SECTION 27 OF THE CHARTER: MORE THAN A "RHETORICAL FLOURISH"

DALE GIBSON*

Professor Gibson investigates how, under the Canadian Charter of Rights and Freedoms, *Canadian society has started to move away from the traditional bilingual and bicultural emphasis which has heretofore characterized Canadian culture, and toward a bilingual and multicultural emphasis, reflecting the spirit of section 27 of the* Charter *Professor Gibson argues that the canon of interpretation in section 27, which mandates that the* Charter *be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians, has affected the judicial interpretation of a number of sections of the* Charter. *The author concludes by noting that although section 27 enhances Canada's cultural diversity, it does not displace the two traditionally emphasized languages and cultures from their positions of primacy.*

Le Professeur Gibson examine comment, sous la Charte canadienne des droits et libertés, *la société canadienne a commencé à s'éloigner de la primauté traditionnelle accordée au bilinguisme et au biculturalisme, jusqu'ici caractéristique de sa culture, pour évoluer vers un point de vue du bilinguisme et du multiculturalisme qui est fidèle à l'esprit de l'article 27 de la* Charte. *Selon le Professeur Gibson, la règle d'interprétation énoncée à l'article 27 et prescrivant que "toute interprétation [de la* Charte] *doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens", a influé sur l'interprétation judiciaire d'un certain nombre d'articles de la* Charte. *En conclusion, l'auteur note que, bien que l'article 27 favorise la diversité culturelle au Canada, il ne fait pas perdre aux deux langues et cultures prééminentes le rang qui est traditionnellement le leur.*

TABLE OF CONTENTS

I. INTRODUCTION

For many years the only form of cultural pluralism officially recognized in Canada was biculturalism. The focus was on the French/English and Protestant/Catholic dichotomies. It may have been Lord Durham, who came to Canada in 1838 to investigate the causes of civil unrest, who was first responsible for that focus. He reported finding two cultures (he called them "nations") "warring in the bosom of a single state."[1] If he gave any consideration to native Indian culture, or to the cultures of immigrant minorities that were already present in significant numbers in British North America,[2] there is no indication of it in his Report. This oversight may have been fortunate, given

* Professor, Faculty of Law, University of Manitoba; Belzberg Visiting Professor of Constitutional Studies, University of Alberta, 1988-90.

1. G.M. Craig (ed.), *Lord Durham's Report*, (Toronto: McClelland and Stewart, 1963) at 23.
2. The Quakers, Amish, Mennonites, and American Blacks who had settled in Upper Canada, for example. See: G.E. Dirks, *Canada's Refugee Policy*: indifference on opportunism? (Montreal: McGill-Queen's University Press, 1977) at 17-23.

that his proposal for ending the "war" between the two cultures which he did notice was that the lesser should be assimilated by the greater.

A similarly simplistic approach to cultural matters was taken by those who drafted Canada's Constitution, the *British America Act*, in 1867. The language rights protected by section 133 of that Act were restricted to English and French, and the guarantee of denominational schools in section 93 referred only to the Roman Catholic and Protestant faiths. Native Indians were mentioned (s.91(24)), but solely as objects of federal legislative jurisdiction.

When the Royal Commission on Bilingualism and Biculturalism was established nearly a century later, and more than 125 years after the Durham Report, the familiar dichotomous assumptions prevailed. Those assumptions were punctured, however, by the Commission's Report, which revealed that if Canada ever was a truly bicultural society, it had been in the distant past. The failure of Durham's proposals to integrate the French culture with the English, along with heavy immigration of "others", and a gradual reassertion of aboriginal cultural values, had long since displaced biculturalism with a vibrantly multicultural society.[3]

The self-transformation of the "B & B" Commission (Bilingualism and Biculturalism) into what was, in effect, a "B & M" Commission (Bilingualism and Multiculturalism) had major ramifications for Canada's cultural policy, and ultimately for its Constitution.[4] The Trudeau government adopted a policy of "multiculturalism within a bilingual framework" in 1971,[5] and although neither that policy nor the Commission's recommendations upon which it was based included constitutional components, it was not long before there was official talk of recognizing or protecting Canada's multicultural makeup in the Constitution. In 1972, for example, the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada recommended that a new Constitution should acknowledge, as "objectives", the development of "a bilingual and multicultural country",[6] and a "pluralistic" mosaic.[7] When the Government of Canada made its first attempt to patriate the Constitution unilaterally in 1978, the measure referred, as an "aim" of the

---

3. *Report of the Royal Commission on Bilingualism and Biculturalism, Book 4: The Cultural Contribution of Other Ethnic Groups* (1969). The Report did continue to reflect a bicultural approach in some respects, however. It asserted, for example, that "British and French cultures" should "dominate in the public schools": *Ibid.* at 137.

