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A Respectful Distance: Appellate Courts Consider Religious Motivation of Public Figures in Homosexual Equality Discourse - The Cases of Chamberlain and Trinity Western University [Case Comment]

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CASE COMMENTS

A RESPECTFUL DISTANCE: APPELLATE COURTS CONSIDER RELIGIOUS MOTIVATION OF PUBLIC FIGURES IN HOMOSEXUAL EQUALITY DISCOURSE – THE CASES OF *CHAMBERLAIN* AND *TRINITY WESTERN UNIVERSITY*

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In the recent decisions of the B.C. Court of Appeal in Chamberlain *v.* Surrey School District No. 36 *and the Supreme Court of Canada in* Trinity Western University *v.* College of Teachers, *the courts allowed religiously-based "moral positions" held by would-be teachers and public officials to trump the interests of equal rights protection, in particular that of gays and lesbians. The author examines the ways in which the religious arguments were made (and accepted) in order to achieve this result. The author asserts that the decisions raise troubling questions about the extent to which courts are really willing to go to protect equality in the gay and lesbian context.*

I. INTRODUCTION

Assume a Mr. Chamberlain who wants books about mixed-race parents to be included in school teaching materials. Assume a provincial teaching accreditation body that wants to refuse accreditation to students who have signed a condemnation of sexual relations between people of different races as part of their teacher-education programme. Consider the reaction if those cases went to court and judges speaking for the Supreme Court of Canada or a provincial Court of Appeal had said the following in their reasons:

> *Race issues raise strong emotions and Mr. Chamberlain must have known that by advancing these three books for status as recommended*

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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 race were well known.

Some aspects of race relations remain morally controversial including "mixed-race" relationships. The division of moral conviction on this subject cuts across society and divides religious communities as well as people of no religious persuasion.

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The "Community Standards" document that students attending Trinity Western University (TWU) must sign contains the following paragraph, which is at the root of the present controversy:

REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED. These include but are not limited to ... sexual sins including premarital sex, adultery, interracial sexual behaviour, and viewing of pornography...

While mixed race or minority race students may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. In addition, there is nothing in the TWU Community Standards that indicates that TWU will not treat people of a minority race fairly and respectfully.

The matters in issue in the cases of *Chamberlain* v. *Surrey School District No. 36*[1] and *Trinity Western University* v. *College of Teachers*[2] were not, however, about race or mixed-race relationships but instead dealt with homosexuality and same-sex relationships. The passages set out above are from the judgments of the B.C. Court of Appeal and the Supreme Court of Canada with references to homosexuality or same-sex relationships replaced by race and mixed-race.[3] If the references had in fact been to race or

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1 *Chamberlain* v. *Surrey School District No. 36*, 2000 BCCA 519, leave to appeal to S.C.C. granted, [hereinafter *Chamberlain (C.A.)*].

2 *Trinity Western University* v. *College of Teachers (Br. Columbia)*, [2001] 1 S.C.R. 772, 2001 SCC 31 [hereinafter *TWU (S.C.C.)*].

3 The paragraphs are: 57 and 20 for *Chamberlain (C.A.)*, per Mackenzie J.A., and from paragraphs 4 and 35 for *TWU (S.C.C.)*, per Iacobucci and Bastarache JJ.

mixed race, the judicial language and reasoning would strike almost anyone as inappropriate to say the least. To protect such religious-based expression of school board members or would-be teachers would be thought outlandish. In these cases about homosexuality, however, religiously-based "moral positions" held by public officials and employees were allowed to trump the interests of equal rights protection. These decisions raise troubling questions about the extent to which courts are really willing to go to protect equality in the gay and lesbian context.

Cases such as *Chamberlain* and *TWU* test the nature and content of homosexual equality in Canadian law. They test the openness of Canadian courts to acknowledge celebration as an aspect of legal equality for gays and lesbians. I have argued elsewhere that:

> the field of discourse about legal equality can be divided into three main sites away from the beginning site of condemnation: compassion, condonation, and celebration. To have full legal equality within a society, members of a (minority) group need: 1) to be free from discrimination (compassion); 2) to have access to benefits others have (condonation); and 3) to be included as a *valuable* group by the society (celebration). That debate in Canada with respect to gay and lesbian rights has moved to symbolic issues such as pride day proclamations, content in school curricula, and marriage, means discussion is now at the site of celebration. Success on these matters would represent state, which is legal, acceptance and celebration of the group. It would represent state approval of a group in a positive, active and symbolic way that other state actions such as non-discrimination protection and conferral of benefits do in a non-public or less public and more individualized way.[4]

Chamberlain and *TWU* address celebratory issues. These cases test the limits of the guarantee of legal equality for gay and lesbian members of the public against competing assertions of religious freedom by public officials and employees.[5] To date, the major

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[4] B. MacDougall, "The Celebration of Same-Sex Marriage" (2001) 32 Ottawa L. Rev. 235 at 253 (footnotes omitted).

[5] On the public role of the teacher, see P.T. Clarke, "Canadian Public School Teachers and Free Speech" (1998) 8 Educ. & Law J 295 and (1999) 9 Educ. & Law J 43 and 315. On the role of school boards, see W.J. Smith, "Rights and Freedoms in Education: The Application of the Charter to Public School Boards" (1993) 4 Educ. & Law J 107.

cases on homosexual equality have not been in the realm of celebratory issues. Now the more symbolic issues of equality are coming before the appellate courts and are challenged by the major voice that would deny any celebration of homosexuality, namely traditional conservative religion. The traditional religious view is that homosexuality is distinctly not good and definitely not worth celebrating. The question in both *Chamberlain* and *TWU* was: to what extent can a religious person, acting as a public official or employee, bring exclusionary religious attitudes into the public arena so as to limit the scope of homosexual equality?

Viewed in respect of these two cases, the prognosis on courts accepting celebration as an aspect of homosexual equality is not promising. In both cases, a public person's religious views, translated into actions, were accommodated at the expense of the interests of homosexual equality rights. In both situations, this was done where, I suggest, there would not have been equivalent accommodation for such religiously informed actions if the competition had been with, for example, race or gender equality. Although courts have said there is no hierarchy of *Charter*[6] protections, these cases tend to disprove that assertion. These courts treated religious expression as a monolith that need not or perhaps cannot withstand diminution so as to allow for celebration of homosexual equality, even when the religious expression is that of a public official or would-be public employee.

