THE INTERSECTION OF PUBLIC AND PRIVATE UNDER THE *CHARTER*

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Introduction

The sometimes hidden ramifications of jurisprudence under the *Canadian Charter of Rights and Freedoms*[1] over the past two decades can be better appreciated by considering this jurisprudence against the private/public paradigm, that is a framework exploring how the private and public intersect.

As feminist analysis has taught us, understanding how the public and private spheres do interrelate and how they should interrelate is crucial to advancing the project of equality.[2] The recognition by our legal system that activity which occurs in private may deserve the same sanction as similar activity occurring in public, as in the case of assault, or that certain activities should not be labelled as "private" to remove them from public sanction, as in the case of workplace harassment, has been highly significant in breaking down the barriers between private and public which helped to maintain the subordination of women.

Among feminists, this analysis has become perhaps too limiting to address the more nuanced inequalities that still exist and the intersectionalities of women's identities. The paradigm is still useful, however. For example, the abuse in residential schools, then in private, now exposed to public view, has taught us more recently that the failure to explore the way in which public and private intersect may

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[1] Part I of Schedule B to the *Constitution Act, 1982*.

[2] Discussion of the public/private paradigm and a very few examples of its application can be found in the following: Jane Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992); Daphne Spain, *Gendered Spaces* (Chapel Hill: The University of North Carolina Press, 1992); Janet Guildford & Suzanne Morton, eds., *Separate Spheres: Women's Worlds in the 19th-Century Maritimes* (Fredericton, N.B.: Acadiensis Press, 1994); Catharine A. MacKinnon, "Abortion: On Public and Private," in Alison M. Jaggar, ed., *Living with Contradictions: Controversies in Feminist Social Ethics* (Boulder, Co: Westview Press, 1994); Patricia Hughes, "The Evolving Conceptual Framework of Sexual Harassment," (1994) 3 C.L.E.L.J. 1.

perpetuate oppression. At the same time, there are areas of our lives where we should be free to make our own decisions, unencumbered by public sanction, as in at least some aspects of our reproductive and sexual lives. The idea of privacy may seem out-moded in these days of internet and television self-exposure when some people are eager to reveal the most intimate – or mundane – aspects of their lives and others revel in learning about them. Yet those who reveal are choosing to make the private public for the edification of others. The concern of the legal system needs to be for those whose ostensible "choices" are more determined by societal norms, values and strictures, than by their own free will, as well as for those situations where allowing choice ignores the public ramifications of those choices. Where the boundaries between public and private are properly drawn is assuredly a contentious and evolving issue, but that there are boundaries and that they are permeable must be accepted. Traversing this complex terrain of the public/private requires an appreciation both of how private decisions and actions have public consequences and how public policies can affect private behaviour.

With respect to the *Charter*, the public/ private paradigm underlies both the application of the *Charter* (to whom and in what context) and the ways in which findings about "choice" have infused decision-making under the Charter. Since the Supreme Court of Canada's first decision addressing the issue of the *Charter*'s application, *R. W.D.S.U. v. Dolphin Delivery Ltd.*,[3] the Court has gradually expanded the scope of its application. I suggest that in doing so, it has not adequately addressed either the significance of the public/private boundaries it has drawn, implicitly or otherwise, or the public/private ramifications of defining certain activities as "choices."

The public/private paradigm is at the heart of the *Charter*'s application. On its face, the *Charter* applies only to the legislatures and government. Yet the question of its application has proved to be far from simple, for underlying its application have been a number of often unarticulated questions: What are the consequences of insulating entities from *Charter* scrutiny on the basis that they are "private?" What are the implications of imposing constitutional obligations on non-governmental entities? When do public authorities have the right to limit private choices? How does law prohibit and promote choice? When is choice a public rather than a private affair? When do public authorities have an obligation to enhance opportunities? Are public decisions ever "neutral?" How are choices that restrict the lives of others addressed through rights discourse? And, how does the *Charter* help us address

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[3] [1986] 2 S.C.R. 573 [*Dolphin Delivery*].

these questions?

