

Multiculturalism and the Canadian Constitution

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While Canadian politics has long emphasized the theme of two founding nations, English and French, the country has, in fact, never been so homogeneous ethnically and racially. Even at the time of Confederation, the population was not only English and French: the descendants of the First Nations were members of the new nation, albeit without their participation or consent; black citizens lived in parts of Ontario and Nova Scotia, and individuals of German descent were found in the new nation. That racial and ethnic diversity increased with time, especially as a result of the waves of immigrants to Western Canada at the turn of the century. Since World War Two, immigration policy has led to profound changes in the makeup of Canadian society, as the dominance of those of English and French origin has been eroded by groups from other countries and, more recently, from other racial groups.¹

Not surprisingly, this change in the composition of Canadian society has had an impact on politics, consciousness, and, of course, law. While Canada continues to be a country with two official languages, French and English, and while Quebec, as the home of a French speaking majority largely descended from one of the two founding peoples, is a distinct society, other groups in the last thirty years have also claimed recognition, both politically and constitutionally, for the contributions made to Canada's development, by individuals from many lands and cultures.

"Multiculturalism" won explicit constitutional recognition in the words of section 27 of the *Canadian Charter of Rights and Freedoms*² in 1982:

*This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.*³

This paper explores multiculturalism and the Canadian constitution. While I start with section 27, discussing its history and the way in which it has been interpreted in the few judicial decisions to date, that jurisprudence is far from voluminous. However, this does not adequately convey the importance of multiculturalism in the interpretation of the constitution. Indeed, debates

about the relevance of racial and ethnic diversity to the definition of rights, and the scope of acceptable limitations may arise in a number of ways under the constitution. The frequency of such debates can be expected to increase over time, not only because of the changing composition of the Canadian population, but because of the growing emphasis on group identity, in Canada and elsewhere.⁴

In the future, courts will see a variety of section 15 claims for racial or ethnic equality, legal rights cases that challenge the traditional concepts of a fair trial, and demands that electoral boundaries be drawn in ways that maximize minority groups' demands for better representation - to give but a few examples. These potential challenges, discussed later in this paper, highlight the difficult issues confronting the courts when dealing with multiculturalism in a constitutional context.

At what point must the law recognize ethnic or racial differences and respond to them in the interpretation of rights? Is there a positive government obligation to promote ethnic and cultural difference? Are there limits to claims for recognition of cultural diversity in order to implement a uniform Canadian vision of rights that transcends ethnic and racial differences? These are the questions that multiculturalism poses, both in legal disputes about the meaning of the constitution or other legal instruments such as human rights codes, and in political debates about the shape of public policy in a racially and ethnically diverse country.

The debate is difficult and often emotional, duplicating the tensions that feminists have confronted in assessing whether gender difference should be recognized and accommodated in law.⁵ The dilemma of difference enters into discussions of racial and ethnic equality as well, requiring members of a society to ask when it is necessary to adapt societal institutions to racial and ethnic diversity and when difference can be ignored in the interests of assimilation. Section 27, while the only express reference to multiculturalism in the constitution, is not the only, nor the main, avenue into this debate, for these are the issues that any society concerned with racial and ethnic equality must confront.

I. SECTION 27 OF THE CHARTER

While many in this country were well aware that "two founding nations" provided an incomplete record of Canada's history, effective challenges to this vision emerged only in the 1960s.⁶ John Diefenbaker, elected in 1957, was the first Canadian Prime Minister of neither English nor French origin - an individual aware of Canada's ethnic diversity and committed to making government more responsive to it. Yet he was also committed to "unhyphenated Canadianism", for his vision of multiculturalism rested on goals of integration and non-discrimination, not a commitment to government efforts to promote ethnic differences.⁷

Yet others shared a different vision, demanding a recognition of the diversity of Canadian society. As a result, the terms of reference for the Royal Commission on Bilingualism and Biculturalism, as originally constituted in 1963, were challenged by members of ethnic groups who felt that their contributions were being ignored in the vision of Canada espoused, with its

emphasis on bilingualism and biculturalism. Their voices were heard, and in 1969, volume 4 of the Royal Commission's work dealt with the cultural contribution of the other ethnic groups, laying the basis for the federal government's first multiculturalism policy, launched in 1971.⁸

Despite the federal policy commitment to multiculturalism, the original draft of the Charter of Rights, introduced in the fall of 1980, made no reference to Canada's multicultural heritage. However, section 27 was added in January of 1981, in response to pressure from ethno-cultural groups during the hearings of the Joint Parliamentary Committee.

