



WHOSE DIVERSITY IS IT ANYWAY?

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Overview

How much have we changed since Confederation? Since 1982? What do we mean by diversity? How do we make sense of the various ways in which diversity is discussed?

1. Federalism and diversity
2. Charter and diversity
3. Towards value pluralism?

The views expressed are my own and do not necessarily reflect those of the Attorney General of Canada or the Government of Canada.

Can the Constitution support value-pluralism?

- Canada has been described as a community of communities.
- Our constitution has been successful in promoting regional diversity and legal pluralism (the latter being more difficult) – especially among the provinces and even within Quebec.
- Is this model transposed to support a pluralism of values? Or are federalism and the *Charter* in tension?
- Could the *Charter* recognize a diversity of fundamental rights and values?

Federalism and diversity

- The *Constitution Act, 1867* is hardwired for diversity.
- But a particular species of diversity.
- This architecture has an impact on how we think about diversity and how we think about rights.
- The *Charter* approaches diversity very differently.

Federalism and diversity

[32] [...] In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities.

[38] [...] These included guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and "Property and Civil Rights in the Province" to the provinces). The protection of minorities was thus reaffirmed.

[43] [The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments.

Reference re Secession of Quebec, [1998] 2 SCR 217

Federalism and diversity

Obviously, the federal system of government itself demands that the values underlying s. 15(1) cannot be given unlimited scope. The division of powers not only permits differential treatment based upon province of residence, it mandates and encourages geographical distinction. There can be no question, then, that unequal treatment which stems solely from the exercise, by provincial legislators, of their legitimate jurisdictional powers cannot be the subject of a s. 15(1) challenge on the basis only that it creates distinctions based upon province of residence. As Wilson J. stated in *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1197, "[it] was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution". To find otherwise would be to completely undermine the value of diversity which is at the foundation of the division of powers.

R. v. S. (S.), [1990] 2 SCR 254

Federalism and diversity

Section 93(1) requires the Ontario government to fund Roman Catholic separate schools fully. The claim that the government's choice to fund Roman Catholic separate schools but not other religious schools contravened the equality provisions of s. 15(1) of the *Charter* should be rejected for two reasons. First, the decision falls "fairly and squarely" within s. 29 of the *Charter* which explicitly exempts from *Charter* challenge all rights and privileges "guaranteed" under the Constitution in respect of denominational, separate or dissentient schools. Second, the decision is nonetheless "immune" from *Charter* review because it was made pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise. One part of the Constitution cannot be used to interfere with rights protected by a different part of that same document.

***Adler v. Ontario*, [1996] 3 SCR 609**

Federalism and diversity

Section 93 of the *Constitution Act, 1867* is the product of a historical compromise crucial to Confederation and forms a comprehensive code with respect to denominational school rights which cannot be enlarged through the operation of s. 2(a) of the *Charter*. It does not represent a guarantee of fundamental freedoms. The appellants, given that they cannot bring themselves within the terms of s. 93's guarantees, have no claim to public funding for their schools. To decide otherwise by accepting the appellants' claim that s. 2(a) requires public funding of their dissentient religion-based schools would be to hold one section of the Constitution violative of another.

***Adler v. Ontario*, [1996] 3 SCR 609**

Diversity and the Charter

Fundamental freedoms

Section 2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Diversity and the Charter

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Diversity and the *Charter*

Multicultural heritage

27. This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

27. Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.

Section 27 does not confer substantive rights but assists in interpreting other Charter rights and legislation.

But see: *An Act for the preservation and enhancement of multiculturalism in Canada* RSC 1985, c.24 (4th)

Diversity and the *Charter*

The justiciability of religious claims is limited

“[16] In my view, an agreement between spouses to take the necessary steps to permit each other to remarry in accordance with their own religions, constitutes a valid and binding contractual obligation under Quebec law. As the comments of the former Ministers of Justice reveal, such agreements are consistent with public policy, our approach to marriage and divorce, and our commitment to eradicating gender discrimination.”

“[19] Mediating these highly personal claims to religious rights with the wider public interest is a task that has been assigned to the courts by legislatures across the country. It is a well-accepted function carried out for decades by human rights commissions under federal and provincial statutes and, for 25 years, by judges under the *Canadian Charter of Rights and Freedoms*, to ensure that members of the Canadian public are not arbitrarily disadvantaged by their religion.”

***Bruker v. Marcovitz*, [2007] 3 SCR 607**

Diversity and the *Charter*

The justiciability of religious claims is limited

“[43] [C]laimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make.”

Syndicat Northcrest v Amselem, [2004] 2 S.C.R. 551

Diversity and the *Charter*

Individual vs. collective rights

[94] The individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith.

***Loyola High School v Quebec*, [2015] 1 SCR 613**

Can the *Charter* support value-pluralism?

"There are innumerable differences which obviously add to the interest of life, and without which it would be unendurably dull. Again, there are differences which can neither be left unsettled nor be settled without a struggle, and a real one, but in regard to which the struggle is rather between inconsistent forms of good than between good and evil. [...] There is no surer mark of a poor, contemptible, cowardly character than the inability to conduct disputes of this sort with fairness, temper, humanity, goodwill to antagonists[.]”

Stephen, James Fitzjames (1874). Liberty, Equality, Fraternity

Can the *Charter* support value-pluralism?

The *Charter's* approach is often narrow and blunt despite a purposive and contextual analysis.

- ❖ **It is a rights-based approach**

- Rights are interpreted as restraints on government action, not duties (a shield, not a ladder OR at best, a meal, but not a seat at the table)
- Rights are understood primarily as providing protection of individuals, not communities;

- ❖ **Rights are enforced by courts in an adversarial process**

- Participation is limited to rules of standing and/or intervention.
- Subject matter is confined to respect the role of courts as expressed primarily through the doctrine of justiciability.

Can the *Charter* support value-pluralism?

If a multicultural society entails constitutional recognition of “value-pluralism” to be successful, we don’t have the tools.

Focusing on individual rights and the subjective views of rights holders will necessarily limit the analysis.

Courts may need to articulate community values and protect them at the level of the cultural community, rather than the individual.

Can the *Charter* support value-pluralism?

Freedom of Association – as an example of collective rights

Jurisprudence interpreting section 2(d) of the *Charter* (*BC Health, MPAO, Meredith and Roach*) adopts a novel approach of freedom of association as being a right held by a group, not by a particular individual.

Aboriginal Law – as an example of collective rights and objective assessment

- Aboriginal rights are recognized as *sui generis* which, at a minimum permits (even requires) a distinct analytic framework
- Some are collectively held
- They include fiduciary obligations
- They include procedural guarantees – notably, the duty to consult