4. See, M.R. Hudson, "Multiculturalism, Government Policy and Constitutional Enshrinement — A Comparative Study," in Canadian Human Rights Foundation, *Multiculturalism and the Charter: A Legal Perspective* (Ontario: Carswell, 1987) at 59, for an excellent review of the historical development. The same book contains several other useful essays on s.27 of the Charter.

5. Canada, House of Commons, *Debates*, October 8, 1971.

6. *Minutes of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada*, (1972), rec. 3. At p. 2 of its Report the Committee was explicit in rejecting biculturalism:

> "The Committee rejects the theory that Canada is divided into only two cultures, not because we do not wish to give full protection to the rights of the French-speaking citizens, but because the concept is too confined to do justice to our reality as a people. In the sociological sense most would agree that there is a French-speaking Canadian nation, but there is no single English-speaking nation in the same sense. In the face of this cultural plurality there can be no official Canadian culture or cultures."

7. *Ibid.* rec. 5.

Canadian Confederation, to "equal respect for the many origins, creeds and cultures" that form Canadian society.[8]

When the Resolution that eventually evolved into the *Canadian Charter of Rights and Freedoms* was introduced in Parliament in October, 1980, however,[9] it made no reference to multiculturalism, other than by vaguely acknowledging aboriginal rights and existing rights for unofficial languages, and by providing constitutional protection against discrimination. The English and French languages, moreover, were to have greater rights than ever before.

The absence of any direct reference to multiculturalism was noted and criticized by many of the individuals and groups that made representations to the Special Joint Committee of Parliament which studied the Resolution. One observer has calculated that almost one-quarter of the 100 witnesses heard by the Committee commented on the issue of multiculturalism, and that the great bulk of them favoured some constitutional recognition of multiculturalism.[10] Similar sentiments were expressed, on behalf of the Conservative Party of Canada, by Mr. Jake Epp.[11] In response to these demands, then Minister of Justice Jean Chrétien introduced an amendment to the Resolution, which ended up as section 27 of the enacted *Charter*:[12]

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

By happy coincidence, the section number is the same as that of the Article in which the *International Covenant on Civil and Political Rights* affirms the right of "ethnic, religious or linguistic minorities" to "enjoy their own culture, to profess and practice their own religion, or to use their own language."

The form in which the *Charter*'s recognition of Canada's "multicultural heritage" is expressed is worth noting. Most witnesses before the Joint Parliamentary Committee who supported a multicultural clause suggested one of two forms: either a preambular reference, which would have had only interpretative significance, or a substantive guarantee of protection in the body of the *Charter*.[13] The form chosen was of a third type: a clause in the body of the *Charter* that is interpretative rather than substantive in nature.

Some commentators appear to regard section 27 as a distinct substantive right. Professor Gerald Gall has suggested, for example, that because section 27 is not one of the provisions that may be opted out of by a legislative "notwithstanding" clause under section 33 of the *Charter*, it could provide fallback protection for cultural rights if a government chose to opt out of such basic

---

8. *Constitutional Amendment Bill*, C-60, s.4.
9. Canada, House of Commons, *Proposed Resolution for a Joint Address to Her Majesty Respecting the Constitution of Canada*, October 6, 1980.
10. Hudson, *supra*, note 4 at 73-4.
11. Canada, *Proceedings of Special Joint Senate-House of Commons Committee on the Constitution of Canada*, 1980, 14:70.
12. *Ibid.* 36:18.
13. See, for example, the exchange between Mr. Epp and Mr. M. Malichi from the Canadian Polish Congress, *ibid.* 9:113; and that between Mr. I. Waddell and Mr. Kiesewalter of the German/Canadian Committee on the Constitution, *ibid.* 26:47, as to suggestions for a substantive right. Proposals for preambular recognition were made in statements made by Messrs. De Jong (*ibid.* 8:42) and Lapierre (*ibid.* 23:29).

cultural safeguards as the fundamental freedoms of religion, expression, or association entrenched in section 2, or the equality guarantee enshrined in section 15.[14] It is difficult, however, to see how section 27 could be so employed by a court. That section 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.

If observers like Professor Gall attribute too much significance to section 27, there are some who give it too little. Professor Hogg, for instance, has dismissed section 27 as a "rhetorical flourish",[15] and has not included a single reference to it in his general treatise on the Constitution.[16] There has already been enough judicial use made of section 27 to demonstrate that Professor Hogg has seriously underestimated the importance of the provision.

