

VALUE PLURALISM & NEGATIVE FREEDOM IN CANADIAN EDUCATION: THE TRINITY AND SURREY CASES

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ABSTRACT. This paper revolves around two recently decided cases by the Supreme Court of Canada that illustrate how that Court views fundamental legal rights in terms of public policy and administrative decision making by creatures of statute in a free society. The protagonists in each case differ, as do the legal arguments, but the salient socio-political issues are the same, the conflict between value pluralism and value monism, and what Isaiah Berlin calls positive and negative liberty. That is, should society enforce one set of values over all others, and if not, when, if ever, ought public values enshrined in law, trump private values that are also legally protected? Based upon the Court's approach to resolving incommensurable rights in conflict this paper reflects on how educational policy and decision makers might deal with that conundrum by considering matters of positive and negative liberty from a communitarian perspective while nurturing value pluralism, and freedom.

PLURALISME ET LIBERTÉ INDIVIDUELLE DANS L'ÉDUCATION AU CANADA : LES CAUSES DE TRINITY ET DE SURREY

RÉSUMÉ Cette étude porte sur deux récentes décisions rendues par la Cour suprême du Canada qui illustrent comment cette Cour interprète les droits juridiques fondamentaux en matière de politique publique et de prise de décision administrative par la création de lois dans une société libre. Dans les deux cas, les protagonistes et les arguments juridiques diffèrent, mais les enjeux socio-politiques importants sont les mêmes, soit le conflit entre le pluralisme et le monisme et ce que Isaiah Berlin appelle liberté sociale et liberté individuelle. Plus précisément, la société doit-elle imposer un ensemble de valeurs plutôt qu'un autre, et, sinon, dans quelles situations, le cas échéant, les valeurs publiques enchâssées dans la loi devraient-elles l'emporter sur les valeurs privées qui sont également protégées par la loi? L'étude, qui se fonde sur l'approche de la Cour pour prendre des décisions relativement à des droits incommensurables conflictuels, examine de quelle façon les décideurs dans le domaine éducatif peuvent envisager cette énigme en prenant en considération les questions de liberté sociale et individuelle d'un point de vue communautaire, tout en cultivant le pluralisme et la liberté.

INTRODUCTION

A fundamental question for liberal democracies is, “How can a society deal with conflicting fundamental rights amongst its citizens?” In the course of human social conduct, public values will come into conflict with some citizens’ private values. When public values have crystallized into legal rights what ought to be the legal status of privately held values which are ostensibly not consonant with those public values, yet are arguably protected under other broadly protected legal rights such as freedom of conscience, freedom of religion, and the right not to be discriminated against due to holding unpopular values? In other words, can and should private values that are legally protected in the sense *not of the specific content* but in terms of the freedom to hold *socially dissident values per se*, and not to be discriminated against for doing so, trump legally articulated public values?

This is the broad nature of the question recently faced by the Supreme Court of Canada in the *Trinity Western University* (Trinity, 2001) and *Surrey School District* (Chamberlain, 2002: hereinafter referred to as *Surrey*) cases. Both cases refer more particularly to the nature of decision-making in educational policy matters when rights, and hence the values which underlie those rights, are in conflict.

This paper will a) briefly outline the facts of both Trinity and Surrey, b) analyze the parties’ positions from Communitarian and Berlinian (Berlin, 1952/2002) perspectives and, c) articulate the significance of those legal decisions in terms of educational decision-making and policy-making.

TRINITY WESTERN AND SURREY: THE FACTS¹

Trinity Western

In May 2001, the Supreme Court of Canada in *Trinity Western University v. College of Teachers* (2001) was asked to adjudicate between conflicting rights when they are based upon very different value orientations.

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

Given its mandate, Trinity’s students were required to enter into a contract with that institution which required, among other things, that students adhere to certain core values, which were clearly spelled out in its students’ version of the “Responsibilities of Membership in the Community of Trinity Western University (otherwise referred to as ‘Community Standards’). Among those

values was the requirement that students, “Refrain From Practices That Are Biblically Condemned,” which included “homosexual behaviour” (Trinity, 2001, S.C.R., p. 15).

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

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

Trinity applied to BCCT for certification of its teacher education program, but on May 17, 1996, the BCCT Council refused that application for certification “on two grounds: TWU [Trinity] did not meet the criteria stated in the BCCT bylaws and policies; and *approval would not be in the public interest because of discriminatory practices of the institution*” (Trinity, 2001, S.C.C., p. 9) [emphasis added].

A reading of the *Trinity Case* evidences that the Council’s position was to the effect that the real purpose of Trinity’s *Community Standards* contract was to shut out applicants who were homosexual or lesbian, and further, that it inculcated in its students a bias against those groups. The Council feared that this attitude would manifest itself in Trinity’s graduates displaying discriminatory attitudes in British Columbia’s public school system. Such actions were illegal under that Province’s *Human Rights Act*, and the *Canadian Charter of Rights And Freedoms* Section 15 (1). Having come to those conclusions, the BCCT Council, acting under the *Teaching Profession Act*, section 4, wherein it was mandated, “to establish, having regard to the public interest, standards for . . . persons who hold certificates of qualification and applicants for membership” (p. 17), Trinity’s application for accreditation of its teacher education program was denied.

