

The Impact of Constitutional Multiculturalism after Three Decades of Existence

by
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Abstract

Canada's 1971 multiculturalism policy simultaneously promoted cultural retention and sociocultural integration. According to the literature, it has tended to promote superficial cultural differences, rather than deep ones, to the benefit of a single social structure. When the multiculturalism ideal was enshrined under section 27 of the *Canadian Charter of Rights and Freedoms, 1982*, there was no consensus on whether the normative meaning of multiculturalism would mirror that of the federal policy or take on a new one. While most scholars agreed that this provision was an interpretative clause that did not guarantee a positive or absolute right in the domain of multiculturalism per se, they debated whether it would conflict with other provisions of the *Charter* or would supplement them. After three decades of *Charter* rule, what has been the weight and content given to section 27 of the *Charter* and multiculturalism in general? In order to answer this question, this paper proposes a doctrinal analysis of the Supreme Court's *Charter* jurisprudence and an assessment of its political consequences in the area of multiculturalism in Canada. It will be argued that constitutional multiculturalism, just like the official multiculturalism policy, has tended to favour liberal pluralism.

INTRODUCTION

With the adoption of a multiculturalism policy in 1971, Canada became the first officially multicultural country in the world. In formulating this policy, the federal government was pursuing four goals, which can be summarized as follows: 1) to assist cultural groups in preserving their cultural heritage; 2) to help cultural groups overcome cultural barriers in view of greater participation in Canadian society; 3) to promote cultural exchange in order to foster greater national unity and 4) to facilitate the learning of one of Canada's official languages for immigrants (*House of Commons Debates, 1971: 8546*). In order to further these goals, ethnic cultural expression funding and programs aimed at the reduction of racial discrimination were put in place, but no parallel ethnic institutional structures were established (Breton 1986; Stasiulis 1988; Abu-Laban 1999). Officially, the multiculturalism policy simultaneously promoted "cultural retention" and "sociocultural integration" (Jedwab 2003, 312). In reality, it has tended to promote superficial cultural differences, rather than deep ones, to the benefit of a single social structure (Roberts and Clifton 1982; Brotz 1980).¹

According to Augie Fleras and Jean Leonard Elliott, the ideology behind Canada's official multiculturalism policy has amounted to liberal pluralism:

With its commitment to individual rights and to government intervention to ensure tolerance for others, official multiculturalism did not veer from a liberal-pluralist ethic. It seemed to be enforcing diversity yet also denying its relevance as grounds for entitlement. It was inclusive to the extent that it focused on neutralizing those advantages which prevented minority women and men from participating fully in society. Ethnicity was to be tolerated to the extent that it was shared with other Canadians, made a contribution to Canada, was consistent with core Canadian values, and was confined to the private or personal domain. Cultural differences were to be purged from the public domain; in this the hope was to ensure that everyone was treated alike (2002, 65).

¹ For a different view, see (Bissoondath 1994)

When the multiculturalism ideal was enshrined under section 27 of the *Canadian Charter of Rights and Freedoms, 1982* (hereafter “*Charter*”), there was no consensus on whether the normative meaning of constitutional multiculturalism would mirror that of the federal policy or take on a new one (Hudson 1987). Section 27 stipulates that the “*Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians*”. From a legal point of view, “it does not have a static meaning, circumscribed by the niceties of legal precision” (Magnet 1987). At the outset, constitutional experts agreed that this provision was an interpretive clause that did not guarantee a positive or absolute right in the domain of multiculturalism per se (See for example Lebel 1987; Woehrling 1985; Tarnopolsky 1982). They debated whether section 27 would conflict with other provisions of the *Charter* or would supplement them (Lebel 1987; Bottos 1988; Woehrling 1985). Some saw it as more ‘declarative’ in nature and questioned whether it would be given any weight at all in constitutional interpretation (Hudson 1987; Hogg 1982). To that effect, Peter W. Hogg suggested that “s.27 may prove to be more of a rhetorical flourish than an operative provision” (Hogg 1982, 71-72). Others however, speculated that it had the potential to promote certain cultural group rights (Kallen 1987; Woehrling 1985; Magnet 1987).

After almost 30 years of *Charter* rule, what has been the weight and content given to section 27 of the *Charter* in particular, and multiculturalism in general? In order to answer this question, this paper reviews the Supreme Court of Canada’s jurisprudence on multiculturalism², as well as its reception by governmental authorities, to determine the types of cultural rights the *Charter* has promoted in this domain. Cases involving freedom of religion, freedom of expression and due process will be surveyed. It will be argued that constitutional multiculturalism, just like the official multiculturalism policy, has tended to favour liberal pluralism.

FREEDOM OF RELIGION

The ideal of Canadian multiculturalism was first put to the test in freedom of religion cases. Most of the claims made under section 2(a) of the *Charter* pertaining to “freedom of conscience and religion” have amounted to exemption rights demands (*R v Big M Drug Mart* 1985; *R v Edwards Books and Art* 1986; *Multani v Commission scolaire Marguerite-Bourgeoys* 2006; *Alberta v Hutterian Brethren of Wilson Colony* 2009). Jacob T. Levy defines exemption rights as “individually exercised negative liberties granted to members of a religious or cultural group whose practices are such that a generally and ostensibly neutral law would be a distinctive burden on them” (1996, 25). But the judiciary has also been confronted with one claim of assistance right (*Adler v Ontario* 1996). This type of right involves demands for state benefits by religious minorities and thus, the recognition of a positive right (Levy 1996). As will be seen, the success of freedom of religion demands has been uncertain.

