religion and equality is that these conflicts tend to arise in the education context (for example, *Trinity Western*, *Chamberlain*, *Vriend*, and *Hall*). This is not coincidental. Historically, religions have been accorded a large role in educating children – and this is important to the religions. Educational institutions of course are thought of very much as movers and shapers of the future. They determine what society will be like in coming generations. They are the primary institutions which form and perpetuate values, especially with the waning

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[61] *Ibid.* at 130. This place is not just a concession to the dominant group. Sheelagh Day and Gwen Brodsky have dealt with the dangers of such a formal equality view of accommodation. See Shelagh Day and Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can. Bar Rev. 433. The authors study recent court cases that employ at least a partial accommodative view of what is proper in the Canadian context. See also, Hilary Paterson, *supra* note 4. This article has a good discussion of the accommodation of religious freedom and other constitutional and treaty values.

[62] *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at 877. In *Vriend*, *supra* note 7, though it was not decided or argued primarily as a case about conflict between religion and equality, Iacobucci J. nonetheless emphasized accommodation at paras. 123-25 in his reasons.

[63] *Hall*, *supra* note 1 at para. 31. This is similar to L'Heureux-Dubé's statement at para. 106 in *Trinity Western*, *supra* note 9: "If the religious exemption were allowed to shield TWU graduates from complete scrutiny of their abilities to work and to be perceived to work effectively in diverse classrooms, then an advantage would be conferred on these students as compared with public institution graduates, suggested as the appropriate comparator group by the respondents."

direct influence of the religions themselves. As I have said:[64] "Religions, all of them proselytising to some degree, care little to have their own banks or hockey rinks because those institutions do not have the role of spreading or preserving ideas and values the way schools and universities do. Religions, however, spend a great deal of energy to preserve or extend their hold on the school system."[65]

Educational institutions are also institutions whose decisions and practices have tended not to be interfered with by the courts.[66] The *Chamberlain* decision at the Court of Appeal level is an example. So, too, is *Trinity Western*. *Hall* is exceptional in that respect, but its approach is correct, even in the context of a constitutionally-protected sectarian school. The conflict between sexual orientation and religion in *Hall* (and the other cases such as *Trinity Western*) did not arise in the context of a religious service, but in the context of the provision of a public function – that is, education. R. MacKinnon J. rightly characterized the Catholic school board as "a religious government actor"[67] and as "a religiously oriented state actor"[68]. The question is whether in the context of education provided or administered by a religious organisation, the teachings of that religion can be constrained in any way by constitutional equality interests. The education provided is not just any education, but part of an education programme certified or authorized in some way by the state and providing an alternative to the education which would normally be provided by the state itself. Various religions provide supplementary education of some sort that is not associated with state accreditation, for example Sunday schools or after-hours education in a particular language or cultural tradition. Such education can perhaps legitimately ignore equality concerns, for example, by not teaching girls or people not of a particular ethnicity. In the context of an accredited school or college, however, the state is lending or transferring its authority – and duties - to such institutions. The constitutional obligations of the state ought to be transferred with that authority and duty. Otherwise, as R. MacKinnon J. suggested, the state could handily avoid many of its *Charter* obligations by transferring its duties to religious organizations which could claim religious immunity from compliance with *Charter* guarantees of equality.

In addition to the constitutional guarantees for certain sectarian schools, the religious institution can rely on the protection for religion and conscience

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[64] MacDougall, *supra* note 13 at 103-04.

[65] Historically religions had a great interest in the university system as well, particularly in the eastern half of Canada. On historical aspects, see C.B. Sissons, *Church and State in Canadian Education: An Historical Study* (Toronto: Ryerson, 1959).

[66] MacDougall, *supra* note 13 at 104-05.

[67] *Hall*, *supra* note 1 at para. 43.