While all these and, no doubt, other questions pose exciting and challenging issues about the application of the *Charter*, and thus are worth raising in the context of applying the public/private paradigm, I cannot hope to answer them all here. My purpose, then, is to offer some general observations about the implications of several decisions for the development of *Charter* (and *Charter*-related) jurisprudence over the past twenty years using the public/private paradigm as my framework.

Private Litigation and the Common Law

Subsection 32(1) of the *Charter* determines to whom and in what contexts the *Charter* applies:

> 32.(1) This *Charter* applies
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> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
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> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.[4]

The meaning and objective of subsection 32(1) appear straightforward enough: the *Charter* is intended to apply only to public bodies or, put another way, private actors owe no constitutional duty to other private actors. This is exactly how the Supreme Court of Canada interpreted subsection 32(1) in *Dolphin Delivery*. But, of course, private actors may employ the *Charter* to change the nature of their private relationship and to require other private actors to act in a manner consistent with constitutionally mandated legislation, since all legislation is subject to the *Charter* (unless the legislature invokes section 33 of the *Charter* to exempt legislation from the impact of certain *Charter* - provisions).[5] This is, then, the first and most obvious way in which private relationships can be affected by the *Charter*. It is an extremely

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[4] *Supra* note 1.

[5] An obvious example is found in a challenge to family law legislation governing support on separation which resulted in the application of the relevant provision to same-sex relationships: *M. v. H.*, [1999] 2 S.C.R. 3.

significant way in which private individuals may be subject to constitutionally mandated obligations even though they are not imposed upon the individuals directly.

In these instances, the question of choice raises issues not easily resolved. In *M. v. H.*, two women had entered into an intimate relationship at a time when same-sex relationships did not have legal recognition. Upon the dissolution of their relationship, one of the couple challenged the exclusion of same-sex couples from the support provisions of Ontario's family law legislation, provisions which applied to both common law and married different-sex couples. The success of the challenge constituted recognition, in this limited way, at least that same-sex relationships were worthy of public recognition. Marriage is not yet a legal option for same-sex couples; thus it is not possible to conclude, as is the case with different-sex common law couples, that same-sex couples have rejected marriage as the way to structure their relationship.

Recently, the majority of the Supreme Court of Canada held that the exclusion of co-habiting (different-sex) common-law couples from the presumption under Nova Scotia's matrimonial property regime of an equal division of property on separation did not contravene the *Charter*'s equality guarantee under subsection 15(1).[6] At first blush, this seems a surprising result, since the Court had previously held that exclusion of common law spouses from insurance policies did contravene the *Charter*[7] and, it must be said, against the historical background of a particularly dramatic family law case in which a common-law wife's property rights were protected through the mechanism of a constructive trust.[8] Seen another way, however, this case involves the impact of the diminishing differences between legal marriages and common-law relationships, on the one hand, and the increasing

[6] *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 [*Walsh*]. By the time the case had reached the Supreme Court, Nova Scotia had enacted legislation permitting both same and different-sex partners to register as "partners" and thus bring themselves within the matrimonial property regime. Under this new system, all couples must take a positive step, either by marrying or by registering their partnership. It is not unreasonable to infer that this change made it "easier" to conclude that there was not an infringement of section 15. It must also be recognized that it would have been difficult to exclude same-sex couples from the presumption had only common-law different-sex couples been added to the legislation.

[7] *Miron v. Trudel*, [1995] 2 S.C.R. 418. In this case, of course, a third party had determined that common-law couples would not benefit from provisions which benefited legally married couples.

[8] *Pettkus v. Becker*, [1980] 2 S.C.R. 834. At least Rosa Becker's share was *legally* protected on the basis that her common law spouse had been unjustly enriched by her contribution to their relationship, although she never actually received her share and eventually committed suicide.

freedom to choose to marry or to live common-law, on the other. Many couples have chosen not to marry at least in part to avoid the obligations the law imposes on married persons; and today it is less likely that couples are "forced" to have a common-law relationship because they are unable to marry.