II. THE CASES AND THEIR CONTEXT

In *TWU*, the British Columbia College of Teachers (BCCT) refused to accredit the teacher education programme of the University, which "serves the needs of the whole Christian community."[7] In the opinion of the BCCT, the proposed programme was deemed to be discriminatory and contrary to public policy and the public interest on the grounds that the graduates were likely to be biased when dealing with homosexual

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[6] *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 [hereinafter *Charter*].

[7] According to Iacobucci and Bastarache JJ, *TWU (S.C.C.), supra*, note 2,at para. 3.

students.[8] The basis for the BCCT's view was that students at the University, including those wanting to be teachers, were required to (and did) subscribe, upon admission, to a code of conduct, a "Community Standards" document, which included an obligation to refrain from homosexual behaviour. This requirement was found in a paragraph that contained the following:

> REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED. These include but are not limited to drunkenness ... all forms of dishonesty including cheating and stealing ... involvement in the occult ... and sexual sins including premarital sex, adultery, homosexual behaviour and viewing of pornography ...

Faculty and staff were required to sign a similar document.

The decision of the BCCT was upheld on appeal to the College's Council, but was overturned by the B.C. Supreme Court.[9] The B.C. Court of Appeal found the BCCT had acted within its jurisdiction, but the majority affirmed the trial judge's decision on the basis that there was no reasonable foundation for the BCCT's finding of discrimination.[10] The majority of the Supreme Court upheld that decision on appeal, with L'Heureux-Dubé J. being the sole dissenter.

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[8] The BCCT is empowered under s. 4 of the *Teaching Profession Act* RSBC 1996, c. 449, 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 ... to encourage the professional interest of its members...." This was the reference to the public interest that the BCCT invoked as justification for considering the TWU admissions policy in deciding on the certification of its teacher education programme. According to para. 11: "The BCCT argues that teaching programs must be offered in an environment that reflects human rights values and that those values can be used as a guide in the assessment of the impact of discriminatory practices as pedagogy." *TWU (S.C.C.), supra* note 2. The BCCT required graduates of TWU to do a year of study at Simon Fraser University in order to consider them for qualification as teachers.

[9] *Trinity Western University* v. *College of Teachers (BC)* (1997), 41 B.C.L.R. (3d) 158 (S.C.); See 165-171 for an elaboration of the structure and role of the BCCT and Council.

[10] At the B.C. Court of Appeal level, Rowles J.A., dissenting, said: "The condemnation of homosexual behaviour in the Community Standards is capable of discriminating against gays and lesbians in two ways: 1) through the exclusion of gay and lesbian students and faculty; 2) through the declaration that homosexual behaviour is biblically condemned and the requirement that faculty accept this statement as a fundamental article of faith." *Trinity Western University* v *BC College of Teachers* (1998), 169 D.L.R. (4th) 234 at para. 220 (B.C.C.A.) [hereinafter *TWU (C.A.)*].

In *Chamberlain*, the issue arose out of the provisions of the B.C. *School Act*, which states:

> 76(1) All schools must be conducted on strictly secular and non-sectarian principles.
>
> (2) The highest morality must be inculcated, but no religion, dogma or creed is to be taught in a school or Provincial school.[11]

The Board of Trustees of the Surrey School District passed a resolution, referred to as the "Three Books Resolution," on April 24, 1997, indicating that the Board did not approve the use of three books depicting children with same-sex parents as "Recommended Learning Resources."[12] The issue arose against a background of considerable public acrimony in the community. For example, the trial judge said: "...there is evidence that at least one trustee who voted for the motion...has campaigned for several years to promote a greater role for religion in governance of the community, including on the issue of homosexuality."[13]

The petitioners, led by Mr. Chamberlain, a primary school teacher, applied under the *Judicial Review Procedure Act*[14] for an order quashing the "Three Books Resolution" and another on the basis that the resolution (and another) infringed the *School Act* and the *Charter*. The Chambers judge quashed the "Three Books Resolution" as being contrary to the *School Act*. She was persuaded, and found as a fact, that those who argued in favour of and voted for the resolution were significantly influenced by religious considerations. Moreover, they were specifically opposed to homosexual conduct, this being contrary to section 76(1), which forbade the school board from implementing a

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11 *School Act*, R.S.B.C. 1996, c. 412.

12 The Board issued no prohibition on the three books being available as library resources. The difference between a recommended learning resource and a library resource seemed to be that the former "is relevant to the learning outcomes and content of the course or courses" whereas the latter is intended to be merely "appropriate for the curriculum": *Chamberlain (C.A.), supra* note 1 at para. 52.

13 *Chamberlain* v *Surrey School District No. 36*, [1998] B.C.J. No. 2923 at para. 94 (S.C.), online: QL (BCJ) [hereinafter *Chamberlain (S.C.)*].

14 *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

decision made on religious views.[15] This decision was overturned by a unanimous B.C. Court of Appeal, which held that the "Three Books Resolution" was consistent with the *School Act* and within the jurisdiction of the Surrey School Board.

These two cases decided important issues about the content and nature of education in B.C. and Canada, as well as the nature and scope of homosexual equality. Education issues are issues of vital importance and are highly symbolic, especially for gays and lesbians who have been excluded (or at least rendered invisible) in the education system. In *Ross* v. *New Brunswick School Dist. No. 15*, La Forest J. said:

> A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the board of inquiry stated, a school has a duty to maintain a positive school environment for all persons served by it. [16]

To date, there has been little in the way of "a positive school environment" for gays and lesbians, either as students, teachers or interested members of the public.

In neither of these cases was there a question of whether to include or not to include religious content in the curriculum or teacher qualifications. Religion as an included element in education was not at issue. What was involved, in both situations, was the value placed on homosexual equality either as being fit for inclusion in class materials or as being protected from hostile actions or assertions by would-be teachers. In both cases, a public or would-be public person argued, in effect, that the state must accommodate that person's private religious beliefs in the way their public functions are performed, so as to exclude the celebration of homosexual equality, and in fact to denigrate homosexuality.