[68] *Ibid.* at para. 57.

guaranteed in s. 2 of the *Charter*. Nonetheless, as McLachlin C.J.C. said in *Sharpe*:

> ...freedom of expression is not absolute. Our Constitution recognizes that Parliament or a provincial legislature can sometimes limit some forms of expression. Overarching considerations, like the prevention of hate that divides society as in *Keegstra*,[69]... or the prevention of harm that threatens vulnerable members of our society as in *Butler*,[70]... may justify prohibitions on some kinds of expression in some circumstances.[71]

In a similar way, freedom of conscience and religion cannot be absolute. As Lemelin J. said in *Hendricks*:

> La liberté de religion n'est pas supérieure au droit à l'égalité consacré par l'article 15(1). Dans le contexte précis de ce dossier, la liberté de conscience et de religion n'est pas menacée et elle ne peut justifier le législateur fédéral de légiférer pour maintenir la définition traditionnelle de l'institution du mariage comme l'union d'un homme et d'une femme.[72]

Clearly, non-religious expression, notably political expression, is inappropriate if it translates into state action that infringes equality guarantees. A political party can hold ideas and views that are contrary to *Charter* values; it can express them; it can incorporate them at the party's institutional level; it can even profess them on the campaign trail. None of these activities involves any form of delegated state authority. Nonetheless, if the party gets into office and is in a position to control in some way the education, health, police, justice systems and so on, those party views cannot be transferred into action at these state institutional levels – nor would it be any more appropriate for the party to achieve this by having the state institution delegate its powers to a "private" organisation which did discriminate.

Why should the guarantees for conscience and religion be any different? Those who argue that it is construe religious views in a very large way and argue for some sort of religious exceptionalism.[73] Any infringement of religious expression, in any context, even when religious expression ventures into the public realm, is somehow a betrayal of the whole religious expression guarantee. It might be argued that constraints on religion in the education context can cause the religion to appear hypocritical to students and others. If so, that is part of the territory, a compromise the religion must make if it takes on what is in effect a delegated state function. Remember that the religion is not *required* to take on the state education function: it does so because it sees

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[69] *R. v. Keegstra*, [1990] 3 S.C.R. 697.

[70] *R. v. Butler*, [1992] 1 S.C.R. 452.

[71] *Sharpe*, *supra* note 17 at para. 22.

[72] *Hendricks*, *supra* note 12 at para. 170.

[73] See the discussion and writers cited in MacDougall, *supra* note 26 at 521-22.

some sort of benefit to itself as an institution. It is, in fact, not much different from a political party using rhetoric of inequality in its professions of beliefs which once in power is not able to implement those inequality beliefs in the state institutions. In any event, it is unlikely the religious position will be confused. As R. MacKinnon J. said in *Hall*: "No objective observer would ... have been confused about the Board's public position on homosexuality and no reasonable, fully informed Canadian would then have understood the Board to be condoning or promoting the proscribed activity."[74]

Of course the religious institution can teach religion as a component of its education; that is the whole idea of a religious education. There its actual teachings could probably not be constrained by the *Charter*. In teaching courses such as literature, biology, physical education and in student activities where the core is not the teaching of religion, a school is exercising a governmental function and the *Charter* should apply.[75] Similarly, in conducting non-educational functions, like proms, there should be no deference to religious prejudice. One might see the issue a little clearer if one were to say that the issue was not sexual orientation, but sex, race or ethnic background. A religion could quite conceivably say women were inferior or that black people should be kept separate or that people of British origin were not welcome. But what if that religion wished to operate a state-accredited educational institution on that basis? I rather think the response might be that if they wished to operate a school on such a basis they would not get the imprimatur of the state. I expect that such a response would not be thought to be a state violation of religious protection guarantees. Sexual orientation should not receive any different treatment.[76]

In *Hall*, there was evidence of teachings of the Roman Catholic church distinguishing between being and doing with regard to homosexuality. The judge nicely turned the being/doing distinction back on the church. He said:

> "An injunction will not compel or restrain teachings within the school and will not restrain or compel any change or alteration to Roman Catholic beliefs. It seeks to restrain conduct and not beliefs. As such, it does not impair the defendants' freedom of religion. Neither the defendants nor any other Canadian need adjust their beliefs regarding lesbian women and/or gay men as a consequence of the order sought."[77]

Even though this approach is consistent with the church's approach on homosexuality and may, perhaps, be necessary by virtue of the constitutional

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[74] *Hall*, *supra* note 1 at para. 49.

[75] Another exception where there might be some justification for exclusion of *Charter* religious equality guarantees is a theology school in which adults are specifically trained to be priests, ministers and so on for that religion.

[76] See L'Heureux-Dubé J.'s U.S. race analogy in *Trinity Western*, *supra* note 9, dissenting, at paras. 70-71.

