

IAIN BENSON OPENING REMARKS

I'd like to extend my thanks to the organizers of this event for bringing together different people from different areas of British Columbia society. It's my experience that too little of this kind of discussion occurs, and I'd like to see this become a much more frequent part of our discussion, particularly in the education area. I'm very pleased to see Craig Jones here and Ms. Sims from the BCTF.

When I was at the Labour Relations Board, I was struck with how infrequently some of the political philosophical issues actually got any kind of broad public discussion, and it seemed to be that in many cases basically different councils would take potshots at each other across the trenches, and I didn't think that did a lot of good for the analysis and it certainly didn't do any good for the citizens of British Columbia.

This issue that we have been asked to address today, conscience protection in public education, is extremely important. It's always been important. Writing in 1775, Thomas Paine, who was one of the great Enlightenment thinkers that was influential in the United States particularly but elsewhere as well, said that spiritual freedom is the root of political liberty.

And it seems to be that when you look at the rise and fall of different countries, often how they deal with the views of what we could broadly describe as spiritual views of the populous is, in some respect, a litmus test of how free they are.

And we talk a lot about freedom in Canada, and we talk a lot about diversity and pluralism, but it's my view that in some respects Canada is developing its own unique form of oppression in a velvet glove, particularly with respect to genuine diversity, practical diversity in such large public areas as education.

It's a temptation in any area. Healthcare also at the moment is struggling with how to accommodate diversity views, and Mr. Jones in his opening excellent quick overview touched on that as well. I just spoke at a medical conference in Alberta last weekend and had some very interesting discussions with two people in particular, one a recent ob/gyn graduate and another a pharmacist, both of whom had experienced this velvet glove oppression in different ways. And, indeed, right now the whole question of how medicine is going to accommodate those who oppose particular practices remains to be seen.

Craig mentioned the dilemma of people in the small town and whether there's the desire of citizens to have access to certain medical services, whether it's the abortion procedure or a pharmacist issuing emergency contraceptives. How we're going to deal with that is extremely important because in some respects there's an element of -- in a sense it's not civil disobedience, per se, but it's a situation in which the freedom of conscience of professionals can lead to a situation of which people simply can't get what they want unless people are forced to do things that are fundamentally opposed to their deepest beliefs. And it's the "unless" there that concerns me because, in some respect, if you want to talk about conscience and you look at the nature of some of the regimes that have

developed over the past couple of hundred years, ask yourself where would you have been in a society that started to, in your view, go wrong.

What would have happened if people at different points within the Weimer regime stopped to play along with what they saw as the rise of unjust actions against various groups within society? How did that society tolerate or not tolerate people saying they weren't going to go along with things they thought were objectionable? Well, no society can put itself above rejection, above the views of citizens, who say, "I don't want to do this. I'm fundamentally opposed to this."

And the question of how we're going to deal with that kind of a view in public education or in medical care is one that we've got to pay some attention to. Why? Because I think we're getting to the point now where our rhetoric of diversity is starting to be tested because we no longer have the homogeneous population that we once may have had.

I'm not sure that immigration is the reason for this. I think that there are core moral principles within all the world traditions. But it's really that there's been within all moral traditions a kind of a break of confidence with respect to there being objective moral goods at all so that whether one is from a Hindu tradition or Islamic tradition or from countries of all manner of ethnic background there are those within each tradition who would line up with the idea of objective moral goods and those who would line up with the idea of individual moral views, kind of individualism or there being truths that are only created by the individuals.

If you like values which are "you have your values, I have mine" versus the more objective notion of virtues, all the world traditions have some notion of virtue. It's the modern and post-modern period that has developed to a fine point this language of values in which "you have yours, I have mine". George Grant the Canadian philosopher once said that "values language is an obscuring language for morality used when the idea of purpose has been destroyed - - and that is why it is so wide-spread in North America." I think we need to reevaluate completely this "values" language approach in all aspects of society including public education. It is simply insufficient for serious approaches to personal relationships, community or citizenship itself. To learn the contents of what "virtues" and objective principles are is far superior to being told to work out what your own "values" are. Values are not simply "second rate virtues" they are not necessarily even "virtues" at all. That is why the current public education Career and Personal Planning (CAPP) programme in BC is so deficient. It is not adequate for the "community building" and "character formation" that so many realize we need as a society. Virtue and principle are superior to the ambiguity of "values."

What does this all mean for public education? Well, I think it raises some very difficult questions, particularly with respect to the controversial issues. Most particularly we're seeing in the cases of the obvious ones to what extent homosexuals will have their particular views incorporated in public classrooms or not.

Both the Surrey School Board decision, of the BC Court of Appeal which came down on September 20th, 2000 and which I don't need to tell people in this auditorium about, and the Trinity Western University case, which was argued on November 9th in Ottawa, raised generally important questions about accommodation and diversity of views. They also raised some extremely important categorical definitions such as the meaning of "secular". In a nutshell, the Surrey decision has killed any notion that the "secular" means "free from religion" in BC. It overturned such an interpretation by the trial judge three judges to zero. It is now the law in BC. And that law says that the "secular" does not "privilege" an atheist or agnostic view of morals in schools. So we are going to have to learn the proper place for moral disputes - - and how to accommodate religion and conscience beliefs of all sorts whether they are religious or not. Religion is not going to be driven out by an atheistic definition of the "secular."