In *Walsh*, the majority of the Court emphasised the significance of personal choice in determining the structure of personal relationships and suggested that those who are not in a common law relationship out of choice may take steps to bring themselves within the matrimonial property regime. Not only does different treatment not indicate lack of respect for the merit or dignity of persons in common law relationships, the majority concluded it positively "respects the fundamental personal autonomy and dignity of the individual."[9] L'Heureux-Dubé J., in dissent, emphasized that the nature of the relationship is functionally similar, since individuals in both married and common law relationships have need for a redistribution of economic resources when the relationship breaks down and that partners should be presumed to make the same contribution to both kinds of relationships.

Walsh is a case of its time: within its parameters we find the focus of a liberal emphasis on individual private choice confronted by a desire to establish systemic public policy methods of protecting individuals during a period of significant societal change. Is this a case where recognizing difference reduces or enhances inequality? Or is the desired result more complicated: designing a way for public regimes to promote ways in which individuals are able to implement their own choices in the most effective way?

In contrast, in *Symes v. Canada* the majority's conception of choice failed to take into account the impact of societal or public expectations and assumptions on private arrangements.[10] Symes, a female lawyer, unsuccessfully challenged the limited deduction of childcare expenses under the *Income Tax Act*, comparing it to the scope permitted business expenses. *Symes* is a "difficult" case in a number of

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[9] *Walsh, supra* note 6 at para. 62 (per Bastarache J. for the majority).

[10] *Symes v. Canada*, [1993] 4 S.C.R. 695 [*Symes*]. *Symes* is not an example of private litigation to which the *Charter* applies through a challenge under the *Charter* by one of the parties to legislation, as in *M. v. H.* and *Walsh*, but an example of how "public" litigation (here tax litigation) involves conceptions of the structure of private relationships. For an examination of the concept of "choice" in this case, see Rebecca Johnson, "If Choice is the Answer, What is the Question? Spelunking in *Symes v. Canada*," in Dorothy E. Chunn and Dany Lacombe, eds., *Law as a Gendering Practice* (Don Mills, Ont: Oxford University Press, 2000).

respects and a different appreciation of "choice" might not have led to a different result. Yet there is no doubt that Symes was not considered an appropriate claimant under the *Charter* because she was insufficiently disadvantaged for the majority (a view scathingly rebutted by L'Heureux-Dubé and McLachlin JJ. in dissent) and because she had made a "personal" decision to have children. The majority neatly separated this private personal choice from Symes' experience in the public sphere, not unlike failing to appreciate how public decisions to deny contraception and abortion confine women's private lives and choices and consequently are detrimental to women's capacity to participate fully in the public sphere.

Dolphin Delivery also established a distinction between the impact of positive law or legislation and the common law on private litigation. Dolphin Delivery, a courier company in Vancouver, did deliveries in the area for Purolator, which was based in Ontario. Purolator locked out its employees and after the lockout, Dolphin Delivery carried out deliveries for Supercourier, a company associated with Purolator. Dolphin Delivery obtained an injunction against threatened secondary picketing against it by members of the RWDSU. The union argued that the injunction contravened its freedom of expression under the *Charter*. Although finding that secondary picketing is a form of protected expression, but that enjoining it was justified under section 1 of the *Charter*, McIntyre J., for the majority, actually decided the case on the basis that the *Charter* did not apply. Since the *Canada Labour Code*[11] (which applied to the federally regulated employer) did not contain relevant picketing provisions, the common law regulated the secondary picketing. McIntyre J. held that while the *Charter* applied to the common law, it did not apply to litigation between private parties when the common law was at issue. The common law, he maintained, is subject to the *Charter* only in the context of government action and in *Dolphin Delivery*, there was no government action and thus the *Charter* did not apply. McIntyre J. distinguished the court's obligation to "apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution" from the view that one private party owed another private party a constitutional duty.[12]

Dolphin Delivery meant that significant interests may receive constitutional protection in some jurisdictions and not in others because they are raised in the context of private litigation. This somewhat unsatisfactory result was subsequently partially addressed by the Court's breathing life into McIntyre J.'s comment in

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[11] R.S.C. 1970, c. L-1.