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[15] Furthermore, she concluded that this interpretation was consistent with the guarantee of religious freedom expressed in the *Charter*.

[16] *Ross* v. *New Brunswick School District No. 15* (1996), 133 D.L.R. (4th) 1 at para. 42 (S.C.C.) [hereinafter *Ross*].

III. THE DISCOURSE ON RELIGIOUS CONSTRAINTS ON THE CELEBRATION OF HOMOSEXUALITY

Direct anti-homosexual activity or expression in the education system is becoming difficult to justify. While at one time it might have been appropriate to be anti-homosexual, simply on the basis that homosexuality *per se* was unacceptable, this view is no longer accepted alone as a basis for discrimination. Even arguing that homosexuality is a "controversial" issue, on its own, is generally not seen as satisfactory.

The same exclusionary results of old are, however, now achieved in a more subtle way through the types of arguments that were used in both cases. The equality arguments of those advocating the celebration of homosexuality are characterised as creating a conflict with another *Charter* protection – freedom of religion. One technique to avoid the problem of the public nature of the education system, which is supposedly secular or non-religious is to dress up this conflict between religion, in particular religious expression, and homosexual equality as an issue about "morality." Another technique is to argue that religious expression is monolithic and, if protected, it cannot be curtailed, (even by public officials and employees), to prevent the diminution of homosexual equality. In this discourse, the characterization of religion is bifurcated in the sense that, on the one hand, it is presented as something that cannot be compromised at all, but on the other hand it is presented as a somewhat trifling thing that could not really affect how others, particularly homosexuals, are affected and, therefore, should be fully accommodated. Apart from these two ways in which religious arguments are put (religious expression as monolithic and homosexuality as a debate-about-morality issue), these cases reveal judicial attitudes about homosexual rights. The controversies involved were blamed largely on homosexuals who were depicted as confrontational and thin-skinned.

The courts treated these cases as though they were primarily about religion and religious expression. Arguably, however, cases such as these could be seen more as cases which test the limits of homosexual equality rather than religious expression. The courts were asked to assist public individuals who wished *their* religious views to prevail in the *public sphere* such that homosexuality (and

homosexuals) could be excluded or made inferior in some way. An analogous situation would include: a homosexual person who had been at an institution that required its students to state unequivocally that they would not practise any Christian activities and that they believed such to be intrinsically and irremediably evil. When that person subsequently desires to teach at a public school (that may or may not contain Christians), would the issue really be one about the rights and place of homosexuals or homosexual conscience or would it be one of how the law views non-discrimination against Christians? Similarly, if homosexuals are elected to public school positions and have resolutions passed saying that there are to be no references to Christianity or to Christian practices and argue that this is because they believe Christianity to be intrinsically and irremediably evil, would a challenge to this be seen as more an issue of homosexual expression or of Christian rights? I would argue the latter.

The marshalling of conservative religious thought against homosexual rights is having an impact in these cases.[17] The Court of Appeal decision in *Chamberlain*, for example, seems to have been a direct (positive) response to a series of articles published in a special edition of the *UBC Law Review*.[18] Some of the articles largely take the same stance, were reacting in response to several cases, including the present two, wherein the authors perceived that religious views were being excluded from public policy and life in Canada. Neill Brown, writing a laudatory summary of these articles said:

> Mr. Justice Mackenzie [in *Chamberlain*] did more than correct what was evidently an error in interpreting the intent of the provincial statute; he indirectly responded, in a balanced and discerning way, to some of the concerns raised in this special edition of the *UBC Law Review*.[19]

In my opinion, Mackenzie J.A. did more than that. He adopted their approach, which is to characterize such cases as being about

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[17] Didi Herman treats the subject of the religious right and homosexual rights in *Rights of Passage: Struggles for Lesbian and Gay Equality*, (Toronto: UTP, 1994).

[18] U.B.C. L. Rev. (2000) 33 No. 3.

[19] Neill Brown, "Freedom of Religion and Conscience: Repairing the Damage" (2001) 59 The Advocate 201 at 201.

religious freedom and which is a justification for translating religious standards and views into political and legal decisions about equality issues such as sexual orientation.

These authors seek to turn equality issues into issues of competing expression, which suits the purpose of legitimatising religious expression activity that would effectively limit equality. For example, Iain T. Benson stated:

> Judges must be careful not to create an approach to competing faith claims that masks the competition of claims. They must also be careful to avoid the temptation (now frequently offered by litigants) to re-fashion what are, in essence, disputes of differing conscience or faith beliefs as disputes based on a supposed and imagined superiority of principles of *equality*, instead of a conflict that is actually rooted in differing faith conceptions.[20]

Such an approach undermines the idea of equality rights as disconnected from freedom of expression, turning equality rights issues, at least with respect to homosexuality, into religious/morality debates. The judges in *Chamberlain* and *TWU* seemed largely prepared to accept this approach in the context of homosexual rights. Would the response be the same if issues of women's equality or racial equality were re-designated as just "rooted in differing faith conceptions"? There are, for example, strong religious/moral views on (that is, against) issues such as Jewish integration, women's equality, mixed marriages and so on. It would be astonishing, however, to see those issues treated by the courts in the same fashion as homosexual equality was in these cases. The fact that homosexual issues can be treated as such, however, shows that homosexuality still has some way to go to achieve the equality protection that some other grounds of difference enjoy. Homosexual equality is, contrary to what these cases lead one to believe, *especially* in need of *Charter* protection and vigilance from the courts.

IV. RELIGION AS SACROSANCT

As I have noted earlier, the courts accepted these cases not so much as cases of homosexual equality but as instances of assault

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[20] Iain T. Benson, "Notes towards a (Re)definition of the 'Secular'" (2000) 33 UBC L. Rev. 519 at 543 [emphasis in original].

on religion. It was argued that any curtailment of religious expression is equal to a denial of religious protection. The Supreme Court, of course, has made statements in the past to the effect that religious freedom is not absolute. The classic statement in this area is that of Dickson J. in *R* v *Big M Drug Mart Ltd.*,[21] who said:

> The essence of the concept of freedom of religion is 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 belief by worship and practice or by teaching and dissemination.