In form, the clause is interpretive only, conferring no rights, but only requiring that the rights set out elsewhere in the constitution, as well as the reasonable limits provision in section 1, be interpreted in a certain manner. Subsequent cases have indicated that the provision may not be relevant in the interpretation of some rights in the Charter. In *Mahé v. Alberta*,⁹ the Supreme Court of Canada refused to consider section 27 (or the equality guarantee in section 15) in the construction of the minority language education guarantee in section 23. Dickson C.J. stated for the Court:

Section 23 provides a comprehensive code for minority language educational rights; it has its own internal qualifications and its own method of internal balancing. A notion of equality between Canada's official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada.¹⁰

While section 27 had no application in relation to minority language education, it has been considered by the Supreme Court of Canada in other areas, although it does not appear to have

played a key role in any of the cases. In *Big M Drug Mart*¹¹ and *Edwards Books*,¹² section 27 was a factor in determining the meaning of freedom of religion in section 2(a) of the Charter. In *Big M*, the first case, the Court rejected a narrow interpretation of freedom of religion that would only have prohibited compelled observance of another religion; instead, the Court invoked a principle of equal respect for all religions, noting that the Christian underpinnings of the federal *Lord's Day Act*, challenged in the case, acted as "a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture".¹³ Dickson J. then went on to consider section 27 briefly, noting that "to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians".¹⁴ Therefore, section 27 reinforces the understanding of section 2(a) - namely, cultural diversity exists and must be recognized, with the result that the majority's preferences cannot ignore the impact on minority religions and non-observers.

In *Edwards*, Ontario's Sunday closing law, providing a common pause day for retail workers, did not have a religious underpinning, as did the *Lord's Day Act* in *Big M*. Therefore, the issue was raised as to whether indirect burdens on freedom of religion could contravene the Charter. Section 27 was invoked by Dickson C.J. to support the conclusion that the Charter reached indirect effects, although without any real discussion of the content of the section.¹⁵ However, his discussion of the merits of the case again drew on concerns about the equality of religious groups, as in *Big M*, for he found a violation of section 2(a), because the Sunday closing law conferred a benefit on those of the Christian religion, able to worship on their Sabbath without

the fear of financial competition, while those who worshipped on Saturday or another day received no equivalent benefit from the state.

Wilson J., in dissent, also invoked section 27, giving it a more precise meaning than the other members of the Court. In her view, the exemption from Sunday closing for certain small retailers who had closed on Saturday, but not for larger retailers, would introduce "an invidious distinction into the group and sever the religious and cultural tie that binds them together".¹⁶ As this was precluded by section 27, in her opinion, the legislation could not be seen as a reasonable limit under section 1.

La Forest J., in a judgment concurring with the majority, also made reference to section 27, indicating that it might require all minority religions to be treated similarly, thus calling into question a law that took into account only some minority religions.¹⁷ However, it was not necessary for him to determine this point, as he held that deference should be paid to the legislative branch in determining whether, and how, to grant an exemption from Sunday closing.

More recently, the Supreme Court, in *Gruenke*,¹⁸ referred to section 27 when discussing whether religious communications were privileged, and thus inadmissible in a criminal trial. The Court held that admissibility of religious communications should be determined on a case by case basis, but the application of the criteria for determining admissibility should be informed by section 27 and, therefore, must begin from a non-denominational position - that is, the communication need not be made to an ordained priest nor in the context of a formal confession.¹⁹

In sum, the religion cases make mention of section 27, but with little discussion. *Andrews*,²⁰ the first equality case decided by the Supreme Court under the Charter, used section 27 to bolster the conclusion that equality in section 15 does not require similar treatment for all, nor does it mean similar treatment for those similarly situated. The presence of sections like 27, 2(a), 25 (non-derogation of Aboriginal rights) and 15(2) (affirmative action) indicate that equality sometimes requires acknowledgement of difference.²¹

Finally, section 27 was considered in the hate propaganda cases, *Keegstra*²² and *Taylor*.²³ In *Keegstra*, Dickson C.J., writing for the majority, considered section 27 in the application of section 1. While he held that the hate propaganda provisions of the *Criminal Code* violated the guarantee of freedom of expression in section 2(b) of the Charter, they were a reasonable limit. A variety of authorities supported his view that Parliament was pursuing an important objective in enacting such a law, including reference to section 27 in the following terms:

*[Section] 27 and the commitment to a multicultural vision of our nation bears notice in emphasizing the acute importance of the objective of eradicating hate propaganda from society. Professor Joseph Magnet has dealt with some of the factors which may be used to inform the meaning of s. 27, and of these I expressly adopt the principle of non-discrimination and the need to prevent attacks on the individual's connection with his or her culture, and hence upon the process of self-development.*²⁴