[12] *Dolphin Delivery, supra* note 3 at 603.

Dolphin Delivery that the judiciary should develop the common law in a manner consistent with constitutional values. In *Hill v. The Church of Scientology*, the Court carried out a *Charter*-like analysis in order to determine whether the common law tort of defamation conformed to *Charter* values (it did).[13] In its *Pepsi-Cola* decision, the Court revisited the common law prohibition on secondary picketing, and this time was not only willing to assess it in light of *Charter* values, but to modify it to permit secondary picketing of work sites, exactly the issue in *Dolphin Delivery*.[14]

The Meaning of "Government"

The cases I have considered thus far illustrate both that how the *Charter* is applied breaks down the barriers between private and public, through the *Charter* values doctrine, and the importance of understanding the particular relationship between the public and private spheres in any given case. The most significant expansion of the application of the *Charter*, however, has arisen in the context of interpreting subsection 32(1)'s reference to "all matters within the authority of Parliament" and "all matters within the authority of the legislature of each province," or, to put it more concisely, in the context of determining the meaning of "government."

The major cases dealing with the scope of "government" involved challenges to mandatory retirement in five universities, a community college and a research hospital.[15] In the case of the community college, the college was managed by a

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[13] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. The analysis includes a justification process that resembles but is not the same as the section 1 analysis. Significantly, the individual challenging the common law has the onus to show that the common law conflicts with *Charter* values and when the values are balanced, to show that the common law should be modified. The burden does not shift to the party relying on the common law rule. The Court has shown its willingness to modify common law rules, given that they are made judicially: see *e.g. R. v. Daviault*, [1994] 3 S.C.R. 63 and *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 [*Pepsi-Cola*]. Daviault successfully brought a challenge under section 7 of the *Charter* to a common law rule that an extreme state of drunkenness amounting to automatism could not constitute a defence to a general intent offence. *Pepsi-Cola*, between two private parties, was a "*Charter* values" case.

[14] *Pepsi-Cola, ibid.*

[15] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [*McKinney*] addressed mandatory retirement in four Ontario Universities: Guelph, Laurentian, York and Toronto. Another case decided at the same time dealt with mandatory retirement at the University of British Columbia: *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 450. *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570 involved the community college and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 concerned the research hospital.

board appointed by the provincial government and vulnerable to direction by the government.[16] The Court held that the college was part of the "apparatus of government both in form and in fact" and thus was "performing acts of government."[17] It was therefore subject to the *Charter*, even with respect to its employment practices, including mandatory retirement, provided for by the collective agreement negotiated between the board and the faculty association.[18]

The University cases provide the more interesting consideration of the relationship between private and public with the members of the Supreme Court divided on their conceptions of the role of public education. Writing the majority judgment La Forest J. rejected as criteria for determining whether an entity is "government" for the purposes of the *Charter* that the entity is a statutory body ("a creature of statute"), that it may perform an important public purpose, or that it receives public funding. Thus the universities' reliance on government does not mean that they are "organs of government." Government does not control universities, which are legally autonomous and which make important decisions, such as those regarding promotion and tenure, without government interference.[19] Wilson J. (with whom Cory J. concurred) proposed criteria addressing the extent of government control over the entity, whether the entity performs a function recognized as a government responsibility and whether the entity acts according to statutory authority in the broader public interest. Finding that an entity met one or more of these criteria would be a strong indicator, although not determinative, that the entity constituted government. Wilson J. found that universities satisfied these criteria.

[16] *Douglas/Kwantlen Faculty Association, ibid.*

[17] *Ibid.* at 584.