He then, however, added that the concept means more than that:

> Freedom means that, *subject to such limitations as are necessary to protect* public safety, order, health, or morals or *the fundamental rights and freedoms of others*, no one is to be forced to act in a way contrary to his beliefs or his conscience.[22]

Such statements, making the principle of freedom of religion subject to constraints, have not always been well received. John von Heyking takes Dickson J. to task for "equat[ing] freedom of religion with freedom from religion."[23] Furthermore, it is argued that religious freedom is somehow of paramount concern under the *Charter*. Brown sees a requirement to accommodate other *Charter* values as an obliteration of religious freedom:

> The danger of this kind of language [of Rowles J.A. in *Trinity Western*] is that it provides judicial support for governmental action

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21 *R* .v. *Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 (S.C.C.).

22 *Ibid* at pp 353-4. Similarly, La Forest J. in *Ross*, *supra* note 16 at 29, para.72. said: "Indeed, this court has affirmed that freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience. This freedom is not unlimited, however, and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of others. Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others." On religion and education in the Canadian context, see A.N. Khan, "Canadian Education: The Legal Position of Religion" (1998) 20 Liverpool Law Rev. 137.

23 J. von Heyking, "The Harmonization of Heaven and Earth?: Religion, Politics, and Law in Canada" (2000) 33 U.B.C. L. Rev. 663 at 679.

> designed to compel only one viewpoint on an issue, leaving little room for conscientious or religious objection in the public forum.[24]

Benson takes up the idea that to compromise any portion of a person's religious views, including, it seems, acting on them, is to exclude them from public life. He says: "To follow the idea through leads to the paradoxical result that a religious person could not run for any elected office or, if elected, could not function in a secular manner..."[25] Brown took a similar view of what the trial judge did in *Chamberlain*:

> With one stroke of the pen, a judge has excluded from the educational political process in British Columbia a significant portion of the electorate and constructed a new constitutional principle that religious persons are disqualified from participating in the debates of public, secular institutions.[26]

Related to these arguments is the idea that it is the religious believer or the religion that should set the parameters on any particular issue where that person or religion argues it is involved. Thus, it is important for those who would limit homosexual equality to see cases such as *TWU* or *Chamberlain* as cases primarily of religious expression rather than homosexual rights. Paul Horwitz says that:

> in any conflict between religion and the state, the state or the court should attempt, when balancing the interests of the religious believer, to approach the problem *from the believer's perspective.*[27]

That appears to be the argument even when, as in *Chamberlain* and *TWU*, the religious believer *acts as* or *represents* the state and wants his religiously informed expression to affect the equality position of gays and lesbians.

Mackenzie J.A., writing for the B.C. Court of Appeal in *TWU*, accepted many of these fears of catastrophe for religion, if not for society. He said:

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[24] D.M. Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 U.B.C. L. Rev. 551 at 610.

[25] Benson, *supra*, note 20, p. 537.

[26] Brown, *supra*, note 24, p. 604.

[27] Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 U. T. Fac. L. Rev. 1 at 56 [emphasis in original].

> Can "strictly secular" in s. 76(1) of the School Act be interpreted as limited to moral positions devoid of religious influence? Are only those with a non-religiously informed conscience to be permitted to participate in decisions involving moral instruction of children in the public schools? Must those whose moral positions arise from a conscience influenced by religion be required to leave those convictions behind or otherwise be excluded from participation while those who espouse similar positions emanating from a conscience not informed by religious considerations are free to participate without restriction?[28]

Mackenzie J.A. bought into the monolithic view of religion when he said: "To interpret secular as mandating 'established unbelief' rather than simply opposing 'established belief' would effectively banish religion from the public square."[29] Such an approach subscribes to the idea that religious expression must be protected entirely or not at all.

The majority in *TWU* did only a somewhat better task of withstanding this argument about religious integrity. Writing for the majority, Iacobucci and Bastarache JJ.'s characterization of the case raises some concern. They said:

> The issue at the heart of this appeal is how to reconcile the religious freedoms 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 generally.[30]

The equality concerns are, of course, not ones that "may be shared" by society generally. Society *does* share the equality concerns. The students and teachers in B.C.'s public school system do not have equality *concerns*; they have a *right* to equality. The majority in *TWU* protected religious freedom even where that meant pardoning discriminatory acts of particular religious individuals in or entering the public arena as teachers. Furthermore, the majority aided religious public activism by taking an extremely narrow view of what constitutes acting on belief. Iacobucci and Bastarache JJ. said:

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[28] *Chamberlain (C.A.), supra* note 1 at para. 28.

[29] *Ibid.* at para 30.

[30] *TWU (S.C.C.), supra* note 2 at para. 28.

> 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."[31]

The majority, like the court below, did not think that the act of signing the TWU document was a homophobic *act*. Instead, the majority went out of its way to suggest that this was merely a belief that has no concrete discriminatory aspect or that it was an essentially meaningless formality.

The question, therefore, is just what sort of action would it take to make something more than mere belief? If a teacher had stood up before a job interview or at a school assembly of some sort and made the declaration that TWU entrants did upon subscribing to the "Community Standards" document, would the majority have said it was *just* belief or conscience and therefore had no effect as a discriminatory action, such as would affect the school environment? The signing of the declaration is not the same as a person subscribing to a particular faith. This was a step a person took as part of the education process to become a public school teacher. It was a voluntary *act* in the process of getting an education to become a public school teacher.[32]

Furthermore, in *TWU*, the court privileged the religious position over the equality position by putting the burden on those arguing for equality by saying that: "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."[33] The court did not require those bringing religious views to the public arena to show that their actions did not hinder equality of members of the public. The judges did not ask how a homosexual teacher or student would

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[31] *Ibid.* at para. 36.

[32] The majority in *TWU (S.C.C)* accepted analogies between the situation at TWU and those at the universities such as St. Francis Xavier and Queen's and others who "have traditions of religious affiliations." *TWU (S.C.C.), supra* note 2 at para. 34. *TWU* is a case, however, where an institution, unlike St. Francis Xavier or Queen's, required a student to take a discriminatory step as part of her education process.

[33] *Ibid.* at para 35.

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. Such concerns were raised by L'Heureux-Dubé J. in her minority reasons but were not addressed by the majority. Rather, the court accepted the view that it was inappropriate to curtail the religious expression of a person in a public context.