McLachlin, J., in dissent, also dealt with section 27, but in the context of interpreting section 2(b), where she rejected an argument that the section should be interpreted narrowly in light of section 27 (and section 15) to exclude hate speech. Consistent with the Court's earlier generous interpretation of section 2(b), she refused to leave unprotected a large area of political

and social debate because it offended principles of multiculturalism. Moreover, she went on to note the difficulty of using multiculturalism as a standard, since it is "inherently vague and to some extent a matter of personal opinion". She also noted:

*Is not the ideal of toleration, fundamental to our traditional concept of free expression, also the essence of multiculturalism, and can multiculturalism truly be promoted by denying that ideal?*²⁵

II. EVALUATING SECTION 27

Thus, in a very few Supreme Court of Canada cases, we see limited reference to section 27. Does this mean that the section is an empty one, as Peter Hogg forecast in 1982, when he wrote:

*It is likely that the multicultural heritage of Canadians will rarely be relevant to the interpretation of the provisions of the Charter, so that s. 27 may prove to be more of a rhetorical flourish than an operative provision.*²⁶

The experience to date might lead many to agree with Professor Hogg, but I would caution against too quick a dismissal of section 27. While Hogg might see the section as a "rhetorical flourish", that implies the section is meaningless. This ignores the fact that one of the most important functions of section 27 is symbolic, and constitutions can be a repository of a nation's symbols and aspirations, as well as a framework for government. Thus, the words that are rhetoric to some are, for others, a constitutional affirmation of their place in a country whose politics for so long have been dominated by concerns of English/French duality. The effect may be largely political, in that it increases attachment to the nation, but that too is an important role for a constitution.²⁷

Alan Cairns has argued that section 27, and others such as section 28, the gender equality provision, provide a rallying point for ethnic and racial groups, who see themselves as "Charter Canadians".²⁸ As a result, section 27 becomes a tool for political organization, used in both litigation and lobbying. While one should be cautious in pinning too much on the politicizing effect of one provision of the Charter, nevertheless, it is an element contributing to the vitality of ethnic identity.

But beyond the symbolic, section 27 has an educative function for the judiciary - it is in the constitution to remind judges, especially in interpreting the Charter, that Canada's societal vision is the mosaic, not the melting pot. It may be that the express inclusion of section 27 was unnecessary, since judges in Canada would have acknowledged this vision anyway, particularly in the 1980s and subsequent decades, as group claims have become common in society. However, in case judges might sometimes or some day lose sight of this vision, and in memory of the sad history of Canada's discrimination against many racial and ethnic groups, section 27 stands as a reminder of the nature of this society and its aspirations.

This reminder will be important in future years, as more and more cases come before the courts raising issues of multiculturalism. Section 27 may not be directly in issue, nor even mentioned, yet its message will be there subliminally in a range of cases. In the section that follows, I speculate on the nature of some of these cases, while also attempting to describe the various understandings of multiculturalism that judges will be asked to consider in cases like these.

III. MULTICULTURALISM AND THE CHARTER: A SEARCH FOR PRINCIPLES

Madame Justice McLachlin's observation in *Keegstra* that multiculturalism is a term of many meanings is very true, as writers on this issue indicate.²⁹ Clearly, the term is a statement of fact describing Canadian society: this is a land of many races and cultures. But what flows from that in legal, and especially constitutional, terms?

For many, the most obvious principle that flows from multiculturalism is a commitment to non-discrimination. This was accepted by Dickson C.J. expressly in reference to section 27 in *Keegstra*, but also arises out of his holdings in the religion cases. In its narrowest terms, that principle requires an end to overt prejudice towards, and subordination of, members of certain racial or ethnic groups. The goal is equality of opportunity for all in Canadian society, regardless of name, race or ethnic background. In more positive terms, the goal is tolerance and mutual respect. Those objectives underlie the decision in *Big M*, where the law impermissibly attempted to impose the morality of the majority religion on all groups in society, whatever their faith.³⁰

The concept of non-discrimination in Canada no longer stops at a prohibition of purposeful discrimination. Human rights codes and the Charter's equality guarantee require us to consider whether the rules and standards of our society unfairly disadvantage protected groups, such as religious, racial and ethnic minorities. A society wishing to promote equality of opportunity for all citizens, regardless of race or ethnicity (or gender or disability), will wisely consider whether a rule or statute developed at one time, or with one set of considerations in mind, should be revised because of the unfair burdens it imposes on other groups in a different time. In the context of this paper, then, a rule such as a height or weight requirement for fire fighters, which would have a harsher impact on a visible minority group or on women than on white males, should be vulnerable under section 15. The result would be a consideration under section 1 whether the rule is justifiable and whether the minority group can be accommodated in a reasonable manner.³¹