[18] In *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 [*Lavigne*], a teaching master who objected to the way the union spent compulsory union dues could not challenge the union's activities directly, since the union was not subject to the *Charter*, but he could challenge the collective agreement which had been negotiated by the Ontario Council of Regents for Colleges of Applied Arts and Technology which was subject to control by government. The Council's agreement to the compulsory dues provision constituted government action. In *Lavigne*, La Forest J. specifically rejected the argument that, because with respect to its contractual and commercial activities the government was acting as a private entity in contrast to its regulatory functions, these contractual and commercial activities should not be subject to the *Charter*.

[19] The University of Guelph was subject to the *Ontario Human Rights Code* which was subject to the *Charter*: at that time *Human Rights Code, 1981*, S.O. 1981, c. 53. The Court held that the limitation in section 9(a) of the *Code* which defined age in the employment context to mean "an age that is eighteen years or more and less than sixty-five years," thus permitting mandatory retirement, violated section 15's equality guarantee, but was justified under section 1.

The Court applied a similar analysis to whether a hospital was subject to the *Charter* in *Stoffman*. The majority held that, although the mandatory retirement policy imposed by a hospital board regulation had to be approved by the Minister of Health Services and Hospital Insurance, the day to day activities of the hospital were not subject to government control. Furthermore, even though the hospital provided an important public service, this was not sufficient to bring it within subsection 32(1) of the *Charter*.

Generally speaking, the university cases established a "government control" test for an entity to be subject to the *Charter*. Yet the statutory authority test has also served to bring entities within the purview of the *Charter* which might be thought of as private entities. Thus the rules governing self-governing professions are subject to the *Charter*, even though these professions establish these rules partly in order to avoid government control which might occur if the professions did not do this themselves.[20]

The Court's decisions with respect to which entities or conduct falls within subsection 32(1) do not make it easy to determine which entities are "government" and which are not. On the one hand, it seems clear that with respect to government entities, they will be subject to the *Charter* for all purposes. On the other hand, a determination that an entity is not government does not mean that it will not be subject to the *Charter* for some purposes. In *McKinney*, La Forest J. had commented that "where a statute authorizes a person to exercise a discretion in the course of performing a governmental objective," the *Charter* would apply. "But," he continued, "the *Charter* was not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing without engaging governmental responsibility."[21] Thus where an entity is not in itself government, some of its activities might be subject to the *Charter* if they engage governmental responsibility. This was the case in *Eldridge v. British Columbia (Attorney General),* where the Court held that the *Charter* applied to hospitals when they were carrying out a specific government mandate,

[20] *Black and Co. v. Law Society of Alberta*, [1989] 1 S.C.R. 591, involving a rule established by the Law Society prohibiting partnerships with non-resident lawyers. The Court did not explicitly address the applicability issue, but simply applied the *Charter* to the Law Society's rules.

[21] *McKinney, supra* note 15 at 266. Corporations are the clearest example of private entities which are required to comply with certain legislative standards, but are not controlled by government. Self-governing professions, however, are viewed as exercising a control delegated by government.

specifically the provision of health services.[22]

The inquiry in the "specific government function" cases is not into the nature of the entity, but into the nature of the activity. The question is not, "is this a branch of government?" but rather, "is this otherwise private entity entrusted with carrying out a specific governmental function?" Government cannot be allowed to evade constitutional responsibilities by delegating their programs to private entities; form will not supercede substance in these cases. Of course, what is considered "governmental" depends on political culture and history. Thus provincial governments are now considering privately-run prisons subject to government guidelines. In contracting out responsibility for running prisons, has government also delegated its constitutional obligation to deal with prisoners in compliance with the *Charter*? On the case law, it would seem not. But when does government by proxy shift to private activity that is not subject to the *Charter*?