Only L'Heureux-Dubé J. in the Supreme Court[34] managed to put the fear-mongering about religious beliefs in its place. She said:

> The distinction and differential treatment resulting from the BCCT's decision are not based on Ms. Lindquist's religion, but on the act of signing the Community Standards contract performed by TWU students."[35]

L'Heureux-Dubé J. recognised that this case was far from being a case about jeopardising religion and the intrusion of the *Charter* into theology. It was, instead, about privileging certain religious beliefs in the public sphere. She said:

> 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.[36]

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[34] Of the judges in the Supreme Court of Canada in *TWU* and the B.C. Court of Appeal in *Chamberlain*.

[35] *TWU (S.C.C.), supra* note 2 at para. 102.

[36] *Ibid.* at para. 106. See also L'Heureux-Dubé J. who says in *P.(D.)* v. *S.(C.)* (1993) 108 D.L.R (4th) 287 at 317 (S.C.C.) :

> I am of the view, finally, that there would be no infringement of the freedom of religion provided for in s. 2(a) were the Charter to apply to such orders when they are made in the child's best interests. As the court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practice religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion.

V. RELIGION RECONSTRUED

Another approach in this discourse is to deny that the arguments against homosexual equality are in fact really religious, or alternatively, that religion is inseparable from concepts such as secularity and morality. The reintroduction of religiously motivated actions as a legitimate basis for making public decisions that have the effect of denying *Charter* guarantees (for things such as equality for homosexuals) is achieved semantically.[37] Benson, for example, takes on the concept of "secular."[38] He argues that faith, understood as metaphysical assertions that we do not empirically prove, is an inevitable aspect of human action. He asserts that "all human beings operate on *some basis of faith*."[39] Even those who are not religious have what he calls "faith" and secular decisions must, therefore, be rooted in "faith." Thus, for Benson, it is wrong to exclude a particular faith from a secular debate. It represents a "thinning of our common life." Religion is thereby not really separate from the secular. So, a statute like B.C.'s *School Act* mandates "strictly secular" decisions, does not actually exclude the sectarian. Similarly, Brown denies that secularism exists. He says: "the 'neutrality of the secular' is simply a myth and should be recognized for what it is – a substitute moral construct supported by the power of the state."[40]

Furthermore, homosexuality is defined as a morality issue and not an equality issue. It can then be argued that morality is rooted in and cannot be separated from religious views; so the debate on homosexual equality must be carried on from the parameters established by religion. Of course, the traditional view of homosexuality is that it is first and foremost a matter of (im)morality. This linkage and characterization has deep roots in

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[37] On semantic and rhetorical shift in rights discourse, see W. N. Eskridge, Jr., "No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review" (2000) 75 N.Y. U. L. Rev. 1327.

[38] Benson, *supra*, note 20, p. 519.

[39] *Ibid.* at p. 529 [emphasis in original]. See also D. Novak, "Law: Religious or Secular?" (2000) 86 Virginia Law Rev. 569 who says at 595 that "the reason our polities in Britain, the United States and Canada ... have not become Hobbesian-type tyrannies is because the majority of the citizens believe themselves obligated by a prior, divine morality..."

[40] Brown, *supra* note 24 at 605.

the law. Patrick Devlin called homosexuality a "pure point of morals,"[41] and then linked morality to religious beliefs, particularly Christianity. Benson cites Lord Denning approvingly as follows:[42]

> As *recently* as 1953, Lord Denning wrote about the necessity of a relationship between law, morality, and religion ...:
>
> > The severance [of law from morality, and of religion from law] has, I think, gone much too far. Although religion, law and morals can be separated, they are nevertheless still very much dependent on each other. Without religion there can be no morality: and without morality there can be no law...
> >
> > If religion perishes in the land, truth and justice will also. We have already strayed too far from the faith of our fathers. Let us return to it, for it is the only thing that can save us.

Benson takes a somewhat more temperate view himself but still denies that religion can be divorced from morality in legal debates:

> There is morality *without* religion, just as there is morality *informed by* religion; and all forms of morality are based ... on some kind of faith. The question is: Which kind of morality makes the most sense and explains the human situation best? No matter what answer is given to this question, all approaches must recognise that faith (religious or otherwise) is a primary fact of life for all human beings. Therefore, "faith questions" (including those questions that involve morality) must be considered as part of all debates in society.[43]

In the Court of Appeal judgment in *Chamberlain* and echoing Benson, Mackenzie J.A. began by trying to separate religion and morality. He said: "A moral proposition may originate from a religious insight but religion is more than morality and moral positions are not necessarily derived from religion."[44] However, and importantly, he then adopted the conservative religious attitude that homosexuality is an issue of morality. He said:

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[41] Patrick Devlin, *The Enforcement of Morals*, (London: Oxford University Press, 1965) at 92.

[42] Benson, *supra* note 20 at 527; A. Denning, *The Changing Law*, (London: Stevens & Sons Ltd., 1953) at 99 and 122 [emphasis added].

[43] *Ibid.* at p. 528.

[44] *Chamberlain (C.A.), supra* note 1 at para. 14.

> Some aspects of human sexuality remain morally controversial including homosexual or "same sex" relationships. The division of moral conviction on this subject cuts across society and divides religious communities as well as people without religious persuasion. The moral position of some on all sides of particular issues will be influenced by their religion, others not. There is no bright line between a religious and a non-religious conscience. Law may be concerned with morality but the sources of morality in conscience are outside the law's range and should be acknowledged from a respectful distance.[45]

To speak about homosexuality as a moral issue is to accept a particular religious conception of it. It is not a biological given or some fact or choice but a "moral issue." This characterization of homosexual rights issues as issues of morality does a disservice to rights litigation. By characterizing homosexual rights cases as morally troublesome, the general issue of the legitimacy of equality for gays and lesbians is raised. Homosexual equality is certainly not something to be celebrated if it is morally controversial. This approach is in contrast to that used for other equality issues – for race, women, even religion itself – though there were certainly times and places where current ideas of equality for women, races and other religions would have been considered immoral. One can imagine how women's equality issues would be decided if the courts turned to the writings of St Paul. It is only by detaching the religious characterization of such issues that a court can really achieve an equality analysis of it. As I have argued elsewhere:

> Equality for gays and lesbians is only a "moral" issue because the established religions make it so, by virtue of making homosexuals and homosexuality immoral. If the court accepts that characterisation then the issue is fought on the terms and territory and with the language established by religion and of course religion will win. If you invite the door-to-door religious proselytiser in to have a discussion with her (more likely him) about what she wants to talk about, you will never win the argument. She has set the terms and the ground rules and knows well what the result must be. If you have a discussion with her about "whether homosexuality is moral", then you have conceded that

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[45] *Ibid.* at para. 20.