R v Big M Drug Mart Ltd. (1985) and *R v Edwards Books and Art Ltd.* (1986)

The constitutionalized notion of multiculturalism was first used as a support for interpreting freedom of religion in two cases involving Sabbatarian observance. The first case, *R v Big M Drug Mart Ltd.* (1985) challenged the federal government’s *Lord’s Day Act, 1970* and the second case, *R v Edwards Books and Art Ltd.* (1986), challenged the *Ontario Retail Business Holidays Act, 1980*. Both statutes barred most commercial activities on Sundays, thus compelling retailers and their employees to observe the Christian

² To qualify as a multiculturalism case, a case had to directly invoke section 27 of the *Charter* or the concept of multiculturalism.

Sabbath, but the *Retail Business Holidays Act* provided for an exemption for some Saturday Sabbath observers. In *Big M Drug Mart*, the judges unanimously³ invalidated the federal statute since it was found to violate section 2(a) of the *Charter* pertaining to “freedom of conscience and religion”. However, in *Edwards Books and Art*, a divided bench⁴ upheld the impugned provincial law. A majority of the judges determined that the Act violated section 2(a) of the *Charter*, but should be saved under section 1.

In *Big M Drug Mart*, the judges thought that the entrenchment of the freedom of conscience and religion in the Canadian constitution warranted a break from past jurisprudence based on the *Canadian Bill of Rights, 1960*. Contrary to the *Canadian Bill of Rights*, the *Charter* “does not simply ‘recognize and declare’ existing rights as they were circumscribed by legislation current at the time of the *Charter’s* entrenchment” (para 115). Following the decision in *Hunter et al. v Southam Inc.* (1984), the Court believed a purposive approach should guide the interpretation of section 2(a) of the *Charter*. In *Hunter*, Chief Justice Dickson had pointed out that the *Charter’s* purpose was “the unremitting protection of individual rights and liberties” (155). In *Big M Drug Mart*, Chief Justice Dickson added that “[i]t [was] easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection” (para 121). He also indicated that the freedom of conscience and religion was vital to the protection of the democratic tradition underlying the *Charter*: “The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government” (para 122). The judges thereby associated freedom of religion with the need to reinforce the democratic political process.

Given the philosophical and political foundations of the *Charter*, the Court defined the freedom of conscience and religion guaranteed by it as follows:

[E]very individual [is] free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice (para 123).

Chief Justice Dickson concluded that “government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose” (123).

Following American Sunday-closing laws jurisprudence and the decision rendered in *AG (Que.) v Quebec Protestant School Boards* (1984), the Court established that both the purpose and effect of legislation should be scrutinized when determining its constitutionality under the *Charter*, but that priority should be given to the purpose. Given that the legislative purpose of the *Lord’s Day Act* was compulsory

³ In reality, the reasons for the decision in *Big M Drug Mart* were given in two separate judgments. Chief Justice Dickson wrote the majority judgment on behalf of himself and Justices Beetz, McIntyre, Chouinard, and Lamer. Justice Wilson wrote the concurring judgment. For the purpose of this paper, only the arguments laid in the majority judgment will be discussed.

⁴ The *Edwards Books and Art* case gave rise to four different decisions. The majority judgment was rendered by Chief Justice Dickson for himself and Justices Chouinard and Le Dain. Justice Beetz, in accordance with Justice McIntyre, and Justice Forest both issued concurring judgments. Finally, Justice Wilson wrote a dissenting judgment.

religious observance, the impugned statute was found to infringe freedom of conscience and religion. Chief Justice Dickson declared:

To the extent that it binds all to a sectarian Christian ideal, the *Lord's Day Act* works [as] a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture (para 97).

Conversely in *Edwards Books and Art*, the secular legislative purpose of the *Retail Business Holidays Act* which was to provide retail workers with a common day of rest was not found to violate section 2(a) of the *Charter*. The Court thus inquired into the effects of the law. It found, exemption aside, its effects to be detrimental to Saturday observing retailers who had to close an extra day in comparison to Sunday observers. Even the exemption for some Saturday observers was found to be disadvantageous. Section 3(4) of the *Retail Business Holidays Act* granted the right to retailers to open on Sundays if they had been closed the preceding Saturday, but only if they had seven or fewer employees at the time servicing the clientele in a commercial space of less than 5,000 square feet. According to the majority, this exemption had the effect of penalizing large Saturday observer retailers as compared to smaller ones. Finally, the Act was also seen as constraining the religious freedom of Saturday observing consumers by limiting their access to commercial services.

Having determined in *Big M Drug Mart* and *Edwards Books and Art* that direct and indirect burdens on religious practice were inconsistent with the freedom of conscience and religion guaranteed by the *Charter*, the Court also established that they ran contrary to section 27. As per Chief Justice Dickson, "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" (para 99). While this declaration may have been self-explanatory for the bench, the lack of further clarification for this perceived inconsistency did not allow for additional light to be shed on the meaning of section 27. It only suggested that this *Charter* provision could "support the liberal interpretation of a substantive right" (Small 2007).

Once the Court ascertained that the *Lord's Day Act* and the *Retail Business Holiday Act* both violated section 2(a) and were inconsistent with section 27 of the *Charter*, it asked whether these statutes could withstand a section 1 analysis. At the time the decision was rendered in *Big M Drug Mart*, the Court had not standardized its interpretational approach to the limitation clause – it would do so later in *R v Oakes* (1986). Nevertheless, it established the necessity of having a sufficient legislative objective to limit a *Charter* right as well as reasonable means to achieve that objective. In the case at hand, the Attorney General of Canada attached two policy goals to the Sunday-closing law that should justify limiting the freedom of conscience and religion. First, he argued that the choice of Sunday as a day of rest was the most practical one due to the fact that a majority of the population was of the Christian faith. The Court dismissed this utilitarian argument as repugnant "because it would justify the law upon the very basis upon which it is attacked for violating s. 2(a)" (para 140). Second, the Attorney General insisted on the secondary importance of having a uniform day of rest. While the Court agreed on the reasonableness of such a secular legislative intent, it found that this was not the primary motivation behind the *Lord's Day Act*. To the contrary, the act had been enacted chiefly to compel religious observance.