Blurring of the Boundaries: Implications for the Public-Private Divide

The cases addressing the application of the *Charter* have gradually pushed back the boundaries of contexts or disputes which are subject to the *Charter*. The way they have done so, however, fails to take into account the implications for the relationship between private activity and its public ramifications. This does not mean that the *Charter* should apply directly to private relationships. This would run counter to the plain words of subsection 32(1), as well as have practical consequences: in *McKinney*, La Forest J. had commented that if the *Charter* applied to private activities, it "could strangle the operation of society" and "impose an impossible burden on the courts."[23]

What underlies the expansion of subsection 32(1)? When do we care that constitutional principles or values apply? When does it matter? At a minimum we would expect the law itself to accord to constitutional expectations and in our system of law, that should include the common law, as well as statutory law. The decision in *Dolphin Delivery* was disturbing because it did not seriously view the law itself as a separate repository of *Charter* values, a situation partially remedied by *Hill v.*

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[22] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. The hospital did not provide translation services for the deaf; subsection 15(1) requires that health services be provided equally and therefore translation must be provided since this is an integral part of the provision of health services.

[23] *Supra* note 15 at 262.

Church of Scientology and *Pepsi-Cola*. If a party wishes to rely on a law to protect its behaviour or to challenge the behaviour of another party, then it should expect that the law is vulnerable to constitutional challenge, whether common law or statutory law. Furthermore, criminal accused can challenge common law rules as constitutionally invalid,[24] while private parties cannot, even though the interests concerned may be equally significant.

Another way we might consider this question is to ask what interests should attract constitutional protection or supervision? The Supreme Court's apparent greater willingness to impose positive obligations on government coupled with a better understanding of the public ramifications of private decision-making and action may contribute to ensuring that certain groups are not denied the benefit of the *Charter* because of boundaries which are permeable in some instances and not in others. While it is not possible to explore this area further in this commentary, section 7 of the *Charter* provides fertile ground for recognizing the significance of private interests which are equal in worth to those found in contexts in which the Crown is directly involved.[25]

The fact that private activity can have detrimental implications for the ability of a group to engage in the public sphere was recognized in *Dunmore v. Ontario (Attorney General)* which concerned the exclusion of agricultural workers from the protection of Ontario labour relations legislation.[26] At trial, Sharpe J. had held that the *Charter* did not apply because the problems facing agricultural workers in organizing stemmed from the conduct of employers, not the government, and there was not a positive obligation on government to remedy this situation.[27] The majority of the Supreme Court not only redefined the parameters of the guarantee of freedom of association under section 2(d) of the *Charter*, but more significantly for the analysis held that the government had an obligation to protect the workers from the

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[24] There is no issue because the prosecution is government action. See *e.g. Daviault, supra* note 13.

[25] See *e.g.* Patricia Hughes, "*New Brunswick (Minister of Health and Community Services) v. G.(J.)*: En Route to More Equitable Access to the Legal System" (2000) 15 *J.L. & Soc. Pol'y* 93. The possibility of a broader interpretation of section 7 is found in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84.

[26] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016.

[27] *Ibid.* The case was complicated by the fact that one government had enacted legislation to govern the labour relations of agricultural workers and this legislation had been subsequently repealed by its successor. Thus Sharpe J. was concerned about "constitutionalizing" the legislation granting the workers protection. Seen more simply, however, the case was really about the exclusion of the workers from the current legislation.

action of private employers. The decision reflected an understanding of the public ramifications of private activity. The reason that employers could be successful in preventing agricultural workers from organizing is that these workers, particularly in need of protection, had no protection in the way many — indeed, most — other workers did.

The same understanding was not present in *Trinity Western University v. British Columbia College of Teachers*.[28] Trinity Western University ("TWU"), a private institution, had offered a teachers' training program of which one year was implemented under the aegis of Simon Fraser University. TWU wanted total control over the program and applied to the British Columbia College of Teachers for approval of the program. The BCCT refused approval because TWU expected students and teachers to sign a Declaration of Community Standards which required them to refrain from a list of "practices that are biblically condemned," including "homosexual behaviour." As an administrative law matter, the issue to be decided was whether the BCCT had acted appropriately in taking into account what it perceived to be discriminatory provisions in the Declaration in deciding whether to approve the program. The BCCT had concluded that it was against the public interest to approve the program when its graduates would be teaching in the public school system. Writing for themselves and six other judges, Iacobucci and Bastarache JJ. held that the BCCT had jurisdiction to consider whether a program involved discrimination, but that its decision not to approve the program was unfair.