> homosexuality is an issue where morality (probably defined by her religion) has something to say.[46]

Once the religious characterization is removed from an issue of racial or gender discrimination, the issue becomes much more straightforward. So should it be with homosexuality.

The central issue the court was asked to address in *Chamberlain* was whether the Board members who voted against the three books were acting in concert with the provisions of section 76(1) and (2) of the *School Act* that the schools be conducted on "strictly secular and non-sectarian principles" and that "the highest morality must be inculcated, but no religious dogma or creed is to be taught." If "morality" is not to be found in religious precepts, then where are public officials, including teachers and school board members, including religious ones, to find it?

It can be argued that for public or legal purposes, morality is to be found in the law itself. Lon L. Fuller usefully adopts and explains the distinction between the morality of aspiration and the morality of duty.[47] The moralities that religions (conservative or liberal) espouse are largely moralities of aspiration and are not well suited in any event to legal adjudication in a secular world. As Fuller says:

> There is no way by which the law can compel a man to live up to the excellence of which he is capable. For workable standards of judgment the law must turn to its blood cousin, the morality of duty. There, if anywhere, it will find help in deciding whether gambling ought to be legally prohibited."[48]

A morality of duty can include ideas of truth, respect for life, dignity of the individual, security of the person, equality, fidelity, fairness, responsibility for one's actions, duty and so on. These are all, in fact, principles in Canadian law as distilled from norms evident in constitutional law, criminal law, contract law, trusts,

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[46] B. MacDougall, *Queer Judgments: homosexuality, expression and the courts in Canada* (Toronto, University of Toronto Press, 2000) at 124. This approach was approved by L'Heureux-Dubé J in *TWU (S.C.C.)*, *supra* note 2 at para. 71.

[47] L.L. Fuller, *The Morality of Law*, revised ed. (New Haven: Yale Univ. Press, 1969) at 5.

[48] *Ibid.* at p. 9. Fuller says at 15 that if we look for affinities among the human studies, the morality of duty finds "its closest cousin" in the law – unlike the morality of aspiration which "stands in intimate kinship with aesthetics."

torts and other legal areas. In modern Canadian law, however, ideas of the inferiorization of homosexuality or same-sex couples are decidedly not present. In fact, however, the opposite is true.

The *Charter* should be the starting point for determining what is legally relevant as "moral." Lamer C.J.C. in his dissent in *Rodriguez* said: "the Charter has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation of our institutions."[49] David Dyzenhaus says: "Moral disapprobation is recognized as an appropriate response when it has its basis in *Charter* values."[50] How can the law, therefore, accept that ideas are to be incorporated into the legal realm as the basis for action by public officials or employees, under the guise of being morally controversial, when they have been decided as legally and constitutionally deserving of non-discrimination and equality protection? Where else except for sexual orientation could the law, on the one hand, say it is unconstitutional for the government to discriminate on that basis but at the same time allow public officials to take a discriminatory action on that same basis on the ground that the category is "morally controversial"?

Mackenzie J.A. himself in the appeal concluded: "That the highest morality includes non-discrimination on grounds of sexual orientation. The public schools must positively espouse that moral position and they cannot teach a morality that is inconsistent with it."[51] If that is so, however, homosexuality cannot therefore be

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[49] *Rodriguez* v *British Columbia (Attorney General)* (1993), 107 D.L.R. (4th) 342 at 366 (S.C.C.).

[50] D. Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991) 1 C.R. (4th) 367 at 376; approved by Sopinka J in *R.* v. *Butler* (1992), 89 D.L.R. (4th) 449 at 476 (S.C.C.). The trial judge in *Chamberlain* echoed this idea. She said that "Section 76 has the effect of distinguishing religious influence from issues of morality, precluding the first while requiring the second": *Chamberlain (SC), supra* note 12 at para. 80. She continued, "[t]he issue underlying this case illustrates this difference. Affidavits placed before the court by the School Board depose that some religions or churches with adherents in the community hold that homosexual activity is wrong. Yet in considering the highest morality as those words are used in the School Act, it is appropriate to consider the values embodied in the Charter of Rights and Freedoms and import them into the moral standard that must be applied: *Hills* v. *A.G. (Canada)*, [1988] 1 S.C.R. 512 at 518. Recent cases under s.15 of the *Charter* state that s. 15 protects equality rights for those of a homosexual orientation: *Egan* v. *Canada*, [1995] 2 S.C.R. 513; *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493": at para. 81.

[51] *Chamberlain (C.A.), supra* note 1 at para. 40.

accepted as morally controversial, as Mackenzie J.A. accepted, so as to permit the exclusionary actions of the Surrey School Board. A member of a school board who is called upon to use standards of "the highest morality" should operate within the "highest legal morality" and not impose personal, religiously based moral beliefs on the state operations which he participates in. In his own personal morality of aspiration, homosexuality, like race or gender, might be a morally relevant issue. In the morality of the law in Canada, it is not.

VI. HOMOSEXUAL EQUALITY RIGHTS: MAKING DO

Along with the judicial kid-glove treatment of religious expression activity in these two cases, we find judges questioning the motives of those who would fight for homosexual equality, blaming the hostility largely on homosexuals and suggesting that homosexuals should just turn the other cheek. While the judges invariably reiterated the principle of protection of homosexual equality, the results indicate the relative priority of that principle as compared to freedom of religious expression. There is an expectation that homosexual equality should accommodate the claims of religion. These cases raise serious concerns about just how seriously homosexual equality is taken, especially when compared with other *Charter* claims.