By the time the Court heard the case in *Edwards Books and Art*, it had developed a test for the application of section 1 in *Oakes*. This was an opportunity for the bench to refine the *Oakes* test. In *Big M Drug Mart*, the Court had already recognized as an important concern the secular objective of having a uniform day of rest for families and community members. The real question, then, was whether a fundamental freedom, that of religiously observant retailers, could be limited in order to promote the interest of a vulnerable group, that of the retail workers. According to the majority, the exemption found in section 3(4) of the *Retail Business Holiday Act* minimally impaired the freedom of religion of Saturday observer retailer. Chief Justice Dickson also added that: “When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail” (para 141). Ultimately, the Court decided that rights balancing under section 1 of the *Charter* had to take into account “the type and intended beneficiaries of public policy” (Manfredi 2001, 41).

Noteworthy in *Edwards Books and Art*, was Justice Wilson’s objection to limiting the right of freedom of conscience and religion under section 1 of the *Charter*. In her dissenting judgment, she regarded as unacceptable the disparate treatment of big Saturday observer retailers and of small Saturday observer retailers because it weakened the bond holding the Saturday observing community together. As per Justice Wilson, “when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group”; otherwise, it would “introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together” (para 207). Only this interpretation would be consistent with “the preservation and the enhancement of Canada’s multicultural heritage” according to her. This understanding of section 27 of the *Charter* suggested that the ideal of multiculturalism supported cultural retention more than socio-cultural integration.

Following the Court’s decisions, the *Lord’s Day Act* was repealed, but the *Retail Business Holiday Act* was upheld. Nevertheless, Queen’s Park amended its Sabbatarian law shortly after the judgment rendered in *Edwards Books and Art* to widen the scope of the exemption for all religious observers (*An Act to amend the Retail Business Holidays Act* 1989). The new legislation allowed retailers to open for business on Sundays if they closed another day of the week for religious reasons. This religious exemption was not accompanied by limitations related to the size of the commercial space and the number of employees servicing the clientele. By providing for such a permissive religious exemption, the authorities complied with the minority judgment of Justice Wilson in *Edwards Books and Art*. Concurrently, Ontario protected vulnerable retail workers by providing them with the right to refuse Sunday work (*An Act to Amend the Employment Standard Act*, 1989). Eventually in 1993, the province of Ontario removed “Sunday” from the definition of “holidays”, permitting retail businesses to operate everyday of the week (*An Act to amend the Retail Holidays Act in respect of Sunday shopping*). The 1989 religious exemption was maintained in cases where a public holiday falls on a Sunday.

Multani v Commission scolaire Marguerite-Bourgeoys (2006) and *Alberta v Hutterian Brethren of Wilson Colony* (2009)

More recent religious exemption *Charter* cases have invoked the ideal of multiculturalism in support of justificatory factors under section 1, and for different reasons without explicit reference to section 27. In *Multani v Commission scolaire Marguerite-Bourgeoys* (2006) a young Orthodox Sikh sought an exemption to wear his kirpan to public school in Quebec, while in *Alberta v Hutterian Brethren of Wilson Colony* (2009), Hutterites wanted to be exempted from Alberta’s universal photo requirement

for licensed drivers⁵. In both cases, an infringement of freedom of religion under section 2(a) of the *Charter* was found and the judges had to debate whether or not it could be justified under section 1. Ultimately, the Court unanimously⁶ granted the right for Sikhs to wear their kirpan to school, but refused to exempt Hutterites from the universal photo requirement by a one vote margin⁷.

In both cases, the authorities had attempted to accommodate the religious beliefs of the appellants. In *Multani*, Gurbaj Singh Multani had been forbidden by the council of commissioners from carrying his ceremonial dagger since it was thought to endanger the security of his schoolmates, but allowed to wear a “symbolic kirpan in a form of a pendant or another form made of a material rendering it harmless” (para 5). In *Hutterian Brethren of Wilson Colony*, the Alberta government had agreed not to display the pictures of Hutterites on their driver’s licences, but had insisted that a picture be taken nonetheless for placement in the province’s central data bank to prevent identity theft. These accommodation attempts, however, were thought to be unacceptable by the appellants on religious grounds.

As set out in *Syndicat Northcrest v Anselem* (2004), two criteria had to be met in order to conclude that there had been an infringement of freedom of religion. First, the claimant had to show “that he or she sincerely believes in a practice or belief that has a nexus with religion” and second, “that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief” (*Multani* 2006: para 145). The Court agreed that Multani could only genuinely comply with his religion by carrying a metal kirpan at all times. The bench also agreed that preventing Multani from wearing his kirpan interfered significantly with his religious conviction. As a result, the appellant had left the public school system to attend a private school where kirpans were allowed. As for the Hutterites, the Court also recognized that their beliefs were honestly held. Relying on lower courts’ judgments, the judges assumed as well that the universal photo constituted a substantial interference with Hutterite beliefs.