The answers to these questions are often difficult and controversial, for they confront the decision-maker with the "dilemma of difference", often discussed in the equality literature with respect to women and the disabled. If we recognize a claim to difference by racial or ethnic groups in order to eliminate disadvantage, do we risk perpetuating the stereotypes about the abilities and characteristics of members of those groups that we are trying to eliminate?³² Does the recognition of difference constitute "special treatment" for them that is unfair from the perspective of others not so benefitted? And what weight should be given to the values and traditions of the majority in the society?

There is not one easy answer, for there will be times to recognize difference and times to avoid it, with the context all important. As in many Charter cases, there will be a delicate balancing of interests required under section 1 that will often be controversial. An understanding of the complexity of the task may be helped through a consideration of some examples.

IV. LANGUAGE REQUIREMENTS: INDIRECT DISCRIMINATION?

Suppose a regulation in several provinces requires demonstrated facility in spoken and written English for garage mechanics in order for an individual to obtain a licence. Quebec imposes a similar requirement of facility in French on nurses. The result is to exclude from these occupations a number of individuals who are new immigrants, and, especially in light of recent Canadian immigration patterns, those who are visible minorities. Is language discrimination a form of discrimination on the basis of national or ethnic origin within section 15, and if so is this discriminatory?³³

In the United States, there is a developing literature on discrimination on the basis of accent and language, which argues for close scrutiny of laws that allocate benefits, especially employment, on the basis of accent or language.³⁴ In Canada, there are now a few human rights cases dealing with language discrimination.³⁵

One of the main concerns about language requirements is the racial prejudice that often underlies discrimination on the basis of accent, which is often conscious but sometimes not. At the same time, these are difficult cases, since it cannot be denied that facility in English or French, depending on the province, is often a very important qualification for a particular job. Moreover, there is not always a close correlation with racial or ethnic origin and the ability to speak English or French, so that there may be difficulty in arguing that section 15 of the Charter or a human rights code has been violated. While new immigrants from certain countries may have difficulty in speaking one of the two official languages, that difficulty is unlikely to carry over to a Canadian born generation, and even within the immigrant group, different members will have varying

degrees of linguistic facility. Therefore, courts may be reluctant to find that language requirements constitute adverse discrimination on the basis of race or national origin.³⁶

Nevertheless, these requirements do impose a greater burden on new citizens, and a court concerned with promoting racial and ethnic equality should ask whether the language requirement is necessary to a particular occupation.³⁷

Language requirements are only one example of a number of rules and practices that may disadvantage certain ethnic and racial groups, even though there may be good reasons for the requirement in some circumstances. Canadian equality law is only beginning the complex task of understanding the concept of indirect discrimination and the degree to which a disadvantage to a particular group leads to a conclusion that an equality guarantee has been violated, requiring a change in the standard.³⁸

V. THE LIMITS OF DIFFERENCE

What happens when a claim for the recognition of racial or ethnic difference comes into conflict with other values in Canadian society, which may or may not also be found in the constitution? Does multiculturalism mean that the unifying feature of the society is only the chorus of the many voices, as Matsuda argues should be the approach in the United States, or is there a broader shared vision of Canada?³⁹

There can be no doubt that at some point the claim for diversity will give way, whether to considerations such as merit (for example, in employment cases) or the need to protect other values and interests. Potential examples of conflicting values are numerous, often arising from the tension between gender and racial equality. What if a father who is a member of a particular religious faith insists that his five-year-old son not sit beside little girls in kindergarten, because his religious beliefs dictate that males and females should not mix in such a setting? Can parents of Sudanese origin raise a Charter defence to assault charges arising because they have subjected

their daughter to a clitorrectomy? Does the claim of freedom of religion or the right to liberty in section 7 extend to a situation where broader Canadian values of gender equality come into play?

Perhaps my examples are too easy, since many would argue that the guarantees of gender equality in section 28 and section 15 trump multiculturalism values - but that answer is too quick. There will be many difficult circumstances where members of a particular group share a vision of gender equality unlike that of the majority in the society, and courts will have the difficult task of mediating the claims.⁴⁰ Some will argue in favor of tolerance for the group and respect for the right to be different; others will argue that the Canadian concept of multiculturalism, while supportive of the mosaic, must also respect the values of the larger society.