So began a battle of articulated public values (enshrined in law as rights) versus private values ostensibly protected by more general rights, which would end up almost five years later being decided at the Supreme Court of Canada.

Trinity took issue with the BCCT Council’s ruling and applied to the British Columbia Supreme Court for judicial review, seeking by way of *certiorari*, an order of the Court to quash the Council’s decision, and by way of a *writ*

of *mandamus*, an order of the Court to compel the Council to accredit its teacher education program. In essence, Trinity argued that the Council did not have the jurisdiction to decide a matter of religious beliefs under the empowering *Teaching Profession Act*.

At trial and at the British Columbia Court of Appeal Trinity was successful in its arguments, whereupon the Supreme Court was asked to consider three matters: jurisdiction, constitutional interpretation, and public policy. The simple *ratio decidendi* of that Court's majority decision was based upon the finding that there was no evidence upon which to base the argument that Trinity's students who had become teachers, albeit by finishing their last year of studies at Simon Fraser University, had ever been discriminatory against gay students and therefore Trinity should be accredited as a B.Ed. granting institution. However, in choosing to come to that holding the majority of the bitterly divided Court was compelled to consider issues of rights and hence public and private values in conflict in terms of the appropriate public policy in a free and democratic pluralistic society. Those issues will be addressed following a recitation of the second case presented to the Court one year later and that raised similar issues: the Surrey case.

Chamberlain et al. v. Surrey School District

In January of 1996 the Surrey School Board passed a resolution stating that teachers could only use books in the "family life component of the Career and Planning curriculum" (Surrey, 2002, para. 44) from the Ministry of Education (British Columbia) or School Board approved lists. Later that year Mr. Chamberlain, an elementary school teacher, sought permission from his school's principal to introduce three books as learning resources into the Grade One Family Life curriculum of his school. The books proffered by Mr. Chamberlain depicted gay and lesbian families and were from the Gay and Lesbian Educators of British Columbia (GALE BC). In October 1996 the school principal directed Mr. Chamberlain "to use only provincially or district approved learning resources in his classroom" (Surrey, 2002, para. 44). Based upon that direction, Mr. Chamberlain was advised that he would have to ask the School Board for approval to use the books.

He made that request and six months later on April 10, 1997 the school board adopted a resolution which, "all administration, teaching and counseling staff [shall] be informed that resources from gay and lesbian groups such as GALE BC or their related resource lists are not approved for use or redistribution in the Surrey School District (2002, para. 45).

Mr. Chamberlain, and his supporters, sought redress via judicial review of the board's decision arguing that, a) section 76(1) of the *School Act* (British Columbia) had been violated as it provided that schools were to be "conducted on strictly secular. . . principles" and, b) that the Board's decision

was contrary to section 15 of the *Charter* which protected individuals against discrimination based upon sexual discrimination. The Board argued that, a) the books in question were not appropriate for kindergarten and grade one children; b) the provincial curriculum did not specifically address the issue of same sex couples or families, and therefore the inclusion of the books as resources in kindergarten and grade one were *not necessary* to meet the requirements of the provincial curriculum; c) it was the parents who were the primary educators of their children and therefore it was their representative, the Board, who would be best placed to determine if the *non-necessary* books should be included in the schools; and d) the inclusion of the books would cause controversy in the community and undermine the school-parent relationship. Therefore it concluded that the books should not be allowed into the schools.

The trial judge accepted Mr. Chamberlain's arguments and quashed the Board's decision, finding that the reason behind the Board's decision was "based on concerns that the books would conflict with some parents' views on same-sex relationships . . . (Surrey, 2002, para. 51). The school board appealed to the Court of Appeal for British Columbia.

The Court of Appeal (Surrey, 2002) (a) unanimously upheld the School Board's position. In an interesting double negative the Court held that although section 76(1) of the *School Act* (British Columbia) stressed the secular nature of public education, it "cannot make religious unbelief a condition of participation in the setting of the [society's] moral agenda" (Surrey, 2000, para. 29). In other words, it was in the Board's legal prerogative to allow it to be influenced by its religious values, or at least those religious values it believed its constituents possessed. The Court said, "No society can be said to be truly free where only those whose morals are uninfluenced by religion are entitled to participate in deliberations related to moral issues of education in public schools" (Surrey, 2000, para. 34). Indeed, the Court found that to have done so would constitute a breach of sections 2 and 15 of the *Charter* that guarantees freedom of conscience, religion, and equality rights.