I was educated in a high school in Victoria on Vancouver Island, and I was taught, as many in this room were, that the secular is a non-religious realm, that that's a realm where religion is out and somehow it's related to the separation of church and state.

I have come in recent years to realize that that's entirely wrong. I wrote an article about it in the recent issue of the UBC Law Review ["Notes Towards a (Re)Definition of the "Secular"" in *University of British Columbia Law Review*, Special Issue "Religion, Morality and Law", No. 33, 2000 pp. 519 – 549]. And, in fact, I was very pleased to see that the three judges of the Court of Appeal in Surrey School Board agreed with what I could describe as my new view of the secular.

What is the new view? Just that the secular must necessarily be understood as a realm of competing belief or faith claims. Everybody believes. Everybody's a believer. The question is what do they believe? Religious believers believe a whole series of things that emerge from their religious assumptions or commitments. Atheists and agnostics are also believers. Their beliefs, however, don't emerge from a particularly religious set of assumptions. But in terms of fairness and distribution within society, why should the only beliefs that dominate culture be those that are from atheistic or agnostic presuppositions? There's no good reason for that. So the secular cannot be construed fairly as a non-religious realm.

The separation of church and state is a valid distinction, but it's entirely different as a distinction from the separation of religion from culture. Too often the jurisdictional distinction, "church should never run the state" (and vice versa) , is used as an argument against the valid role of religion *within* culture. There's no reason why I as a lawyer or someone else as a politician or someone else as a public school teacher shouldn't have their personal religious convictions animate what they think is most important about their lives, including their work. Only an atheistic interpretation of the "secular" (now rejected by BC's highest court) would support that. In fact, that kind of interpretation, far from being "liberal" and "free" as demanded by the *Charter of Rights*, is the ideology of "secularism."

It makes no sense at all for religious teachers to be told to park their very purpose and meaning and existence at the door of the school. What they're told they must do,

however, is to integrate themselves fully into the classroom, be also fully respectful to those people who don't share those beliefs. So it's a much richer respect for diversity of views than sometimes we speak about when we speak about the secular as being a non-religious realm.

There is, as author Lois Sweet described in a book called *God in the Classroom*, [(Toronto: McClelland and Stewart, 1997) p. 211] the very real risk of a kind of rise of what she called "secular fundamentalism". I'd like to term that secularistic fundamentalism because, as I said, I don't believe that the secular realm is properly understood to be non-religious.

Parents' rights are going to be playing a much more important role, I think, following the *Surrey School Board* decision because in that case the three judges of the BC Court of Appeal affirmed the *International Covenant on Civil and Political Rights* which affirm the parental responsibility to determine the moral and religious education of the young.

So this question of the rights of a child versus the rights of the parents, the rights of the family versus the rights of civil society to guide the education of the young, this raises a very difficult series of interlocking clashes or balances that need to be struck. It's not a simple thing at all.

But we do a tremendous disservice to families if we exclude parents from public education. And it seems to me that all too often our society, the way public education is developed, has paid too little attention to the role of family within society and, in effect, alienated the very people who have delegated their parental responsibility by excluding them from fundamental decisions about education, and not just them but teachers as well.

It seems to me that the principle known in European law as *subsidiarity* needs to be reaffirmed and reunderstood, and basically that means that the larger elements within society exist to further the proper functioning of the smaller elements, not usurp their roles. So the school exists to further the proper role of parents as educators, the school board exists to further the school, and the ministry to further the school board. You see how that works?

What we've had happen is it's almost been flipped upside down so that everything is driven from the top down, and that's a disaster, not only for parents and students but, it seems to me, for teachers as well because they effectively lose their fundamental relationship with the very people they're supposed to be teaching and the result is that all the "smaller" elements are simply alienated.

So I think I may have gone over my time, but those are some of the points I wanted to raise, that really the question today is accommodation of differing beliefs, and remember that the root of the term accommodation is the Latin term *commodus* which means to make comfortable, to be comfortable. Many people at the moment are not comfortable and we have a real, serious problem facing us of how we can get all sorts of people - - religious and non to feel more affirmed within culture, gay people to recognize that there are appropriate ways they have to be affirmed within culture, and so on.

Everybody can't have what he or she wants in the public sphere. There's a lot of people around who would like the public school system to be a kind of separate religious system in which religious doctrines are inculcated in the young, and I don't think that's appropriate now in the public system. But so too other groups have to realize that they can't get everything they want out of the public system. And part of the accommodation of diverse views is to recognize where the line seems to be drawn.

Society, in a sense, exists for the community, and the community exists for the people who live within it. The individual does not exist for the sake of the state, but the state for the individual. It seems to me that that's the right way of ordering the relationship between the person and the state. Everywhere that there's tyranny that's developed it's usually when people are viewed as a means or instruments of the state or of larger groupings.