In *TWU*, for example, the majority was very forgiving of the institution's homophobia. Iacobucci and Bastarache JJ. said: "While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers."[52] Would that have been the reaction if, say, the teacher-training students had signed a document saying women were inferior and committed evil practices? Would the court have said, well women can just go elsewhere? In the same paragraph, the majority said: "there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully."[53] Again, what if students had signed a declaration

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[52] *TWU (S.C.C.), supra* note 2 at para. 35.

[53] *Ibid.*

that Jews were killers of God and were condemned as inferior? Would the court have said that there was nothing to indicate that such graduates would not treat Jews fairly and respectfully? Just what can potential teachers do by way of a written declaration and still be said to treat homosexuals fairly and with respect? Why are homosexuals expected to have such thick skins so as to preserve *intact* the religious prejudices and sensitivities of certain people who enter public life and expect to bring those attitudes with them to public life?

The majority in *TWU* appeared to believe that in signing the TWU declaration, a potential teacher was only condemning homosexual acts and not homosexual people and that this was a tolerable situation. This is certainly what some conservative thinkers believe is appropriate. Brown,[54] having noted the Catechism of the Catholic Church,[55] says, with astonishment:

> While the Catechism continues by calling for the acceptance of homosexuals with respect, compassion, and sensitivity, the teaching clearly is a criticism of a practice engaged in by others. Does it constitute an "attack and condemnation" of the views, beliefs, and practices of others which does not merit constitutional protection? Courts have not yet given a direct answer to that question, but two recent decisions involving religious beliefs on homosexuality – [*Chamberlain* and *Trinity Western University*] – strongly suggest that at least some judges think that such religious beliefs no longer are entitled to a place in public debate, because they contravene "Charter values."[56]

It is precisely because of religious teaching against homosexuals *and homosexuality* that "*Charter* values" are needed. One has only to look at various churches' and religions' histories of attacks on groups such as homosexuals, because of who they are *and* what they do, to see that it is exactly these types of organisations that gays and lesbians most need protection from.

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[54] Brown, *supra* note 24 at 602. Note here how there is an expectation that a potential religious expression belief should be able to be translated into action.

[55] "2357 ... Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that "homosexual acts are intrinsically disordered." They are contrary to the natural law." *Catechism of the Catholic Church* (Ottawa: Cdn., Conf. of Catholic Bishops, 1994) as cited by Brown, *ibid.* at 603.

[56] Brown, *ibid.* at 603.

Similarly, while religions might claim to be able to distinguish between "being" and "doing" when it comes to denigrating homosexuals and homosexuality, they do not usually propose a similar distinction for their own members, even when it means accepting religious-based public actions affecting others. Those such as Brown seem to argue that bringing religious belief to the public debate means also being able to implement those beliefs in a public context without constraint. L'Heureux-Dubé J. addressed this matter, another point of hers to which the majority did not respond:

> I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations... This is not to suggest that engaging in homosexual behaviour automatically defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.[57]

She made the apt comparison with the U.S. case of *Bob Jones Univ.* v. *U.S.*[58] and said:

> This American case provides an example, namely a ban on interracial dating and marriage, that is difficult to distinguish in a principled way from the ban on homosexual behaviour at issue here. In my view, to paraphrase Burger C.J., there can no longer be any doubt that sexual orientation discrimination in education violates deeply and widely accepted views of elementary justice.[59]

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[57] *TWU (S.C.C.), supra* note 2 at para.69

[58] *Bob Jones Univ.* v. *U.S.*, 461 U.S. 574 (1983).

[59] *TWU (S.C.C.), supra* note 2 per L'Heureux-Dubé, dissenting, at para. 70. In *TWU (C.A), supra* note 9, Rowles J.A. diss., said similarly at 296, para. 228: "Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practices is a condemnation of the person. For example, condemnation of someone's religious practice central to his or her religious faith would be discrimination against the person on the grounds of religion. Human rights jurisprudence accepts that homosexual behaviour is as central to the personal identity of gays and lesbians as religious practices are to the religious identity of the faithful." and at p. 297, para. 229: "Even if the Community Standards are understood only to condemn homosexual behaviour and not people, the condemnation is still a harmful one. It is an

In *Chamberlain*, there was a thinly veiled criticism of homosexual-rights advocates for choosing that particular situation to raise rights issues. Mackenzie J.A. questioned the motives of those who wanted the three books to be available as classroom resources. He said:

> I cannot accept that the initiative of Mr. Chamberlain and the other petitioners was aimed only at demonstrating the presence of nurturing values in alternative families generally. The three books in issue were selected for their sexual orientation dimension. While Mr. Chamberlain could reasonably expect five or six year olds in the classroom to be oblivious to that dimension of the stories he could also expect that by promoting the books as recommended learning resources the books would come to the attention of parents who would object to the sexual orientation dimension as morally offensive.[60]

The clear implication in what Mackenzie J.A. said is that the petitioners did not really care first and foremost about "loving and caring family relationships" or about "alternative families generally." Instead, they cared about "their sexual orientation dimension." Just why the petitioners had a duty to foster and promote books outside those with a sexual orientation dimension is not clear. The Ministry clearly wanted books used that would "develop students' understanding of the role of the family." It would appear, however, that it is inappropriate, in the mind of the court, to advocate gay and lesbian rights unless one does that *only* as part of a larger campaign of inclusivity. That is tantamount to saying that people who request books depicting, say, Moslem families would be acting inappropriately or somehow illegitimately and could be taken to task if they characterized their actions as promoting "religious diversity." Why sexual orientation is an unacceptable object without being wrapped up as part of a larger project of "alternativeness" is not clear. Certainly, books promoting heterosexual families do not have to be packaged as part of a larger inclusivity. Mackenzie J.A. himself said, "K-1 children for the most part are too young to form critical normative judgments. They simply accept the variety around them as fact and

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insidious type of harm because it requires people to deny, condemn, or conceal a part of their own identity."

[60] *Chamberlain (C.A.), supra* note 1 at para. 59.

welcome all the love and care they receive."[61] Similarly, they accept situations they read about as part of the natural order of things. In Surrey, they will probably not read about family situations where there are two moms or two dads.