Perhaps, in order to understand the legitimacy of the second claim, it is useful to examine the metaphor of the mosaic more closely and to remember what a mosaic is and is not. It is, indeed, a collection of many stones, but they are not free-floating; rather, they are cemented into a frame in order to convey a harmonious image. So, too, is the cultural mosaic in Canada part of a larger society with certain shared aspirations and values. Therefore, a nation committed to multiculturalism can, in some circumstances, require assimilation of ethnic and racial groups. Indeed, the ideal of multiculturalism, for many of its proponents, is ultimately integration with many of the dominant norms of Canadian society, not a right to preserve the culture of another race or country in pristine form.

In sum, while Canadian society respects the desire of groups to preserve their heritage, it is also a society with other values, including individual autonomy and the equality of men and women. Therefore, while courts must strive for sensitivity to the minority's experience, they need not always accept diversity as the ultimate or primary value.⁴¹

VI. REPRESENTATION AND GROUPS

A third area of dispute is likely to arise in the context of claims for better representation of groups. One area in which this may occur is the administration of justice. Think of the situation where a white police officer is charged with manslaughter after shooting and killing a black youth fleeing after a robbery attempt at a store. The defence lawyer uses her peremptory challenges each time a prospective black juror comes forward, with the result that the jury is all white.⁴² Would such a result lead the black community to feel that the trial was fair?

Alternatively, the case might be reversed - and one might ask if it makes a difference if the accused is black, and the protests are launched against white jurors in an effort to get some visible minority members on the jury. Another possible challenge is to the constitution of the jury panel, on the ground that it does not adequately reflect the racial composition of the broader society. These hypotheticals raise difficult questions about the meaning of equality and fairness in the administration of justice in a multiracial society: is race irrelevant to adjudication, or would an important perspective be missing in a racially homogeneous jury?

In the few cases to date in which this has arisen, the Canadian courts have been concerned not to allow discrimination against potential jurors on the basis of a ground prohibited in law, such as race or gender. Therefore, there has been no sympathy for efforts to ensure a particular racial or gender makeup in a jury. Thus, in *Pizzacalla*,⁴³ the Ontario Court of Appeal held that the Crown improperly stood aside men from a jury in a sexual assault case, while the Manitoba Court of Appeal in *Kent*⁴⁴ rejected arguments that an Aboriginal accused had a right to a jury of Aboriginal people or, in the alternative, a more representative jury panel drawn from the whole province, rather than one district, so as to increase Aboriginal population on the panel.

Clearly, the judges in *Kent* felt that to accept the challenge would belie our aspiration that individual jurors will decide on the basis of the material before them, rather than preconceived prejudices. Moreover, a successful challenge seems to reduce every citizen to a stereotype that suggests our cognitive processes are dominated by a particular characteristic - gender or race or ethnicity - rather than the wide variety of experiences and characteristics that make us who we are

- age, status, education, occupation, class, to name but a few, in addition to race, ethnicity and gender.

Yet, there is a very real concern that our backgrounds do precondition us in certain ways, often unknown to us, so that diversity of backgrounds on a jury - or in any decision or policy - making body - may well be important to improve the decision-making process. The challenge, then, is to reflect that diversity in institutions like the jury, without reducing people to a particular characteristic and without placing undue emphasis on one particular characteristic. Thus, in a case like *Kent*, while one might be reluctant to provide a jury made up of members of one race, one might well have concerns about the makeup of the jury panel for the use of certain lists, such as the voters' list or the health services commission registrants, may skew the makeup of the panel.⁴⁵

There are many more examples of cases which raise issues of representation and multiculturalism. In the United States, there are many disputes about "affirmative gerrymandering" - that is, drawing the boundaries of electoral districts so as to maximize the opportunities for minorities to elect a candidate. In Canada, some have fastened on the words of McLachlin J. in *Reference re Electoral Boundaries* to argue that electoral districts not only can take into account minority representation, but should do so.⁴⁶ In that case the Court held that the right to vote in section 3 of the Charter does not require "one person, one vote" or "representation by population" alone, but rather aspires to "effective representation", which allows departures for the following reasons:

*Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic.*⁴⁷

While I do not read these words as requiring "affirmative gerrymandering", they do suggest that electoral boundaries commissions can consider effective representation for minorities when

they draw their lines.⁴⁸ Again, the challenge will be to increase opportunities for minorities to elect representatives, while at the same time recognizing that individuals will often form alliances, whether in politics or other activities, on the basis of characteristics other than race or ethnicity.