[77] *Hall*, *supra* note 1 at para. 55.

parameters on sectarian schools and the *Trinity Western* decision, care should be taken that the beliefs of the church not turn into discriminatory acts, which I argue include classroom teaching.[78] *Pace* the majority of the Supreme Court of Canada in *Trinity Western*, the very teaching of homophobic doctrine is a homophobic act and in any public context should be impermissible. It ought not to be the practice of any state actor, religious or otherwise. It should be permitted, if at all, only in a specifically religious context.

Any other approach is an indication that homosexuality is not legally entitled to the same level of unqualified celebration as heterosexuality. In *Hall*, the judge acknowledged the inferior position traditionally accorded to gays and lesbians and that "the effects of this sort of exclusion are pervasive, serious and contribute to an atmosphere of self destructive behaviour among gay youth."[79] The judge said: "The evidence in this record clearly demonstrates the impact of stigmatization on gay men in terms of denial of self, personal rejection, discrimination and exposure to violence."[80] Having said that, however, the court still privileged this "state actor's" ability to teach discrimination on the basis of sexual orientation. R. MacKinnon J. said: " The Board could have counselled Marc on his Church's teachings about the sinful nature of all premarital sexual activity (heterosexual or homosexual) and about the sinful nature of homosexual genital contact."[81] There seemed to be no connection in the judge's mind between the exclusionary situation homosexuals have traditionally faced with its negative consequences, on the one hand, and the teachings of institutions like the Catholic school, on the other. In *Jubran v. Board of Trustees*, the B.C. Human Rights Tribunal awarded damages to a high school student who did *not* identify as gay for homophobic epithets repeatedly directed at him by the other students.[82] Arguably the school would be making those epithets in the situation contemplated by R. MacKinnon J. Hall might be included in the celebratory activities in the schools, such as proms, but only after having endured years of being taught that the nature of his sexual orientation was bad or sinful. The celebration would certainly be muted. Permitting such a situation to exist or to continue does not represent true legal celebration of or equality for homosexuality.

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[78] Or, signing documents like those in *Trinity Western, supra* note 9.

[79] *Hall, supra* note 1 at para. 56.

[80] *Ibid.* at para. 53.

[81] *Ibid.* at para. 49.

[82] *Jubran v. North Vancouver School District No. 44*, 2002 BCHRT 10, rev'd 2003 BCSC. 6.

V. THE FLOODGATES ISSUE

The fourth issue that emanates from this line of sexuality cases is a floodgates argument. This issue is always present when society or the courts are asked to make a change that affects existing norms, particularly norms as deeply entrenched as those affecting sexual minorities. The concern is that if one "concession" is made for members of a particular group then what sort of demand will that group make next and perhaps more importantly what "related" group will make similar demands. The floodgates concern is both a social one and a financial one. There is concern about undue and rapid change in society and too many demands on the public pocketbook.

In terms of what homosexuals will want next, concern has been expressed about the financial impact of equality demands. This was clearest in *Egan*. Sopinka J. said: " I agree with the respondent the Attorney General of Canada that government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all."[83] It is not clear to what extent these financial concerns mask social and political concerns about whether it is a "good thing" for society to make the change to accommodate gays and lesbians. On the whole, however, Canadian courts in the past ten years have been willing to dismiss such floodgates concerns and litigation (as opposed to many legislative initiatives) has often been successful. In the area of gay and lesbian equality rights, there are probably few cases left that are "large issue" equality issues, assuming the same-sex marriage, immigration and education issues are settled. Domestically, the floodgates opened ten years ago and the water is mostly out. The fights will also be in other areas, in particular for international recognition, especially in the U.S., for the status acquired in Canada.

One area of gay and lesbian rights that still has the capacity to raise a floodgates concern is the extent to which *children* are implicated in such equality. While not all those going to a high school prom will be children, many will. There are in fact very few cases in Canada that involve the rights of gay *children*.[84] Even cases such as *Chamberlain* and *Trinity Western* are argued at the "adult" level. The *Chamberlain* case was argued largely ignoring that children might be gay or lesbian. Mackenzie J.A. said: "Discrimination against children because of the sexual orientation of their parents would be

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[83] *Egan*, *supra* note 6 at para. 104.