Having recognized a freedom of religion violation in *Multani* and *Hutterian Brethren of Wilson Colony*, the bench made its final decisions based on the *Oakes* test. In *Multani*, the judges found the need to ensure a reasonable level of safety in schools to be a pressing and substantial need. They also ascertained a rational connection between the need for safety and the prohibition of metal kirpans. The Court asserted that the absolute prohibition on kirpans in schools did not however minimally impair the rights of Sikhs. The evidence had demonstrated that the risk of kirpan use for violent purposes was low. Consenting to having kirpans worn sealed and sown up inside the clothing was seen as a better alternative. Without directly invoking section 27 of the *Charter*, Justice Charron added that the “absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others” (para 78). A religious exemption in *Multani* was deemed necessary to show the importance of religious tolerance to students. In that sense, the deleterious effects of the decision of the council of commissioners

⁵ The *Operator Licensing and Vehicle Control Regulation*, Alta Reg. 320/2002, s. 14(1)(b) (am. Alta. Reg. 137/2003, s.3) specifies this requirement.

⁶ Chief Justice McLachlin and Justices Bastarache, Binnie and Fish concurred with the reasons given by Justice Charron. Justice Deschamps, in accordance with Justice Abella, and Justice Lebel both issued concurring judgments.

⁷ The majority judgment was delivered by Chief Justice McLachlin on behalf on herself and Justices Binnie, Deschamps and Rothstein. Justices Abella, Lebel and Fish each delivered their dissenting reasons in separate judgments.

outweighed its salutary effects. In the end, since Multani was no longer attending school in the public system, the Court simply declared the kirpan prohibition to be null and void. Nonetheless, the school board announced in a press release that it would comply with the judgment (Marguerite-Bourgeys 2006).⁸

On the other hand, the application of the *Oakes* test in *Hutterian Brethren of Wilson Colony* did not result in a religious exemption. The majority thought that the maintenance of the integrity of the drivers' licensing system, in order to prevent identity theft, was an important policy objective. It also believed that a universal photo requirement was rationally connected to that objective. As well, the majority argued that the policy passed the minimal impairment test. The Hutterites retained the option to use alternate means of transportation. Furthermore, the majority asserted that any measure other than the universal photo requirement would severely increase the chance of identity theft. Finally, the deleterious effects of the law were not found to outweigh its salutary effects. To that effect, Justice Charron stated:

In judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important. However, this perspective must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs. The bare assertion by a claimant that a particular limit curtails his or her religious practice does not, without more, establish the seriousness of the limit [...]” (para 90).

In this statement, Justice Charron hinted at a thin vision of multiculturalism in which differences are officially recognized but given no clout in terms of rights. This led the majority to conclude that the law imposed on the Hutterites some financial costs and prevented them from being self-sufficient in terms of transportation, but insisted that it did not prohibit religious practice per se. The collective security goals of the government were thought to be more important than the preservation of the communal lifestyle of a religious group.

This thin multiculturalism perspective was contested notably by Justice Abella in her dissent. She was of the view that the limit imposed on the Hutterites' freedom of religion was dramatic. The universal photo requirement would inevitably lead to the Hutterites' inability to drive and thus, not only affect them individually, but also collectively by hampering their autonomous communal lifestyle by having them rely on others for their transportation needs. Conversely, requiring all Hutterite drivers to have their photo taken for inclusion in a central data base only benefitted marginally the province, according to Justice Abella. As she explained, 700,000 Albertans did not have a driver's licence and their photo was hence not included in the province's central database. Consequently, to exempt 250 Hutterites from having their picture taken would not significantly hinder Alberta's efforts in reducing identity theft. In the end, these arguments did not sway the government and to this day, there exists no exemption for Hutterite drivers.

⁸ It was confirmed in a phone interview conducted June 27, 2011 with the School Board's Secretary General Alain Gauthier that Sikh students are now allowed to wear their kirpan to school provided that it does not endanger the safety of others. Problematic cases are dealt with on an individual basis as they arise and there is no set rule as to how the kirpan must be worn.

Adler v Ontario (1996)

The entrenchment of the ideal of multiculturalism in the *Charter* was less successful in securing positive entitlements than protecting negative freedoms for religious groups. The Supreme Court made that clear in its decision in *Adler v Ontario* (1996). At issue in this case was the constitutionality of Ontario's *Education Act, 1990* which provided direct funding only to the province's secular public school system and the separate Roman Catholic school system, as well as of *Regulation 552, 1990* of the Ontario *Health Insurance Act* which provided for special education programs only for disabled children attending taxpayer funded schools. By not funding independent religious schools, both policies were challenged on the ground that they violated freedom of religion and the right to equality, protected respectively by sections 2(a) and 15 of the *Charter*. Of the nine judges who heard the case, eight upheld the validity of the *Education Act* and seven, that of the Ontario *Health Insurance Act* regulation.

The majority⁹, led by Justice Iacobucci, explained that section 93 of the *Constitution Act, 1867* which guarantees the right of denominational schools, such as the Roman Catholic schools in Ontario, was the result of a political compromise that enabled Confederation. As established in *Reference Re Bill 30* (1993), it was thought to constitute a comprehensive code that could not be enlarged by other parts of the constitution, such as section 2(a) and 15 of the *Charter*. The majority supported this argument by invoking *Mahe v Alberta* (1990) in which section 23, pertaining to minority linguistic rights, had also been held to be a comprehensive code protected from the operations of other sections of the *Charter*. In *Mahe*, Chief Justice Dickson had declared: "[Section 23] 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" (para 27). Accordingly, the majority in *Adler* decided that denominational rights were thought to grant a special status to Roman Catholics, but that these rights could not be extended to other religious groups. Further, the rights of Roman Catholics could not be abrogated by other rights and freedoms, as provided by section 29 of the *Charter*. Relying again on *Reference re Bill 30*, the majority also held that public schools were an integral part of the comprehensive code of section 93 of the *Constitution Act* and were thus immune from *Charter* scrutiny. Ontario's funding of the secular public school system could not be found to discriminate against independent religious schools under section 15.