VII. A RIGHT TO GOVERNMENT SUPPORT?

Does multiculturalism go further than a broad principle of non-discrimination and respect to require positive action on the part of governments to "enhance" racial and cultural difference? To date, courts have been reluctant to find positive rights in the Charter, except where expressly included, as in section 23. As well, there has been little sympathy for groups who come forward to claim financial support for their educational system or language equivalent to that provided to denominational schools and the French and English minority by the constitution's guarantees.

Professor Magnet has argued that the *International Covenant on Civil and Political Rights*, on which section 27 is based, mandates such action. It reads:

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*⁴⁹

While some groups will endorse this approach, many in Canada would argue against it as a general constitutional principle.⁵⁰ It is one thing to respect the practice of another religion or the use of another language in private. But to require, as a constitutional obligation, that government

support many languages and groups risks reinforcing separation and difference, rather than integrating them into Canadian society.

Canadian concepts of multiculturalism have aimed at inclusion, but in a society with certain established institutions and a certain history that gives priority to English and French and to a strong public school system in most jurisdictions, along with mandated support, in some cases, for other denominational schools.⁵¹ Indeed, some will argue that a constitutional guarantee of positive support for the separate institutions of many cultural and linguistic groups will work against the tolerance and respect that the policy of multiculturalism has traditionally sought to achieve.

CONCLUSION

There is reason for pride in a country which celebrates the differences of groups from many languages and cultures, although such pride should be tempered with humility in light of our past history. While Canada has given constitutional affirmation to multiculturalism in section 27 of the Charter, there will often be difficult debates about the implications of a policy of multiculturalism. Respect for, and recognition of ethnic and racial difference often bring into question longstanding rules and practices. Sometimes respect for diversity will require adaptation of those rules; at other times, it may be necessary to sacrifice diversity in the interests of other values such as gender equality. With the Charter, the challenge of determining when racial and

cultural difference counts will often fall to judges; the hope is that they will approach their adjudicative task sensitive to the perspective of the many groups in Canadian society.

FOOTNOTES

1. For an overview, see W. Kalbach, "A Demographic Overview of Racial and Ethnic Groups in Canada" in P. Li, ed., *Race and Ethnic Relations in Canada* (Toronto: Oxford U. Press, 1990) at 18. Those of British and French origin constituted 91.1% of Canada's population in 1871 and 73.3% in 1971 (Table 2.2, at 24). By 1986 the number had fallen to 54.3%. This number rises to 75% if one counts those with multiple origins involving British or French (at 28). Those of Asian origin constituted 3.9% of the population in 1986 (at 32), although they were concentrated in British Columbia, Alberta and Ontario in above average proportion.
2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
3. The Consensus Agreement reached at Charlottetown on August 28, 1992 would have added a new section 2 to the *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3, had it been approved in the October 26, 1992 referendum. It would have required that the constitution be interpreted in a manner consistent with a number of characteristics, including:

"2(1)(e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity."
4. This type of litigation may also increase because of the organization of ethno-cultural groups set up to use the courts to assert such claims, such as the Minority Advocacy and Rights Council.
5. One of the best discussions of the dilemma of difference (although without any firm answers to the dilemma) is M. Minow, "Foreword: Justice Engendered" (1987) 101 Harv. L. Rev. 10.
6. A good overview of Canadian multiculturalism policy, up to and including the Charter of Rights, is found in R. Breton, "Multiculturalism and Canadian Nation-Building" in A. Cairns and C. Williams, eds., *The Politics of Gender, Ethnicity and Language in Canada* (Toronto: University of Toronto Press,

- 1986) 27.
7. P. Newman, *Renegade in Power: The Diefenbaker Years* (Toronto: McClelland and Stewart Ltd., 1973) 187 at 281.
 8. A brief history, through to the *Department of Multiculturalism and Citizenship Act*, S.C. 1991, c. 3 is found in J.L. Elliott and A. Feras, "Immigration and the Canadian Ethnic Mosaic" in Li, *supra* note 1, 51 at 64-66.
 9. *Mahé v. Alberta* (1990), 68 D.L.R. (4th) 69 (S.C.C.).
 10. *Ibid.* at 87-88.
 11. *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 (S.C.C.) [hereinafter *Edwards*].
 12. *Edwards Books & Art Ltd. v. R.* (1987), 35 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Edwards*].
 13. *Supra* note 11 at 354.
 14. *Ibid.* at 354-355.
 15. *Supra* note 12 at 34.
 16. *Ibid.* at 61.
 17. *Ibid.* at 74.
 18. *R. v. Gruenke* (indexed as *R. v. Fosty*), [1991] 6 W.W.R. 673 (S.C.C.) .
 19. *Ibid.* at 690 Lamer C.J.C.
 20. *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.).
 21. *Ibid.* at 15, McIntyre J. (for the majority in this part of his reasons).
 22. *R. v. Keegstra* (1990), 61 C.C.C. (3d) 1 (S.C.C.) [hereinafter *Keegstra*].
 23. *Canada (Canadian Human Rights Commission) v. Taylor* (1990), 75 D.L.R. (4th) 577 (S.C.C.)