Mr. Chamberlain appealed to the Supreme Court of Canada. Once again, that Court was to deal with jurisdiction and the proper standard of judicial review, but also, and for the purpose of this article, upon how the values of a minority enshrined in law may be balanced against the values of the many who seek refuge under more generic rights. On December 12, 2002, a divided Court held that the Board's decision was unreasonable and directed the Board to reconsider its decision. How the Court arrived at that decision, when just twelve months earlier it had determined in favour of Trinity Western University may appear on the face of it to be perplexing, perhaps leading to the conclusion that the Court had been inconsistent in its approach to dealing with conflicting values (i.e., freedom of religion

and conscience) which underlie the rights of Canadian citizens. This article takes issue with that position and proffers that the Supreme Court acted consistently in developing the law as it implicitly supported a communitarian view of society based upon value pluralism, positive and negative liberty, and displaying how best to nurture those elements within a free society. It is to that matter that I now turn.

COMMUNITARIANISM

This section of the paper will discuss the Trinity and Surrey cases in terms of Communitarian theory in terms of a) society; b) incommensurability, the *narrow ridge*, and value pluralism; and c) legal rights in a communitarian society.

A theory of society

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

This presupposes that the *I* has a morality which learns from the community through interactions with others. It is this sense of morality or of what is *good* held as a community value, that distinguishes, and indeed can transform, a community from a mere association or grouping of individuals. It is the community that defines the common good, the *authoritative horizon*, and seeks it. Communitarians believe that it is this “feeling of commitment to a common public philosophy which is a precondition to a free culture” (Kymlicka, 1990, pp. 122-3).

In general, it is fair to say that communitarians believe that the freedoms and rights enjoyed by individuals, which are not denied but are circumscribed by society, flow from the common understandings or values accepted by the community (Etzioni, 1996). The difficulty is that “common understandings” are difficult to determine when some understandings held by some citizens are not consonant and indeed appear to be incommensurate with public values.

Notwithstanding the *authoritative horizon*, Communitarians do not steam-roll over the individual, as the individual is respected and valued as an end,

and not simply a means to a collective end. Nor do communitarians seek to produce automatons to the collective will. Bellah (1998) states,

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

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

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

The nub of the issue for communitarians is what to do when facing value incommensurability in defining the *common good*. The Trinity and Surrey cases are examples of a fundamental disagreement between two communitarian perspectives. In both cases the majority of the Supreme Court accepted the communitarian idea of common societal values but argued that it is expressed in a *plurality within unity* that guarantees freedom within community.

The majority in Trinity said,

at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU [Trinity] with the equality concerns of students in B.C.'s public school system, concerns that may be shared with their parents and society generally. (2001, p. 23) [emphasis added]

Whereas the dissent stated, "*at its core*, this case is about providing the best possible educational environment for public school students in British Columbia" (Trinity, 2001, p. 27). This position was clearly in accord with a prior decision of the Supreme Court of the United States, *Bob Jones University v. United States*² (1983), where Chief Justice Burger stated "The institution's purpose must not be so at odds with the *common community conscience* as to undermine any public benefit that might otherwise be conferred" (p.13) [emphasis added].

In Surrey the majority of the Court stated,

The School Act's insistence on secularism and non-discrimination lies at the heart of this case. Section 76 of the School Act provides that "[all] schools and Provincial schools must be conducted on *strictly secular and non-sectarian principles*." It also emphasizes that "the highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school." (Surrey, 2002, para. 18) [emphasis added]

While the dissent, on the relevant issue for this paper stated, "No society can be said to be truly free where only those whose morals are uninfluenced

by religion are entitled to participate in deliberations related to moral issues of education in public schools” (Surrey, 2002, para. 138).

Here then is the dilemma. Where are the *common understandings of the community* when the community is divided over apparently incommensurate values and thus where each side believes that the common good is best defined by its values? In other words, where is the *authoritative horizon* when what are at stake are not just differing values but more importantly, freedom of choice of those values within society?

Incommensurability, the narrow ridge, and value pluralism

The incommensurability of the values as expressed in the Trinity and Surrey cases are best expressed by the fundamental metaphysical underpinnings of the values that were espoused by the various parties. Trinity Western University and the Surrey School Board believed in a theological perspective, that the nature of being human, *qua human*, proscribed homosexual and lesbian acts. The College of Teachers and Mr. Chamberlain fundamentally saw homosexuality and lesbianism, and hence sexual acts associated with those orientations, as being actions as fundamental to being human as the color of one’s skin, or the shape of a person’s eyes, or as sexual relations between heterosexuals. In other words the dissent in Trinity took the position that those sexual orientations were a biological fact of human existence and therefore to discriminate against a person for in essence *being* was tantamount to denying the very humanity of the person, citing the United States Supreme Court case, *Bob Jones University v. United States* (1983), which arguably had come to the same conclusion on the matter of race. For the gay community and the dissent at the Supreme Court, because those orientations were part of being human per se, neither homosexuals and lesbians nor their actions could reasonably be said to be a moral, ethical, or religious issue. Therefore what was fundamentally at stake in Trinity was a question of the common good being the preemptive protection of gay students in the province.