[84] See *Jubran*, *supra* note 82, involving a student (wrongly) identified as gay. See MacDougall, *supra* note 13 at 98-135. See Gerald Unks, ed., *The Gay Teen: Educational Practice and Theory for Lesbian, Gay and Bisexual Adolescents*, (New York: Routledge, 1995); see especially Andi O'Conor, "Who Gets Called Queer in School? Lesbian, Gay and Bisexual Teenagers, Homophobia, and High School" in Gerald Unks, *supra*, 95.

even more invidious."[85] Most invidious however would be discrimination against children because of *their* sexual orientation. It is interesting to consider whether the *Trinity Western* case would have been considered differently if a gay student had challenged the position of one of his teachers who had made the homophobic statement required by the university to gain admission.[86] As I have said of the *Trinity Western* case:

> The judges did not ask how a homosexual teacher or student would likely feel if they knew that the colleague or teacher had voluntarily signed a document to become a teacher saying that their actions, and therefore they, are biblically condemned and to be lumped in with cheaters, drunks, thieves and so on.[87]

The courts have not wanted to associate children with homosexuality.[88] Courts have indicated on numerous occasions that they consider it to be of utmost importance to protect children's interests. For many legislatures and courts, this has meant separating them from exposure to homosexuality or homosexuals. Some laws have had this fear of contagion as their basis. Reed J., in *Halm v. Canada*, said of s. 159 ["anal intercourse"] of the *Criminal Code*[89] that:

> A reading of the debates of the legislative history, including the Wolfenden Report, makes it clear that a distinction was made between the age of consent under what is now section 159 and the age of consent for other types of consensual sexual activity because (1) homosexual practices were considered immoral and (2) there was a concern that homosexuality was a learned behaviour or a disease such that de-criminalizing the activity in question could lead to youth being corrupted.[90]

In a case where a school principal was convicted of sexual assault on boys, Marshall J., in a lengthy discussion of pedophilia, said: "Serious problems of sexual adjustment and sexual orientation in life often also follow. All show a sharp loss in self-esteem and confusion in their own sexual orientation. Some go on to develop frank homosexuality and paedophilia itself."[91] The assumption of homosexuality by infection in the academic setting was the basis of the School Commission's submissions in *L'Association A.D.G.Q. v.*

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[85] *Chamberlain*, *supra* note 11 at para. 36.

[86] In addition to discrimination on the basis of sexual orientation, a gay student might claim age discrimination if he were denied equality rights when an adult in an equivalent position were able to get them.

[87] MacDougall, *supra* note 26 at 524-25.

[88] MacDougall, *supra* note 13 at 110-16.

[89] R.S.C. 1985, c. C-46.

[90] *Halm v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 331 at 358-59 (T.D.). See also the opinion of Abella J.A. in *R. v. M. (C.)* (1995), 41 C.R. (4th) 134 at 141-42 (Ont. C.A.).

[91] *R. v. H. (E.)*, [1987] N.W.T.J. No. 3 (S.C.) (QL).

Catholic School Commission of Montreal (1979). The Catholic School Commission of Montreal denied to a gay organisation the right to use a school building to hold a weekend conference. The court said that: "the real problem is this: respondent refuses to rent to petitioner because it apprehends the deleterious effect which the rental of a building to a homosexual association would have on its Catholic students, it being accepted that homosexuality is a practice condemned by the Catholic Church."[92] In fact, of course, recognition of homosexual rights and equality promotes the interests of children. As Greer J. has said in a dissenting judgment: "Any stigma created for these children by their parent's homosexual union would be lessened if the relationship was one of marriage sanctified by the state."[93] Rare among judges, L'Heureux-Dubé J., dissenting in *Trinity Western*, set out at length the situation of gay and lesbian youth. She said in part: "Without the existence of supportive classroom environments, homosexual and bisexual students will be forced to remain invisible and reluctant to approach their teachers. They will be victims of identity erasure, forced to endure what Professor Kathleen Lahey has called 'a "spiral of silence" in which lesbians and gays modify their behaviour to avoid the impact of prejudice': see *Brillinger v. Brockie* (2000), 37 C.H.R.R. D/15, at para. 35."[94]

One of the reasons that children are not associated with homosexuality is that there is a tendency to think children are not sexual at all. Because homosexuality is associated with sex, it cannot be associated with children. If children can be taught to be homosexual, then in what other "deviant" sexualities might children be implicated? The constant bombardment of children by the heterosexual message is not considered or not considered relevant. Even a judge such as L'Heureux-Dubé J. showed discomfort with the association of children and sex made by McLachlin C.J.C. in the *Sharpe* case, where the Chief Justice said: "... for young people grappling with issues of