The mandate of the BCCT under the *Teaching Profession Act* was to establish "standards for the education, professional responsibility and competence of its members, . . .," taking into account "the public interest."[29] The majority recognized the importance of teachers in transmitting values, saying at para. 13, "[i]t is obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights." Since "[s]chools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance," then the factors that the BCCT should take into account cannot be limited to skills and knowledge and can include discriminatory practices.[30]

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[28] [2001] 1 S.C.R. 772 [*Trinity Western University*]. This is not a *Charter* case, but raises *Charter* values which in part motivated the decision of the British Columbia College of Teachers ("BCCT").

[29] *Teaching Profession Act*, R.S.B.C. 1996, c. 449, s. 4.

[30] *Trinity Western University, supra* note 28 at paras. 13-14.

The BCCT erred, however, in not taking into account TWU's freedom of religion and reconciling it with the equality rights of gays and lesbians (and the need for an atmosphere of tolerance in the school system).[31]

Most significantly, in the context of the impact of the private on the public, the majority stated that "[i]t is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the *Charter* does not apply."[32] At para. 34, the majority explained that consideration of human rights values in the case requires "consideration of the place of private institutions in our society and the reconciling of competing rights and values." While critical of the BCCT for "privileging" equality rights over freedom of religion, the majority is prepared to privilege the private nature of the institution over the fact that it wants approval to participate in the public sphere. Because it is a private institution, it is not subject to the *Charter* and because it is a private religious institution, it is exempted from human rights legislation. TWU is not content to remain a private institution, however, but wishes to play a public role. As L'Heureux-Dubé J., dissenting, pointed out at para. 62, "[a]ctions in the private sphere can have effects in the public realm." This was a case in which the majority of the Court failed to recognize that the boundary between the private preferences of TWU and the impact of TWU's graduates in a public school system is a highly porous one. If it were not, TWU would not be interested in training teachers in a particular way.[33]

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[31] The majority concluded that the standard of review was the correctness standard, in part because the discriminatory practices issue transformed an inquiry about educational practices into one about human rights.

[32] *Ibid.* at para. 25.

[33] *Trinity Western University* should be read in conjunction with *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 [*Chamberlain*], in which the Court considers the importance of teaching about equality in the public school system and the place of private parental preferences in determining how that teaching can occur. *Chamberlain* is also an administrative law rather than *Charter* case, and both *Trinity Western University* and *Chamberlain* are determined on the basis of the standard of review the majority and dissenting judges consider appropriate. Yet both cases discuss the impact of *Charter* principles. Furthermore, *Trinity Western University* involves a requirement that future teachers refrain from "homosexual behaviour" and *Chamberlain* involves an attempt by some parents through the School Board to deny discussion of same-sex families in grades K-1. The materials at issue in *Chamberlain* were supplementary and would be used at the option of teachers, including those who graduated from the TWU program.

Conclusion

Taken at face value, the decisions of the Supreme Court of Canada which expand the application of the *Charter* seem to blur the boundaries between government or public obligations and obligations of entities otherwise recognized as private, both through the implementation of the "*Charter* values" approach and the "specific government function" analysis. Yet the Court's understanding of "choice" and other cases involving the difficult reconciling of apparently dichotomous rights suggest that it has not yet fully learned the lesson inherent in the public/private paradigm: while we may wish to retain an area of privacy, we cannot be complacent about the extent to which private decisions and actions have public consequences and therefore must be subject to public control or protection. Over the next decade of its jurisprudence, the Court will have to consider situations which come before it as a result of the expansion of the application of the *Charter* and increasingly reconcile the demands of individual choice and public regulation, as well as the dichotomous nature of certain rights and freedoms. As it does so, it might find the public/private paradigm a helpful framework.