Neither could the funding for special education programs be extended to independent religious schools according to the majority. Following the Ontario Court of Appeal judgment in the same case, the majority qualified the special education programs as "education services" as opposed to "health services" and consequently declared them immune from *Charter* scrutiny. In the end, the fact that the majority did not find it necessary to invoke section 27 of the *Charter* directly, suggests that it believed that the ideal of multiculturalism could not grant to every religious group the constitutional privileges granted to historical religious minorities. Implicit in the majority judgment was a preference for the status quo in which cultural differences are tolerated but not vigorously supported. This status quo was however contested by Justice L'Heureux-Dubé in her dissent.

Contrary to the majority, Justice L'Heureux-Dubé believed the *Education Act* and *Regulation 552* could be challenged under section 15 of the *Charter*. Following section 15 jurisprudence (*Andrews v Law Society of British Columbia* 1989; *Egan v Canada* 1995), she determined that both policies were discriminatory in the sense that they denied equal benefit of the law to religious groups. Not only did the law create a financial prejudice for religious groups who wanted to educate their children according to their convictions, it also prevented them from ensuring the vitality of their community of faith. Taking

⁹ The majority was formed by Chief Justice Lamer and Justices La Forest, Gonthier, Cory and Iacobucci.

into account section 27, Justice L’Heureux-Dubé judged that the preservation of the different communities of faith was important to the *Charter’s* project. Using the metaphor she developed in *Egan v Canada* (1995), she declared: “[W]e cannot imagine a deeper scar being inflicted on a more insular group by the denial of a more fundamental interest; it is the very survival of these communities which is threatened” (para 86). Her vision of multiculturalism differed greatly from that of the majority in the sense that she believed it should allow for state-funded parallel religious institutional structures.

Like Justice L’Heureux-Dubé, Justice McLachlin invoked the ideal of multiculturalism, but the latter gave it an opposite meaning. In her partial dissent, she also found the *Education Act* and *Regulation 552* to be subject to section 15 of the *Charter*. While she found both policies to be inconsistent with the equality provision, she upheld the education scheme under section 1. Most importantly, she recognized as pressing and substantial the objective of the *Education Act*, which was “the encouragement of a more tolerant and harmonious multicultural society” (para 215). McLachlin believed that free access to secular education enticed parents of all religions to educate their children within the public system. She was concerned that if the government started to fund independent religious schools, and thus reduced their tuition fees, many students now enrolled in the public system would leave it to join a school of their respective faith. The resulting school segregation, based on religion, would reduce children’s multicultural exposure and consequently their tolerance for diversity. So without directly invoking section 27, Justice McLachlin suggested that a multiculturalist approach should put the emphasis on socio-cultural integration rather than cultural retention.

Shortly after the defeat in *Adler*, the proponents of religious school funding successfully challenged Ontario’s educational policy on the basis of the *International Covenant on Civil and Political Rights, 1966* before the United Nations Human Rights Committee (*Waldman v Canada* 1999). Nonetheless, the United Nation ruling did not prompt the Ontario government to amend its education funding scheme. Eventually, certain special education services were made available to disabled children attending faith-based schools through the Ontario Health Ministry in 2000, but not those provided for children attending publicly funded schools by the Ministry of Education (Byrne 2009).¹⁰ Almost a decade after *Adler*, the Progressive Conservative Party of Ontario ran on the promise to fund religious schools in the 2007 provincial election, but it failed to garner sufficient support to form the government. To this day, faith-based separate schools, other than the Roman Catholics ones, remain unfunded by the Ontario public purse, even though they receive funding in five other Canadian provinces¹¹.

FREEDOM OF EXPRESSION

The meaning of constitutional multiculturalism was further expanded in freedom of expression cases. At issue was the constitutionality of different forms of hate propaganda, and specifically anti-Semitic hate, under section 2(b) of the *Charter* (*R v Andrews* 1990; *R v Keegstra* 1990; *Canada v Taylor* 1990; *R v Zundel* 1992; *Ross v New Brunswick School District No. 15* 1996). On the one hand, individual claimants were challenging governments’ censorship of hate speech. On the other hand, the authorities were trying to protect vulnerable groups from discrimination and emphasize the collective benefits of

¹⁰ While the Ontario government provided for nursing services, occupational therapy, physiotherapy and speech and language therapy for all disabled children, it did not provide services for children attending faith-based schools which are blind, deaf or have other learning-disabilities.

¹¹ Quebec, Manitoba, Saskatchewan, Alberta, and British Columbia provide some direct funding to independent religious schools.

establishing a tolerant society. In all these cases, section 27 of the *Charter* was invoked “in support of justificatory factors under section 1” (Small 2007). Interestingly, the Court was sharply divided on the limits that could be imposed on hate speech and two camps of judges were formed over time. Ultimately, the decisions found mostly in favour of governments’ censorship of hate speech.

Canada v Taylor (1990), *R v Keegstra* (1990) and *R v Andrews* (1990)

The Supreme Court first tackled the validity of hate propaganda in three landmark companion cases: *Canada v Taylor* (1990), *R v Keegstra* (1990) and *R v Andrews* (1990). At issue in those cases were section 13(1) of the *Canadian Human Rights Act, 1977*, which prohibited the transmission of hate messages via telephone (*Taylor* 1990) and section 319(2) of the *Criminal Code, 1985*, which outlawed the public and wilful promotion of hatred against an identifiable group (*Keegstra* 1990; *Andrews* 1990). Using a liberal approach, all the judges found that these provisions violated the freedom of expression protected by section 2(b) of the *Charter*, but disagreed on whether they constituted reasonable limits on that right under section 1.