Mackenzie J.A. appeared to blame the controversy at the Board meeting on gays and lesbians. 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."[62]

Mackenzie J.A. blamed the petitioners for "the anticipated confrontation." And, drawn in they were. Saying that:

> Passions were raised to the point where gross and vituperative epithets were shouted at Board members by spectators during the Board meeting when the resolution was being considered. No doubt some supporters of the Board were also insulting to their opponents.[63]

By treating this verbal fracas as an isolated case, in which the homosexual-rights advocates feature as trouble makers, agitators, name callers and users of children for their own agenda, the court ignored the true reality. "The other side," the religions, is central to the tradition that for *centuries* has spared no effort to denigrate what we now call homosexuality and homosexuals and has spent much effort and money to inculcate the same beliefs in children. As a result, even today, the public school curriculum is riddled with hetero-erotic messages for children, a situation that is simply taken for granted. Furthermore, while the discourse of rights advocates is apparent (and "controversial"), the discourse of those who advocate tradition is often in a code that is so familiar that those (like the judge) do not take notice of it, though its meaning is clearly exclusionary of homosexuals. So, the vocabulary of morality, children, parental authority, community, values, discipline and even education is usually intended, albeit sometimes

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

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

[63] *Ibid.*

unconsciously, to convey a particular *heterosexual* meaning and context. Before criticizing those who advocate equality, the courts should reflect carefully on just who has raised passions about homosexuality over the course of time.

Either sexual orientation is one of the bases for non-discrimination in Canadian law or it is not. It cannot truly be the basis for equal protection such as race or gender if a court declines to offer legal protection whenever those who are opposed to equal protection object or make anti-gay declarations. In *Chamberlain*, Mackenzie J.A. appeared to scold the petitioners for raising the issue when it was "well-known" that some Board members had strong views against homosexuality. Mr. Chamberlain was "inviting a confrontation." As I have said before, the effect of such considerations is clear if one were to replace sexual orientation with another basis for protection from discrimination, such as race. Is a case about whether an organisation such as a school board acted in a racist way to be influenced because some board members had racist views and their "passions" would be raised if somebody raised an issue of racial equality before the board? Should the person trying to fight the racism of certain board members be condemned, even if those racist views, which the board members sought to translate to public action, were rooted in their religious views?

VII. AVOIDING A HIERARCHY OF *CHARTER* PROTECTIONS

It is my contention that if a religious institution wants to get involved in the provision of a public service, such as training teachers for the public school system, then the norms that govern public institutions generally have to be applied to the religious institutions, at least in so far as it provides the service. Similarly, if a religious person wishes to take a position in a public body then public norms still must apply and not be supplanted by the person's religious credo. A religious person can exercise his conscience in public decisions but not where that leads to an infringement of the *Charter* rights of others. A religious person may well think that women should submit to men and in religious conscience believe it is not appropriate for a woman to be raised to a senior government position. But actions on conscience in such a case would be

wrong. Similarly, a gay person might think gays are inherently better than heterosexuals – not for any religious reason but just out of conscience. Acting on such a conviction in a public way would clearly be improper. Such a result is no different from how political views are treated under the *Charter*. One could have (and many do it seems) strongly held political views that certain people are inferior and less deserving and so on. However, those views cannot be implemented in our Canadian democracy. This is not considered to be an infringement of the dignity and place of those political views. It is thought to be the appropriate response in Canadian public life. So it should be with religious views. Religious views should not be privileged over political views that lead to unconstitutional decisions in the public forum.

Although the majority in *TWU* said they were deciding the case by "proper delineation of the rights and values" involved, I submit that the results in that case and in *Chamberlain* point to a hierarchy of protections under the *Charter*. While it is true, as L'Heureux-Dubé J. noted, that: "the Charter makes no provision for directly balancing constitutional rights against one another,"[64] in these cases, the protection offered to sexual orientation was not the same as that that would have been forthcoming for other bases of non-discrimination including race and sex and religion in similar circumstances. Sexual orientation is still not thought quite as worthy of protection as those other bases. It is still possible for the judge to say, as Mackenzie J.A. did in *Chamberlain*, that "sexual orientation issues raise strong emotions"[65] and to use that as an excuse to permit public activity of those who would deny equality.

Where a court is faced with a situation where respecting religious views generates a different resolution from respecting the right to freedom from discrimination on the basis of sexual orientation; that which includes and accommodates should prevail.[66] This approach, requiring inclusion and accommodation, even in the context of protecting sexual orientation rights that upset certain religious sensibilities, does not set up a hierarchy of bases

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[64] *TWU (S.C.C.), supra* note 2 at para. 94.

[65] *Chamberlain (C.A.), supra* note 1 at para. 57.

[66] This and the following paragraphs are adapted from my book, *Queer Judgments, supra* note 46 at 132-2. See ch. 3 generally.

of discrimination – one triumphing over another. In fact it is meant to have the opposite effect.[67] It is consistent with what Lamer C.J.C. said in *Dagenais* v. *Canadian Broadcasting Corp.*:

> 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.[68]

When a religious organisation or a person with strong, proselytising religious views enters into a public arena in any way, such as education or government, the organisation or the person must expect to operate in the public arena by respecting the social ideals of inclusion and accommodation, just as a gay business person, whatever his personal beliefs, must not discriminate on the basis of race, sex, religion, and other analogous grounds. The decision of the B.C. Court of Appeal in *Chamberlain* and the majority of the Supreme Court in *TWU* stand against this position. The court accepted the religious characterization of the situations and the idea that religious expression, even in the context of the activity of a public official or would-be employee, should not be limited to accommodate the claims of homosexual equality. The results make one wonder whether, for the courts, legal equality for gays and lesbians *does* mean that homosexuals and homosexuality are to be celebrated.

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[67] See also *Jones* v. *The Queen* (1986) 31 D.L.R. (4th) 569 (S.C.C.) and *Zylberberg* v. *Sudbury (Board of Education)* (1988) 52 D.LR. (4th) 577 (Ont. C.A.). On this case, see C.A. Stephenson, "Religious Exercises and Instruction in Ontario Public Schools" (1991), 49 U.T. Fac. L. Rev. 82. See also *Russow* v. *British Columbia (Attorney-General)* (1989), 62 D.L.R. (4th) 98 (B.C.S.C.).

[68] *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 877.