In Surrey, the same case was made but with a twist. It was the members of the School Board’s personal rights to freedom of conscience and religion,³ and not to be discriminated against because of those beliefs in their decision-making, juxtaposed against the right to the inclusion of gays and lesbians as family exemplars and not to be discriminated against because of sexual orientation. Essentially, I suggest, this was the same metaphysical and epistemological divide as in Trinity that made, in principle, the positions incommensurable.

For the Supreme Court it was as an issue of deciding cases that put the Court on the *narrow ridge* (Buber, 1938/1965).

I have described my standpoint to my friends as the “narrow ridge.” I wanted by this to express that I did not rest on the broad upland of a system that

includes a series of sure statements about the absolute, but on a narrow rocky ridge between the gulfs where there is no sureness of expressive knowledge but the certainty of meeting what remains undisclosed. (p. 184)

Friedman (1966) suggests that the narrow ridge is a paradoxical unity of what one usually understands as only alternatives (p. 3). In essence, the *narrow ridge* expresses the view that the duality of extreme positions is a false perception when what is real is not such extremes *but rather a harmony or proportion of those positions* (p. 3) [emphasis added]. Societal harmony is always a concern of the Court as its decisions must be not only reasonable but also persuasive to the community at large to be accepted and thus to have effect. Yet because of value incommensurability it appeared that an “either-or” decision of the Court was necessary. Rather than choosing among metaphysics, epistemology, or biology, for warrant the Court implicitly chose in favour of value pluralism not monism. This left the individual the right to choose to make *wrong* choices and judgments, at least in the opinion of other citizens, and thus nurtured a society that accepts *difference*. Such is the normal human condition and indeed what contributes to making us human. This view is not universally accepted,⁴ nevertheless, it appears to be the course taken by the Supreme Court. In essence it agreed that the messiness of living together with many different values in the public square, while not restricting beliefs of the other, is the rule of the day. Moreover, when an institutional instrument of the democracy attempts to shrink the frontier of its citizens’ freedom the Court will rule in favour of value pluralism while recognizing that the individuals who compromise the institution may have their own values but may not impose them on others. The majority in *Surrey* (2002) stated,

Religion is an integral aspect of people’s lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use religious views as one part of the community to exclude from consideration the values of other members of the community. (para.19)

Value purity or even coherence as seen from either side of the value divide was rejected as it,

prizes purity and coherence over patient concern for diverse interests, purposes, and values. Ideologues demand simplified alternatives, encourage a divide between ‘the children of light and the children of darkness,’ invite coercion in the name of correct doctrine. All that is alien to the spirit of community, which prefers the untidy concreteness of social existence to the comforts of political correctness. (Selznick, 2002, p. 71)

Legal rights in a communitarian society

There is much to be concerned with when one’s rights appear to have been overridden by the Courts. One can guess how many in British Columbia’s gay and lesbian community felt when the court decided in favour of Trin-

ity Western and how the Surrey Christian and its supportive community felt when the Surrey Board was unsuccessful before the Supreme Court. It is always difficult to accept defeat when one knows with certainty that one is on the side of the right, the good, the just and the reasonable, especially when one sees the Supreme court's decisions as inconsistent. Yet, the Court had arguably been consistent in defending value pluralism and therefore I suggest in defending the concept of Canadian society as a pluralistic communitarian enterprise.

Rights are not sacrosanct nor are they absolute in a free society. Pierre Trudeau, when faced with the terrorist actions of the Front de liberation de Québec, called out the Canadian Military to the streets of Montreal and invoked the *War Measures Act*⁵ that in effect suspended the right to due process or fundamental fairness in Canadian courts. The *Charter* (Canadian Charter of Rights and Freedoms, 1982) itself provides that rights such as freedom of conscience and religion may be temporarily suspended under section 33 of the *Charter*, albeit, subject to a sunset provision. Rights should be taken seriously, as Ronald Dworkin (1977) says, but they are not absolute. Indeed I would argue that in a pluralistic communitarian society, rights are primarily for the purpose of restricting governmental action against individuals and not to adjudicate between values of community members. If this is true, then again the Court was correct in both Trinity and Surrey in favoring the entity that was not the statutorily created decision-maker.

Communitarians accept that rights are important but that they must be exercised while taking into account the rights of others, "especially consequences for social harmony and cooperation" (Selznick, 2002, p. 70). The Supreme Court in Trinity and Surrey, cognizant of that principle or not, seems to have understood that a pluralistic society must find ways to acculturate at least cooperation if not value harmony in Canadian society. Selznick (2002) states, "In public affairs, rights-centeredness produces social division, stalemate, and distorted priorities. Arguments based on rights do not count costs, promote accommodation, or care much about the purposes in view or the other values at stake" (p. 71). Rights are not ends in themselves but means to ends. The end most proximate is that of a society which promotes harmony and cooperation.