Following the two-step analysis developed in *Irwin Toy Ltd. v Quebec* (1989), the bench established that the prohibition on hate propaganda infringed the freedom of expression guaranteed by the *Charter*. First, the judges asserted that hate speech constituted an activity that conveyed meaning and could therefore be said to have an expressive content. In that sense, it fell within the ambit of section 2(b). Second, the Court determined that the purpose of the impugned provisions was precisely to restrict freedom of expression and was thus in violation of it. Furthermore, hate propaganda could not be equated with violence, and thus be considered an exception. As per the Court, the former expressed a “meaning that [was] repugnant, but the repugnance stem[med] from the content of the message as opposed to its form” (*Keegstra* 1990: para 37). The bench also refused to invoke section 27 to support the interpretation of freedom of expression, finding it more appropriate to invoke it in support of justificatory factors under section 1.

The majority bloc, formed by Chief Justice Dickson, Justice Wilson, Justice L’Heureux-Dubé and Justice Gonthier, saved the impugned provisions under section 1. Most importantly, these provisions were found to have an important objective in a free and democratic society, that of preventing harm caused by propaganda. According to the majority, this objective was two-fold: “to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada” (*Keegstra* 1990, para 80). Greater concern was shown however for the fate of vulnerable groups than for society at large. Section 27 of the *Charter* was specifically invoked to emphasize the necessity to protect individual members of vulnerable groups. Constitutional multiculturalism was understood as “the principle of non-discrimination and the need to prevent attacks on the individual’s connection with his or her culture” (*Keegstra* 1990, para 78). Finally, the impugned provisions having satisfied the proportionality component of the *Oakes* test in all the cases, the majority of the Court upheld the anti-hate legislation, which is still valid today.

For the minority bloc, composed of Justices La Forest, Sopinka and McLachlin, the legislation did not meet the proportionality test. The main argument put forward against state censorship was its possible “chilling effect”. The minority found the impugned provisions to be “drafted too broadly, catching more expressive conduct than c[ould] be justified by the objectives of promoting social harmony and individual dignity” (*Keegstra* 1990, para 309). It was thought that the prohibition on hate propaganda would have the effect of deterring legitimate expression that is essential to the vitality of a democratic debate and the preservation of the rule of law. The minority’s logic would later prevail in *R v Zundel* (1992).

R v Zundel (1992)

Two years later, another freedom of expression case was reviewed by the Supreme Court in *R v Zundel* (1992). This time, section 181 of the *Criminal Code*, which prohibits the wilful dissemination of false news that goes against public interest, was being challenged under section 2(b) of the *Charter*. Interestingly, the previous minority bloc, joined by Justice l'Heureux-Dubé, outnumbered the previous majority bloc. The new majority held that the freedom of expression violation caused by section 181 of the *Criminal Code* could not be saved under section 1 of the *Charter*. It determined that the original objective of the impugned provision, which was "the prevention of deliberate slanderous statements against the great nobles of the realm" (*Zundel* 1992, para 45), to be anachronistic and therefore not pressing and substantial. The majority also refused the argument advanced by the minority to the effect that the purpose of section 181 of the *Criminal Code* had shifted to include the protection against harm caused by hate propaganda. The judges added that even if they did accept this "shifting purpose" as important, the limit imposed by section 181 on freedom of expression would not be able to pass the proportionality component of the *Oakes* test, for the same reasons given by the minority in *Keegstra* (1990).

In the end, section 181 of the Criminal Code was declared unconstitutional but was not repealed by Parliament. This non formal compliance, however, did not mean that the impugned provision still had the force of law following the judgment, since statutes do not have a separate meaning apart from how they are read. Sections 24(1) and 52(1) of the Constitution Act, 1982 give judicial pronouncements the force of law. For the impugned provision to be saved, the federal government would have needed to invoke the notwithstanding clause and thereby explicitly declaring it to be valid. A possible explanation for the government's inaction in this case is that it was awaiting the outcome of the next Supreme Court hate speech case. Four years later, in the case *Ross v New Brunswick School District No. 15* (1996), a unanimous decision favoured anti-defamation rights and to this day the federal government has not formally amended the *Criminal Code*.

Ross v New Brunswick School District No. 15 (1996)

The reversal of fortune of hate propaganda cases observed in *Zundel* (1992) was not final. The judicial and legislative power's general stance against hate speech was confirmed in *Ross* (1996). The appellant, Malcom Ross, was a school teacher who had publicly made anti-Semitic comments on his personal time. He was contesting, under section 2(b) of the *Charter*, a decision rendered by the New Brunswick Human Rights Commission (hereafter "NBHRC") to the effect that the school board contravened the *Human Rights Act* by continuing to employ him after he had made discriminatory comments. The decision had ordered the school board to transfer Ross to a non-teaching position and to dismiss him completely if he continued to propagate hate. In a unanimous decision, the Supreme Court held that the NBHRC's decision violated the appellant's freedom of expression, but could be upheld under section 1 of the *Charter*.

The judges stressed the importance of protecting vulnerable groups against hate speech and promoting a tolerant society under section 27 of the *Charter*, as had been the case in earlier freedom of expression cases. The NBHRC's decision which concerned a specific case and not a general rule of the *Criminal Code* nor the *Human Rights Act* could not be said to be overly broad with regards to expression and was not considered to have the "chilling effect" the minority bloc had feared in the earlier jurisprudence. Ultimately, the Court agreed with the NBHRC's decision to transfer Ross to a non-teaching position, but

refused to dismiss him from his new non-teaching position if he continued disseminating hate propaganda.