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[92] *L'Association A.D.G.Q. v. Catholic School Commission of Montreal* (1979), 112 D.L.R. (3d) 230 at 234 (Que. Sup. Ct.). In a Manitoba case, a school board refused to allow a teacher to reveal her lesbianism to her class because it was inappropriate to disclose "intimate details of [her] personal life." It was said to be "inappropriate for a teacher, in the course of the objective presentation of any instructional material, to declare their own sexual orientation, be they heterosexual or homosexual." *Assiniboine South Teachers' Assn. of the Manitoba Teachers' Society* v. *Assiniboine South School Division No. 3* (2000), 187 D.L.R. (4th) 585, 2000 MBCA 9. The school board appears to have thought this might set a bad example for students to imitate and also appears to have neglected the many ways in which teachers *do* reveal their heterosexuality.

[93] *Layland*, *supra* note 52 at 234.

[94] *Trinity Western*, *supra* note 8 at para. 91. The torment a gay or lesbian student has to undergo is detailed in *Jubran*, *supra* note 81, where the student receiving that verbal torment was not in fact gay. The torment would, I suggest, be even greater if the student were gay.

sexual identity and self-awareness, private expression of a sexual nature may be crucial to personal growth and sexual maturation."[95]

The *Hall* decision goes some way to establishing equality rights for gay and lesbian children, although the case was not specifically argued on this basis. Furthermore the case is consistent with what limited U.S. authority there is giving gay and lesbian children protection, at least with respect to education.[96] On this aspect of the floodgates issue, there is no reason why homosexual children should be denied the protection available to other gays and lesbians to have equality that includes compassion, condonation and celebration.

This matter of children and sexuality (including homosexuality) leads to the other floodgates issue – that measures taken to protect homosexuals will be extended by analogy to individuals in other groups which are thought to be more questionable. Thus transsexuals, polygamists, pederasts and so on will make similar equality demands. Homosexuals and homosexuality being traditionally defined as a sort of deviant sexuality (and certainly still thought so by many religions), it is not so surprising, therefore, that a jump might be made to expectations that demands will follow to extend equality protections to those other "deviants." In the case of materials in the school, if children can be exposed to homosexual material, then do the schools not have to provide material on incest, promiscuity or sex change? If there are legally recognized same-sex marriages then why not polygamous or underage marriages? If the Roman Catholic school has to admit Hall's boyfriend then why not a prostitute or a transvestite? How, if at all, is one to distinguish the acceptance of the sexuality in *Hall* but at the same time, in a principled way, exclude the sexuality in the *Sharpe* case?

This, however, takes us back to the first issue discussed in this paper, namely, the nature of equality. It is true that there is a re-evaluation of many accepted social norms, including those with respect to homosexuality. It is wrong, however, to assume that the re-evaluation with respect to the members of one group will lead to a similar result for the members of another group. There is no necessary linkage between homosexual issues and any other issue connected with sexuality. Cases involving other issues, such as transgender or polygamy, will be re-assessed *on their own terms* to see whether there is any

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[95] *Sharpe*, *supra* note 16 at para. 107. See L'Heureux-Dubé, Gonthier and Bastarache JJ., at para. 131.

[96] In the U.S., a gay high school student was held to have a First Amendment (expression) right to take another male to his high school prom: *Fricke v. Lynch*, 491 F.Supp. 381 (D.R.I. 1980), vacated and remanded, 627 F.2d 1088 (1st Cir. 1980) (decision without published opinion). Gay and lesbian student organisations in the US have been accorded some rights by virtue of the First Amendment. See *Gay Rights Coalition v. Georgetown Univ.* 536 A.2d 1 (1987) (en banc). (Subsequent legislation in the U.S. excepted religious institutions from the Human Rights Act. See Roberta Achtenberg, ed., *Sexual Orientation and the Law* (Webster, NY: Clark Boardman Callaghan, 1994) §9.02[1][b]. See the cases listed at note 79 of §10.04 of that work).

principled reason why those issues should be decided in the future the way they have been in the past. Those cases will raise similar issues to those of equality, characterization, constitutional conflict and floodgates that arise in the gay and lesbian context. In some of those other areas, it may well be that the courts will find it appropriate not to give full equality. For pedophilia, there might be some forms of compassion, but not condonation or celebration – perhaps, similarly for polygamy. Any decision about cases in those areas, however, should be made for reasons other than simple tradition or because of religion-based reasons or sentiment.