The decision making of the Supreme Court involves, as does all legal reasoning, a process involving "ongoing societal moral dialogues . . . couched in legal terms, regarding the proper place to *draw the line between the societal set of values and the particular ones, those of the community of communities and those of the constituting communities*" (Etzioni, 1996, p. 202) [emphasis added]. *Prima facie*, the Trinity Case represents just such a dialogue of values.

This was the dilemma for the Supreme Court that had two conflicting communitarian views to the case before it. The majority approached the values

conflict from a *unity in plurality* position while the dissent argued for a *unity of community* approach.

In communitarian terms, the challenge that was accepted by the Supreme Court was, as Etzioni (1996) suggests, “to point to ways in which the bonds of a more encompassing community can be maintained without suppressing the member communities” (p. 191). The Court had rejected that Canadian society was a *melting pot* of values, preferring a mosaic: value pluralism. It is that ideal that Etzioni (1996) speaks of when he says, “as I see it, the image of a mosaic, if properly understood, best serves the search for an inter-community construction of bounded autonomy suitable to a communitarian society” (p. 192). He goes on to say,

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

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

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

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

In considering value pluralism there must nevertheless be a common core element that transcends the particularities of the various contending groups. In both *Trinity* and *Surrey*, it is suggested that the Supreme Court of Canada was able to navigate its way through the multi-dimensional labyrinth of jurisprudence, politics and philosophy and to provide warrant for its decisions by holding that the preeminent principle was the protection of freedom in society.

If democracy is by definition composed of heterogeneous individuals and groups, and if freedom is, at least in part, the exercise of rights, subject to reasonable democratic limits without coercion, and if there is no clear and present danger to others in evidence, then acceptance of value pluralism is

both appropriate and reasonable. So implicitly suggests the majority's decision in both Trinity and Surrey.

The Supreme Court

Although members of the Supreme Court may not have read Etzioni's writings, there is no doubt that the ideas expressed in their judgment ring with Etzioni's concept of society being a community of communities and, for the purposes of this paper, a mosaic not only of cultures, but of values underwritten by the key value of freedom. If value pluralism is founded upon a particular concept of freedom, how did the Supreme Court define that term and how did it, arguably, reach sufficient warrant for its decisions in Trinity and Surrey?

The Supreme Court's first question in both Trinity and Surrey was whether the conflicting rights were hierarchical in authority. If the rights were hierarchical, then the Court need have only determined which prevailed: freedom of religion and conscience or the right not to be discriminated against for reasons of sexual orientation. In Trinity the majority of the Court stated that it would balance rights and not accept a hierarchical schema saying, "one right is not privileged at the expense of another" (p. 23) and quoted former Chief Justice Lamer, in *Dagenaise v. Canadian Broadcasting Corp.* (1994) when he said, "when the protected rights of two individuals come into conflict . . . Charter principles require a balance to be achieved that fully respects the importance of both sets of rights" (p. 877). That principle was reaffirmed in Surrey but how did the Court balance the rights (and thus the underlying values) in those cases? Indeed, did the Court really use the balancing principle it claimed to have used?

I suggest that in both Trinity and Surrey the Court determined that rights, whether specific or general in nature, were means not ends: which is consistent with Selznick's (Selznick, 2002) earlier comment. In other words, rights are the means that a pluralistic society employs in order to achieve and maintain freedom.

The majority said (Trinity, 2001, S.C.C.),

Freedom, in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the *fundamental rights and freedoms of others*, no one is forced to act in a way contrary to his beliefs or his conscience. (p. 22) [emphasis added]

The Court concluded that values enshrined as rights are not only not hierarchical but also not absolute. This poses a real difficulty; as the list of rights expresses both positive and negative liberty it could be argued that the Court did in fact favour some rights over others in the sense that when

in conflict the rights which favored negative liberty (the right not to be discriminated against for reasons of religious beliefs or sexual orientation) trumped rights expressed in terms of positive liberty. When rights articulated in support of positive freedom are in conflict with rights expressed in terms of negative freedom, how can one justify a decision between the two? A Berlinian perspective offers a resolution to this conundrum.