24. *Supra* note 22 at 44-45. The reference to J. Magnet is from "Multiculturalism and Collective Rights: Approaches to Section 27" in G. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) at 739.
25. *Supra* note 22 at 102-103. Section 27 is also mentioned in *Canada (Canadian Human Rights Commission) v. Taylor*, *supra* note 23 at 594-595 and in the dissenting judgment of Cory and Iacobucci JJ. in *R. v. Zundel* (1992), 75 C.C.C. (3d) 449 (S.C.C.), particularly at 480-482.
26. P. Hogg, *The Canada Act Annotated* (Toronto: Carswell, 1982) at 72. Other interpretations of section 27 are found in a series of essays in Canadian Human Rights Foundation, *Multiculturalism and the Charter* (Toronto: Carswell, 1987).
27. See Breton, *supra* note 6 on the symbolic importance of the recognition of multiculturalism at 28-32.
28. Alan Cairns has written extensively about this point. A good treatment is found in "Constitutional Minoritarianism in Canada" in R. Watts and D. Brown, eds., *Canada: The State of the Federation 1990* (Kingston: Queen's Institute of Intergovernmental Relations, 1990) at 71.
29. See, for example, Breton, *supra* note 6 at 53-54; Magnet, *supra* note 24 at 756-772; Canada, *Report: Citizen's Forum on Canada's Future* (Ottawa: Minister of Supply and Services, 1991) (Spicer Commission) at 85-89.
30. The thrust of *Big M*, as followed and applied by the Ontario Court of Appeal in the cases striking down religious practices and education in the schools (*Zylberberg v. Director of Sudbury Board of Education* (1988), 65 O.R. (2d) 641; *Canadian Civil Liberties Association v. Ontario (Minister of Education)* (1990), 65 D.L.R. (4th) 1) is not a prohibition on state encouragement of religion, but a rejection of favouritism for the majority Christian religion. However, some state favouritism is allowed, as discussed below at section VII.
31. The exercise is similar to that which occurs in applying concepts of equality and the duty to accommodate in human rights codes. See, for example, *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417 (S.C.C.).

32. Do we encourage further division in the society, as some suggested to the Spicer Commission (*supra* note 29 at 86)?
33. There is little guidance in judicial decisions on this issue. In *Forget v. Quebec (Attorney-General)* (1988), 52 D.L.R. (4th) 432 at 439-442, the Supreme Court of Canada dealt with a requirement for facility in French for a particular occupation. Those who had attended secondary school in French for three years were exempted from mandatory testing. This exemption was held to constitute discrimination on the basis of language, since the benefit would disproportionately favour francophones. However, the testing requirements were reasonable and did not contravene the linguistic equality guarantee of the *Quebec Charter of Human Rights and Freedoms*.
34. See, for example, M. Matsuda, "Voices of America: Accent, Antidiscrimination Law, and A Jurisprudence for the Last Reconstruction" (1991) 100 Yale L.J. 1329.
35. For example, *Cornejo v. Opus Building Corp.* (1991), 14 CHRR D/167 (B.C.); *Grewal v. Fletcher Challenge Canada Ltd.* (1991), 14 CHRR D/161 (B.C.) (rev'd by *Fletcher Challenge Ltd. v. British Columbia (Human Rights Council)* (29 October 1992), (B.C.S.C.) [unreported]; *Romano v. Board of Education, City of North York* (1987), 87 C.L.L.C ¶17, 035 (Ont.).
36. In cases like *Brooks v. Canada Safeway Ltd.* (1989), 59 D.L.R.(4th) 321 and *Janzen v. Platy Enterprises Ltd.* (1989), 59 D.L.R. (4th) 352, the Supreme Court of Canada held that discrimination on the basis of pregnancy and sexual harassment constituted sex discrimination because of the disproportionate effect on women of treatment on these bases. The impact of language requirements on a group is much more complex, although *Janzen*, at least, suggests that discrimination on this basis is constructive discrimination under the Charter or human rights codes.
37. A similar kind of challenge may arise with respect to the evaluation of professional qualifications for doctors and other professionals, since rigorous scrutiny of credentials often comes only if they are not trained in the United States or the United Kingdom, which has a serious impact on new immigrants from certain countries. See the discussion in Ontario Task Force, *Access: Task Force on Access to Professions and Trades in Ontario* (Toronto: Ministry of Citizenship, 1989).