Immediately after the judgment, Ross filed a complaint to the United Nations Human Rights Committee (hereafter “UNHRC”) alleging that his transfer to a non-teaching position violated the *International Covenant on Civil and Political Rights* (*Malcom Ross v Canada*, 2000). In its decision, the UNHRC stated that “the removal of the author from a teaching position c[ould] be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance” (para 11.6).

DUE PROCESS

Section 27 was invoked to support the liberal interpretation of substantive rights in two due process cases with partial success (*R v Gruenke* 1991; *R v Tran* 1994). First, in *R v Gruenke* (1991), the appellant failed to get a religious exemption from the admissibility of incriminating evidence at trial. Second, in *R v Tran* (1994), the appellant was awarded an assistance right to an interpreter under section 14 of the *Charter*.

R v Gruenke (1991)

In *Gruenke* (1991), the appellant had been convicted of first degree murder due to the admission, as evidence, of self-incriminating confessions she had made to a pastor and lay counsellor of her fundamentalist Christian church. Adele Rosemary Gruenke was claiming that her confessions were protected confidential communications and thus inadmissible on the basis of her freedom of religion. Two concurring judgments, dismissing the appeal, were rendered.

The Court established that there existed no common law *prima facie* privilege for religious communication and that a case-by-case approach was more appropriate to determine if the evidence was admissible or not. The judges used the common law Wigmore criteria to determine if the appellant’s freedom of religion had been jeopardized by the admission of the pastor and lay counsellor’s testimonies. The necessary conditions for the establishment of a communication as privileged were defined by American jurist and expert in the law of evidence, John Henri Wigmore, as follows:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation (1961, para 2285).

The Court added that the Wigmore criteria had to be applied in light of section 2(a) and 27 of the *Charter*. These provisions would have been particularly relevant to the interpretation of the third and fourth legs of the Wigmore test. However, the bench found that Gruenke’s communication failed to satisfy the first criterion and was thus admissible at trial. According to Chief Justice Lamer, the “communications [had been] made more to relieve Ms. Gruenke’s emotional stress than for a religious or spiritual purpose” (para 40). In this particular due process case, the appellant’s interest in protecting

her relationship with her spiritual leader, on the basis of a religious privilege, was outweighed by society's interest in the search for truth.

The Wigmore criteria call for an interest balancing that allows other social concerns, such as religious tolerance, to be taken into account. In her decision, Justice L'Heureux-Dubé determined that the pastor-penitent relationship satisfied the third and fourth criteria of the Wigmore test. The claim for a religious communication privilege could thus be met in future *Charter* cases. But as the Court suggested, the establishment of such a privilege should be the prerogative of the legislative branch. Still to this day, pastor-penitent communications are only recognized as privileged in two provinces: Quebec and Newfoundland.

R v Tran (1994)

In *Tran* (1994), the appellant had been convicted of sexual assault at trial. Being a native from Vietnam with no command of the English language, the appellant had had to rely on an interpreter during the proceedings of his trial. However, deficiencies in the translation of the evidence had pushed him to question his conviction on appeal, on the basis of section 14 of the *Charter*. This constitutional guarantee provides that: "A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter". In this constitutional case, the Supreme Court had to delineate the scope of this right to the assistance of an interpreter. In a unanimous decision, the judges allowed the appeal and held that section 14 guaranteed the right to "full and contemporaneous translation of all the evidence at trial" (para 8).

Following its general approach to the *Charter* (*Hunter v Southam Inc.*, 1984), the Court decided to interpret section 14 of the *Charter* purposively. Three purposes were identified. First, the bench established that the assistance of an interpreter was based on the right of the accused to hear the case against him or her as well as the right to full answer and defence. Second, the judges believed that the right to interpreter assistance rested on the need for a fair trial. Third, the Court argued that the need to preserve Canada's multicultural heritage under section 27 of the *Charter* mandated such a right: "In so far as a multicultural heritage is necessarily a multilingual one, it follows that a multicultural society can only be preserved and fostered if those who speak languages other than English and French are given real and substantive access to the criminal justice system" (para 37). While the primary intention was the promotion of fundamental justice, the bench suggested in this case that the ideal of multiculturalism had more to do with cultural maintenance than with social equality for individuals.

In order to fulfill all these purposes, the Court concluded that "linguistic understanding" (para 39) should be the underlying principle of section 14. This meant that "a party must have the same basic opportunity to understand and be understood as if he or she were conversant in the language of the court" (Loc.cit). After having proposed a framework of analysis for determining a section 14 violation, the Justices determined that such a violation had taken place in the case at hand. Most notably, the translation given to the appellant at trial could not be qualified as continuous, precise and contemporaneous.

Consequently, the Court quashed the appellant's conviction and ordered a new trial. However, in 1997, the media noted that the appellant had never been retried for sexual assault due to administrative neglect (Canadian CP 1997). However, by that time he had been accused in a murder case in which he was eventually convicted (*R v Tran*, 2000).

CONCLUSION

To conclude, the weight given to section 27 of the *Charter* in multiculturalism jurisprudence has been moderate. The interpretive clause has been invoked in 10 out of 12 cases, and successfully so in 6 of them. Constitutional multiculturalism was effectively used as a support for interpreting liberal rights such as freedom of religion (*Big M Drug Mart*, 1985) and the right to an interpreter in court proceedings (*Tran*, 1994). The Court would most likely have reached the same decisions in these cases irrespective of section 27. This provision played a greater role as a supplement to justificatory factors under section 1. In most hate propaganda cases, the ideal of multiculturalism was upheld as a competing claim against freedom of expression (*Andrews* 1990; *Keegstra* 1990; *Taylor* 1990; *Ross* 1996).