A BERLINIAN PERSPECTIVE

Positive and negative liberty

Berlin (2002) believed that a major debate in political thought was the very issue touched upon earlier by Selznick's (2002). Berlin (as cited in Plaw, 2004) stated what was at the core of the pluralist – monist debate,

The history of political thought has, to a large degree, consisted in a duel between . . . two great rival conceptions of society. On one side stand the advocates of pluralism and variety and an open market of ideas, an order of things that clashes and the constant need for conciliation, adjustment, balance, an order that is always in a condition of imperfect equilibrium, which is required to be maintained by conscious effort. On the other side are to be found those who believe that this precarious condition is a form of chronic social and personal disease, since health consists in unity, peace . . . [and] the recognition of only one end or set of non-conflicting ends as being alone rational . . . (p. 1)

In practice, value pluralism, in a nutshell, has five elements, a) it claims to be the reality of the normative universe, b) it is based upon minimal societal conditions which provide a moral floor and therefore is not mere relativism, c) it states that there amongst many qualitatively heterogeneous goods there is no common universal measure of value, hence, d) values cannot be ranked as there is no agreement amongst all individuals, and lastly, e) human action does not have one overriding set of values for all circumstances (Galston, 1999, pp. 2, 3). Unlike Hobbes, Marx, and others who proffered a harmonious moral universe Berlin did not believe it was in freedom's best interests to seek value harmony in a society, even if such a goal was possible which he believed that it was not, as it could result in those tragedies which had plagued the twentieth century, fascism and communism, that had caused such great human misery. As an aside, he was perhaps ahead of his time, as today many postmodernists would agree that there is *no one best value* and certainly not a hierarchy amongst them.

However, to accept value pluralism as the norm in society is to accept the inevitable collision of values amongst its citizens. Berlin believed that this was the price to be paid if one believed in the ability of the individual to transform her or his life through free choice, in an existential sense but not a nihilistic sense of rejecting all communal values. Negative freedom is, after

all, a value in itself and makes sense only when referenced to the other individuals' in society and their rights. The key to such freedom was what Berlin called negative liberty (hereinafter referred to as negative freedom).

Positive liberty (hereinafter referred to as positive freedom) seems relatively easy to comprehend as an assertion of specific rights such as freedom of religion. However, negative freedom requires an explanation. It refers to the restricted use of others' positive freedom in that when exercising one's rights one must not interfere with others' rights. Berlin (2002) states,

whatever the principle in terms of which the area of non-interference is to be drawn, whether it is that of natural law or natural rights, or of utility, or the pronouncements of a categorical imperative, or the sanctity of the social contract, or any other concept with which men have sought to clarify and justify their convictions, liberty in this sense means liberty from; absence of interference beyond the shifting, but always recognizable, frontier. (pp. 173-174)

Gutman (1999) interprets Berlin's concept,

Worthwhile negative liberty, Berlin recognizes, depends not merely upon the existence of options but their number, accessibility, whether and to what extent deliberate human acts have blocked options, and the value of the accessible options, to both the agent and other members of society. (p. 8)

The Supreme Court certainly was clear that freedom entails both positive and negative freedom). Indeed the *Charter* itself expresses both in section 2 as positive freedom and section 15 as negative freedom. Both Trinity (2001) and Surrey (2002) represent a classic conflict not only of rights manifested in positive and negative terms but also in the fundamental disagreement between the majority and dissent in what constitutes the *common good* in a communitarian society that is the clash of value pluralism vs. value monism. I suggest that such was a wise course as "In the name of universalism, particular groups have been oppressed . . ." (Minow, 1996, p. 34) and although Canadian society does adhere at times to the principle of affirmative action, one is hard pressed to accept that argument when the oppressor is the government or a creature of statute acting on the basis of employing governmental coercion to discriminate against citizens based upon their religion, conscience, or sexual orientation.

A clash of positive and negative freedom

As stated earlier, in Trinity the British Columbia College of Teachers refused to accredit Trinity Western University's teacher education program based upon the premise that its decision was in the public interest, or as this paper interprets those words, the common good. It acknowledged Trinity Western's right to promulgate its own values within its institution based upon both positive freedom to express its participants' freedom of religion and freedom

of conscience, and negative freedom to act without interference even though the value expressed, in the case of homosexuality, was not consonant with public values expressed in law. In other words, the College of Teachers drew the line establishing the *authoritative horizon* where in the public sphere negative freedom stopped: ostensibly as to hold otherwise could prejudicially affect some of the Province's youth.

Trinity Western claimed that its rights (and hence its values), as expressed in a positive sense, freedom of religion and conscience, and in a negative sense, the right not to be discriminated against on those grounds, were usurped by the College's refusal to accredit its teacher education program. The issue then, in Berlinian terms, was not that Trinity Western had a right to both positive and negative freedom but rather whether the College had correctly drawn the demarcation line on the extent of Trinity Western's right to negative freedom. For the Supreme Court, it was a question of where to draw the frontier of negative liberty while considering, I suggest, the *authoritative horizon*, as expressed by communitarians, of the *common good* in Canada.