38. Another good illustration is found in *Bhadauria v. Toronto (City) Board of Education* (1992), 89 D.L.R. (4th) 126 (Ont. Div. Ct.), a challenge on the basis of racial discrimination to the use of an interview and to the selection criteria for candidates for a position as vice-principal.
39. Matsuda, *supra* note 34 at 1403: "the antisubordination rationale for accent tolerance suggests a radically pluralistic re-visioning of national identity. The only center, the only glue, that makes us a nation is our many-centered cultural heritage". She does, however, temper this by arguing that cultural difference must not permit degradation of women, children and others (at 1402).
40. It is useful to recall here the debate about the merits of *A.G. Can. v. Lavell*, [1974] S.C.R. 1349, in which there was an unsuccessful challenge under the equality guarantee of the *Canadian Bill of Rights* to then section 12(1)(b) of the *Indian Act*, R.S.C. 1970, c. I-6, denying status to Indian women who married non-Indians, but not to Indian men who "married out". While many non-Indian women attacked the provision, many Indian women and men supported it.
41. Minow, like Matsuda, *supra* note 34, calls for criteria of oppression to be developed to determine when the minority group's values need not be respected by the larger society. Unfortunately, there is little development of those criteria. M. Minow, "Putting Up and Putting Down: Tolerance Reconsidered" (1990) 28 Osgoode Hall L.J. 409 at 434-435.
42. I acknowledge that there might be arguments that the Charter does not apply here because there is no government action. There are good arguments that the Charter does apply, but I shall not go into them here.
43. *R. v. Pizzacalla* (1991), 5 O.R. (3d) 783 (C.A.). This was not a Charter case. The Court took pains to make clear that it was not saying that an all male or an all female jury would be unable to render an impartial verdict. Its concern here was the lack of impartiality of the Crown prosecutor, who admitted that he felt men were unwilling to convict in this type of case, which involved sexual harassment in the workplace.
44. *R. v. Kent* (1986), 40 Man. R. 160 at 173-175 (C.A.) [hereinafter *Kent*]. Of 148 prospective jurors empanelled, through the use of lists provided by the Manitoba Health Services Commission, two were Indians. A related pre-Charter case is *R. v. Butler*, [1985] 2 C.N.L.R. 107

(B.C.C.A.) at 114.

45. The American courts have developed a jurisprudence on jury selection that is worth considering. See for example the discussion in, "The Supreme Court - Leading Cases" (1991) 105 Harv. L. Rev. 177 at 255-266 on discriminatory use of peremptory challenges.
46. *Reference re Electoral Boundaries Commission Act*, ss. 14, 20 (Sask.) (1991), 81 D.L.R. (4th) 16 (S.C.C.), and see the discussion by K. Roach, "Chartering the Electoral Map Into the Future" and K. Swinton, "Federalism, Representation and Rights" in J. Courtney, P. MacKinnon & D. Smith, eds., *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Saskatoon: Fifth House Publishers, 1992) at 200 and 17 respectively.
47. *Ibid.* at 36.
48. An example is found in the Report of the Electoral Boundaries Commission for Yukon, 1991 (Commissioner The Hon. Mr. Justice K. Lysyk) at 37, which notes the need to reduce the number of electoral districts allocated to Whitehorse in order to improve representation for those in rural areas, especially Aboriginal voters (at 37 and 48).
49. *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, art. 27, referred to in *Magnet*, *supra* note 24 at 772.
50. Note that my concern is the imposition of a *constitutional* obligation on government to financially support diversity. I am not quarrelling in any way with government policy decisions to provide such support from time to time, if there is the requisite popular approval.
51. In *Reference re an Act to Amend the Education Act (Ontario)* (1987), 40 D.L.R. (4th) 18 at 60 and 61 (S.C.C.) (the Bill 30 case), a constitutional challenge was raised to Ontario's decision to extend financial support to Roman Catholic secondary schools. When other groups tried to invoke sections 2(a) and 15 of the Charter to support their claim for similar funding for independent or other denominational schools, the Supreme Court rejected the claim, noting that the Charter's provisions could not disturb a fundamental part of the Confederation bargain - namely, the guarantee for denominational school rights for the Roman Catholic minority in Ontario and the Protestant minority in Quebec.