Of significance, is the fact that constitutional multiculturalism was unsuccessful in extending to cultural minorities the positive entitlements granted politically to official language minorities and denominational minorities (Small 2007; Bottos 1988; DaRe 1995). In *Mahe* (1990) and *Adler* (1996), the Court refused to use section 27 of the *Charter* to extend the rights found respectively in sections 23 and 29. The multiculturalism jurisprudence thus hints to a hierarchy of rights within the constitutional edifice of Canada: “The Constitution clearly favours the Christian religions and the Anglophone and Francophone communities. The extent of s.27 seems to go only so far as to not affect the privileged relationship that the above named groups have over ‘true’ minority cultures” (Bottos 1988, 631).

What is also telling is the Court’s refusal to invoke section 27 directly while still making arguments based on Canada’s multicultural character to justify recent decisions (*Multani*, 2006; *Hutterian Brethren of Wilson Colony*, 2009). This reluctance to use constitutional multiculturalism can be explained by the judges’ fear of creating a jurisprudential slippery slope by further expanding its meaning (DaRe 1995). Instead, the bench prefers to make ad hoc decisions. Another possible explanation for this unwillingness to use section 27 is the fact that this provision is not subjected to the notwithstanding clause found in section 33¹² of the *Charter*.¹³ By not making explicit references to section 27, the Court is perhaps suggesting that the political branch should have the last word on some multiculturalism issues. As it turns out, judicial pronouncements on constitutional multiculturalism seem to have mirrored the ideology behind the official multiculturalism policy.

While the weight given to section 27 has been moderate in the *Charter* jurisprudence (Bakht 2009), the meaning given to multiculturalism has been coherent. Overall, the multiculturalism jurisprudence, as well as its reception by governmental authorities, has tended to promote liberal pluralism with its emphasis on liberal neutrality, its refusal to see cultural diversity as a ground for entitlement and its plea for a tolerant society.

First, liberal neutrality seems to have prevailed in religious exemption cases. In *Big M Drug Mart* (1985), the Supreme Court of Canada invalidated a law whose purpose was compulsory religious observance. The Justices’ refusal to uphold liberal neutrality in *Edward Books and Art* (1986), by maintaining a Sabbatarian law with said beneficial secular effects, was ultimately counteracted by Queens Park. The

¹² Section 33 of the *Charter* provides that “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter”.

¹³ Dale Gibson questions whether it is relevant that section 27 is not subjected to section 33: “[Section 27] requires only that the Constitution be interpreted in a certain manner. If Parliament or a legislature did opt out of the relevant substantive rights, there would be nothing left to be ‘interpreted’ under section 27” (1990: 592).

promotion of a net separation between Church and state was also accompanied by a view of state neutrality as benign.¹⁴ The bench's intent to treat every individual equally pushed it to reject the Hutterites claim for an exemption from the universal photo requirement (*Hutterian Brethren of Wilson Colony*, 2009). While the Court suggested that in certain cases, religious communications could be privileged, it refused to grant them a *prima facie* privilege (*Gruenke*, 1991). A possible exception to the upholding of liberal neutrality under the *Charter* has been the exemption granted in *Multani* (2006). In this case, the Court recognized that deep cultural differences, such as the necessity for Sikhs to wear a kirpan, had a place in the public domain even if they disturb majoritarian mores. Yet, the negative freedom given in *Multani* was to be exercised individually and did not imply a positive entitlement.

Second, the ideal of multiculturalism has not been interpreted as favouring positive state entitlements. In *Adler* (1996), the Court refused to amend Ontario's educational scheme to provide public funding to independent religious schools as well as for certain of their educational services. Even though the province debated the possibility of changing this scheme, it decided to keep it. It is likely that the funding of parallel education institutions for cultural minorities would have contributed to a greater social segregation which runs counter to liberal pluralism. But in Canada, "multiculturalism within a bilingual framework" requires cultural minorities to integrate within the French or English linguistic community. Eventually, Ontario did make accessible some publicly funded special educational services for disabled children attending faith-based schools, but this simply had the effect of guaranteeing the equality of social benefits for individuals and not for specific cultural groups. As for the decision in *Tran* (1994), it did warrant publicly funded interpretation in court proceedings for those who do not have command of one of Canada's official languages. Nevertheless, the aim here was not the promotion of a parallel institutional structure but rather ensuring that every individual had the means to participate fully in society, despite linguistic differences. Accordingly, Robert J. Currie argues that the constitutionalization of multiculturalism has brought greater fairness and equity within in the judicial system for cultural minorities (2007).

Third, constitutional multiculturalism has stressed the need for a more tolerant society. The safeguarding of hate speech censorship by the Court in most freedom of expression cases (*Andrews*, 1990; *Keegstra*, 1990; *Taylor*, 1990; *Ross*, 1996) reveals the importance of protecting vulnerable groups from discrimination and of reducing racial tensions in Canada. More importantly, it recognizes that each individual, irrespective of group affiliation, is entitled to equal respect and dignity (DaRe 1995). Though the majority of Justices struck down anti-propaganda legislation in *Zundel* (1992) by a margin of one vote, it was maintained by the federal government. This objective of tolerance was also omnipresent throughout non freedom of expression cases. Notably in *Multani* (2006), the bench suggested that permitting kirpans in schools would demonstrate the value of religious tolerance to students. Also in *Adler* (1996), Justice McLachlin saw in the promotion of the secular public school system, to the detriment of independent religious schools, a way to encourage cultural diversity in the public system and thus foster tolerance among students.

¹⁴ For a similar earlier view, see (Smithey 2001)

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