The Supreme Court found that the limitation on Trinity Western's freedom set by the College was not supportable in fact and, I would argue, more importantly in principle. The private values espoused by Trinity Western (protected by law as rights both in a positive and negative sense), were contrary to public values (protected by law as a right in terms of negative freedom). Yet the Court held that the College had unreasonably discriminated against Trinity's right to seek accreditation of its teacher education program. Why unreasonably? The dissent argued that the horrific experiences of gay students in public schools most powerfully presented as narratives, should be implicitly linked to the possible jeopardy in which future graduates of Trinity Western might put British Columbia's gay students. But,

stories alone do not articulate principles likely to produce consistency in generalizations to guide future action; stories do not generate guides for what to heed or what additional stories to elicit. Stories on their own offer little guidance for evaluating competing stories. (Minow, 1996, p. 35)

Moreover, the majority in Trinity seems to have understood that life does not follow Checkhov's literary cannon (Tchekhov, 1974), "If in the first chapter you say that a gun hung on the wall, in the second or third chapter it must without fail be discharged." In other words, the naturalistic fallacy will not necessarily win the day in the Court, as the majority found there were no facts to support the argument for reducing the frontier of Trinity Western's negative freedom in this case. More importantly, this finding rests, I suggest, upon the principle that the protection of value pluralism is fundamental to a free and democratic society. Without that principle, the Court could have easily agreed with the dissent in Trinity and acted peremptorily to support the British Columbia College of Teachers' decision and deny Trinity's application for accreditation of its teacher education program.

In Surrey, the School Board members' positive right to hold and express their freedom of conscience and religion was juxtaposed against the negative right of gay and lesbian families in the local community to be represented in the materials used in their children's elementary school classrooms. This was a case, so Mr. Chamberlain et al. argued, of freedom from discrimination on the basis of sexual orientation. The majority of the Supreme Court decided in favour of Mr. Chamberlain, once again in support of negative freedom (the right not to be discriminated against) over positive freedom (the Board members' rights to freedom of religion and conscience). In doing so, the Court held ultimately in favour of value pluralism, and indeed contrary to statute as interpreted by the Court. In other words, the values of the local community as espoused by its school trustees may set the authoritative horizon for the community but not the frontier of negative liberty, as protected by law, of its various constituents. Fundamentally, I suggest, the Supreme Court held in favour of value pluralism which demands, as Berlin would say, that the paramount concern for freedom in a society is the protection of negative freedom: except in very rare cases as stated by the Supreme Court in *Trinity*.

What then does the above all mean in terms of the coherence of the holdings in *Trinity* and *Surrey*? The Supreme Court had arguably been consistent in both *Trinity* and *Surrey* in its analysis and application of the principle that a society which acknowledges the inherent nature of value pluralism must support negative freedom at least when such is undermined by a body which is created by statute: the British Columbian College of Teachers and the Surrey School Board. After all, the primary goal of the *Charter* is to protect the individual and groups against the actions of government and hence the creatures of statute: with Canadian Universities excepted. This principle seems correct if the analysis rests not upon the individuals who comprise the creature of statute but rather the statutorily created administrative decision making body itself. In that case the rationale for both *Trinity* and *Surrey* appears to be clear. A pluralistic society that espouses freedom and thus value pluralism ought to consider those rights that support negative freedom as more important those that support positive freedom.

If the above analysis is correct, and I contend that it is so at least for the two cases under examination in this paper, then the Supreme Court is not correct when it states that it used a balancing of rights approach in the *Trinity* and *Surrey* cases. Quite the contrary. I proffer that the Supreme Court has determined that *Charter* rights, expressed in a negative sense, for example section 15, supercede those right expressed as positive rights, section 2 as well as others. Indeed, this would be consistent with the Berlinian (2002) idea that choice is required when values are incommensurate (p. 192).

IMPLICATIONS FOR EDUCATIONAL POLICY AND DECISION MAKERS

There is much that is significant for educational policy creation and decision-making in the Supreme Court of Canada's Trinity and Surrey decisions. Educational policy makers and decision makers might well consider the underlying meaning to proposed policies rather than merely its administrative objectives. Terry (1993) suggests that this type of reflective action is often counterintuitive and therefore difficult to achieve without the use of conceptual tools, such as the Action Wheel. The Wheel breaks the linear thought process and causes the individual to consider not the purpose of the proposed policy but rather its meaning. In Trinity, the British Columbia College of Teachers might have done well to ask itself "What is the meaning of this action as a statutorily mandated administrative body to society and the freedom of those therein?" In Surrey, the Surrey School Board might have asked itself, "Regardless of our own personal beliefs, what is the meaning of this action as a statutorily mandated administrative body to our society as a whole and the frontier of freedom for each group therein?"

I do not suggest that in either case the decision reached by the policy makers would have been consistent with the holdings of the Supreme Court, but I do suggest that it would have increased the awareness of the policy and decision makers to the deeper meaning of their policies leaving open the chance that an alternative and perhaps more acceptable resolution, at least as far as the Supreme Court was concerned, may have been possible.

Policy creation should be viewed, as means not ends. Policies are devised to provide preparedness, order, equity and fairness to situations that may arise in the administrative world but beyond those purposes what is most significant is the meaning of those policies to those who are affected. The decision making process is designed to consider various factors in a casual relationship which will lead to desired administrative ends. However, beyond mere causality is the consideration that such actions may deeply and fundamentally impact individuals' most personal beliefs and in a wider sense both the nature of the institution and the fundamental nature of society.