So to return to Thomas Paine's understanding it's really in religious or spiritual liberty that freedom finds its ground. And if freedom of choice is going to mean anything in our society, it's going to involve a rethinking of how many of our fundamental relationships are structured, not just in public education but in all public areas of culture. Thank you.

IAIN BENSON FOLLOW UP

Just on that last set of comments, I don't know how there can be "a right to information"? It may be a subordinate aspect of some kind of new developing right to do with the rights of children or what have you, but I've never come across as a legal ground the notion of a right to information. Right to access to certain kinds of provision perhaps, but even that sounds nebulous to me. I'm always nervous about rights that are completely open-ended or that sound to me to be lacking in any kind of proper grounding-- in what information do I have a right to? Who decides that? Surely, the family is the proper determinor of that.

The rights that are known to the law are the kind that the BC Court of Appeal just affirmed in *Surrey School Board*, the parental views on moral questions are entitled to be respected. Now, if that's a right (and it certainly *is*, far from being nebulous like some "right to information"), then the parental view on moral questions being respected necessarily entails a limitation of what my children can be given access to, it seems to me; otherwise, if my child can go into a counselor's office or into a classroom and expect to have a right to the information that someone else wants them to have, then what's happened to the parental rights and rights of the family?

It seems to me to be inconsistent to hold at the same time the notion that parental views on moral questions are entitled to respect and that somebody has an unbridled right to information. That cannot work. So what needs to be curtailed at some point then is either the parental view or this notion of a right to information. And in terms of legal authority and in terms of the structure of society and in terms of democratic theory, I would rather have my systems, public education or healthcare, structured in terms of the parental views on moral questions than on some undefined right to information.

Interestingly enough, the same issue came up last weekend at that medical conference I attended with respect to healthcare in the province of Alberta, where, it turns out, there is no age of consent legislation at all, and the discussion there turned on the right to information and medical care. It transpired that really any child can have a medical procedure if in the physician's estimation they understand the consequences of the procedure and there was some discussion about what that might mean. But it struck me as being potentially very much in conflict with this notion of parental views and guidance on moral questions.

And it's interesting, a few years ago I had a case I was involved with in the Supreme Court of Canada. Because all these Charter cases now have to be analyzed through Section 1, which is basically the rights in the *Charter of Rights and Freedoms* can be limited in a reasonable way provided that right or freedom is limited only as can "demonstrably justifiable in a free and democratic society." That raises three categories of analyses: one, reasonability, so reason; second, some notion of freedom; and some notion of democracy.

When you look at the history of cultures, you discover that freedom is historically meaningfully related to the preservation of three categories. There's a whole book on this written by a Russian mathematician by the name of Igor Shafarevich called *The Socialist Phenomenon* [New York: Harper & Row, 1980]. He gives a very rigorous historical analysis and he identifies a particular thread that runs through all sorts of different types of socialism throughout history.

He looks at the Jesuits in Paraguay, and he looks at ancient Babylon, and he looks at all these different cultures that embodied what he calls *chiliastic socialism* – we could call this socialism with a religious fervour. He says that everywhere socialism, as he defines it, attacks three things within culture: first, the ownership of private property; secondly, the institution of the family; and thirdly, the place of religion within a culture.

Now, as we were putting these materials before the Supreme Court of Canada, it struck me how interesting that at this time in our history we are the only constitution in the western world that doesn't protect property rights as a concession to the NDP in Canada, whereas historically fashionable that's what happened. It's intriguing, whatever one thinks of it.

Second, we always have to be cautious; it seems to me, if we want to maintain freedom of democracy. How are we going to treat the other two categories, the family and religion? And it strikes me that in the *Surrey School Board* case, in the *Trinity Western* case, and in various other cases -- *Brockie v. Brillinger*, the printer case in Ontario, I don't know if you're familiar with that (it involved a printer ordered to print materials he found offensive to his religious beliefs, he was fined by the Ontario Human Rights Tribunal and ordered to print the materials, this case has caused a great deal of concern and is one to watch as it moves forwards; it is discussed in detail in a Case Comment by Brad Miller in the Special Issue of the *UBC Law Review* referred to above) -- in all these cases, the question of freedom of religion is now being brought into sharp contrast and sharp disagreement with these other principles.

At the core, again, is this question of how much contemporary groups expect to gain through the public delivery systems including education. It strikes me that public education can deliver basic notions of “respect” and so we can respect all sorts of different ethnic and religious groups without having to endorse their beliefs. It should be the same with respect for gay and lesbian people. It is asking too much, it seems to me, for these groups to insist upon “welcome” for their “lifestyles” or sexual preferences. This is like religious people asking for acceptance or “welcome” of their deepest beliefs. It is going too far. It is here that adjustments of expectations will have to be made in order for the public realm to accommodate differing views.

Freedom of religion and the related concept of, if you like, freedom of the family if these are to be maintained now seem to be facing a challenge from these other rights like the right to information. That makes me very nervous, and I guess I'd like to have a discussion around that. The question would be whether it's sustainable to have at the same time the role of the family respected and some notion of a right to information of the children that is determined without input from families.

Thanks.