Terry's Action Wheel (Terry, 1993) asks the policy creators and the decision makers to look beyond administrative purposes and objectives to *meaning*, a consideration which I respectfully suggest was lost by the unsuccessful parties in both Trinity and Surrey.

What considerations might policy and decision makers consider in seeking meaning? I suggest the following: (1) consider both policy and decision making as means not ends; (2) consider all constituents as ends, that is as individuals who have their own dreams, fears, hopes, anxieties, and not as ends to a particular policy or as *collateral damage* to broader social or community

goals; (3) prior to taking a terminal administrative action which involves such a choice, seriously consider the various voices not just in substance but in their meaning to themselves and what a rejection of their concerns means to them, the institution and freedom within the wider society; (4) when faced with what appears to be a choice between incommensurable values opt for value pluralism over monism so as to encourage diversity and a broad frontier for freedom in the institution and society; (5) avoid administrative *group think* (Janis, 1995), that is the belief that there is one best way to address the situation at hand; and (6) consider that the policy to be written or the action to be taken is institutional in nature and requires an institutional, and hence societal, not a personal perspective.

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

Plato observed, that it is not the good that we value, but rather, it is what we value that we consider the good. Our views today may be that one right is more important than the other. Tomorrow, our opinion may change. The *golden mean* or balance is what educational policy makers must seek. When faced with the incommensurability of values educational policy and decision makers sit atop the narrow ridge seeking that balance lest they fall into monism with its incumbent ideology and the hardships such bring to many.

The above points speak to the acceptance of the idea by policy makers, decision makers, and therefore the institution of education, that Canada is not just a cultural but also a value mosaic. Value pluralism and its protection in society is the reality of social life. Today it may sound reasonable to some members of a community and be politically correct to restrict the rights of the Christian, Sikh, or gay minority but tomorrow it might be politically correct in restricting the freedom of Serbian or Albanian Canadians or, as in the past, Japanese Canadians. Value monism is simply not acceptable in a pluralistic society nor is it consonant with the reality of societal life. This is no small point, as Canada, a cultural mosaic, has judicially accepted a values dimension to that metaphor.

In practical terms, when educational policy makers or decision makers are faced with a choice between apparently incommensurate values, the key is to first determine those core values underlying their institution, freedom and pluralism, and then to opt in favour of value pluralism without preferring any one of them over the others. This seems at odds with the postmodern view that there are no fundamental values except as seen from the eye of the community espousing them. Yet, education takes place within communities espousing a variety of values. Those communities are part and parcel of a wider community where to foster the democratic ideal, each community and those within it must be free to hold and espouse their values, notwithstanding the political or social Zeitgeist of the times. This is, of course, Etzioni's point of unity within plurality nurtured through value pluralism and negative freedom within the communitarian society that is the lesson of the Supreme Court in both Trinity and Surrey.

CLOSING

This paper outlined the facts and the salient issues surrounding the British Columbia's College of Teachers refusal to certify Trinity Western University's teacher education program and the Surrey School District case. The decisions of both the majority and the dissent at the Supreme Court of Canada were examined focusing upon the incommensurable value positions taken by the parties and the narrow ridge conundrum faced by the Supreme Court in both cases. The argument was made that value pluralism combined with the Berlinian concept of negative freedom provided the means by which the cases' holdings have socio-political and legal warrant. Lastly, it was suggested that educational policy makers and decision makers might well consider utilizing the approach taken by the majority in the Supreme Court of Canada when creating policies and when resolving matters involving ostensible incommensurable values.

NOTES

1. A fuller explanation of the facts of the Trinity Western Case and other argumentation surrounding it may be found at: (a) Donlevy, J. K. (2003). Canadian education: Who's values? Who's rights (The Trinity Western University Case.) (2003) *International Electronic Journal for Leadership in Learning*, 7/20; (b) Donlevy, J. K. (2003). Response to van Blumellam. *The Journal of Educational Thought* (2004) (In Press: Vol.39/2).
2. The Bob Jones case concerned the granting of tax exempt status for a private university which prohibited interracial dating on its campus. Indeed, single Afro-Americans were generally not admitted. The university argued that its regulation was based upon sincerely held religious beliefs whereas the Internal Revenue Service argued that it was contrary to public policy to provide what amounted to federal government endorsement for racially discriminatory policies.

3. The School Board did not argue this point, but it was taken up by the dissent in *Surrey* as being a major point in the Board's favour to allow its members to express their personal religious views as members of the Board.
4. See Dworkin and in retort see Plaw (2004).
5. See Prime Minister Pierre Elliott Trudeau's Televised Statement on the War Measures Act at <http://www2.marianopolis.edu/quebechistory/docs/october/trudeau.htm>

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