Although section 27 is no more than an interpretative aid, it should not be denigrated on that account. Interpretation, whether of statutes, contracts, common law principles, or constitutional rights, is central to the judicial function. A respected legal scholar has observed that: "Hardly any form of words can be thought of which is not, in some circumstances, ambiguous and requiring interpretation."[17] It is in the resolution of such ambiguities that much of the judiciary's power to shape the law resides.

The importance of section 27 is that it is the only explicit instruction to judges within the Constitution (apart from the general freedoms of conscience, religion, expression, and association in section 2, and the protection from discrimination in section 15) to choose constitutional interpretations that favour diversity in cultural matters. Without section 27, parts of the Constitution would have strong monolithic or (more often) duolithic overtones. Entrenched language rights are restricted to the French and English languages, for example, apart from the right under section 14 of the *Charter* to an interpreter in legal proceedings. The right to operate denominational schools, provided by section 93 of the *Constitution Act, 1867* and its post-Confederation equivalents, refers explicitly to Roman Catholic and Protestant schools only. Recognition of "the supremacy of God" in the *Charter*'s preamble might be taken to restrict guaranteed rights of religion and conscience to monotheistic beliefs. Section 27, which calls for interpretations that do not derogate from the preservation and enhancement of Canada's multicultural heritage, provides an important counterbalance to such restrictive inferences.

---

14. G.L. Gall, "Multiculturalism and the Fundamental Freedoms: Section 27 and Section 2," in *Multiculturalism and the Charter, supra*, note 3 at 37. Professor Gall is not alone in taking this expansive view of section 27. There is, for example, a comment by McLachlin J.A. in *Re Andrews and the Law Society of British Columbia*, [1986] 4 W.W.R. 242 (B.C.C.A.), in which section 27 is described as a "cultural right."

15. P.W. Hogg, *Canada Act 1982: Annotated* (Toronto: Carswell, 1982) at 72.

16. P.W. Hogg, *Constitutional Law of Canada (2nd ed.)*, (Toronto: Carswell, 1985).

17. D.M. Walker, *The Oxford Companion to Law*, 1980, at 644.

Because "culture" is such a many-faceted thing,[18] section 27 has a useful role to play in the interpretation of a wide range of constitutional rights. Several of the more important constitutional rights that could be, or have already been, influenced by a "multicultural" approach to interpretation will be discussed below.[19]

II. FREEDOM OF CONSCIENCE AND RELIGION

The first major reliance upon section 27 by the Supreme Court of Canada occurred in *R.* v. *Big M Drug Mart Ltd.*,[20] in which the Court found the uniform Sunday closing requirements of the federal *Lord's Day Act* to contravene the freedoms of conscience and religion under section 2 of the *Charter*. In the course of so holding, Mr. Justice Dickson made the following remarks about section 27 on behalf of a majority of the Court:[21]

> I agree with the submission of the respondent 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. To do so is contrary to the expressed provisions of s.27, which as earlier noted reads:
>
> '27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.'
>
> As Mr. Justice Laycraft wrote (at p. 326 C.C.C., p. 137 D.L.R., p. 642 W.W.R.): 'Whatever the origins of the division of belief, it is indisputable that there can now be seen among Canadians different deeply held beliefs of religion and conscience on this subject. One group, probably the majority, accepts Sunday as the Lord's Day. Another group consisting of those of the Jewish faith, and Sabbatarians whose religious beliefs do not accept Sunday as a Lord's Day distinct from sabbath on the seventh day of the week, believe in Saturday as their holy day. Canadians of the Muslim religion observe Friday as their holy day. Some Canadians who have no theistic belief, while perhaps accepting the concept of a day for rest and recreation, object to the enforcement of a Christian Sunday.'

---

18. In *R.* v. *W.H. Smith Ltd.*, [1983] 5 W.W.R. 235 at 258, Judge Jones of the Alberta Provincial Court adopted the following definition of "culture" from the 1964 edition of Webster's Third New International Dictionary:

> ". . . the total pattern of human behaviour and its products embodied in thought, speech, action, and artifacts and dependent upon man's capacity for learning and transmitting knowledge to succeeding generations through the use of tools, language, and systems of abstract thought. . . . The body of customary beliefs, social forms, and material traits constituting a distinct complex of tradition of a racial, religious, or social group . . . that complex whole that includes knowledge, belief, morals, law, customs, opinions, religion, superstition, and art . . ."

The startling assertion by O'Sullivan J.A. of the Manitoba Court of Appeal in *Reference Re Public Schools Act* (6 February 1990) [unreported] per O'Sullivan at 19-20, that:

> "There is no such thing as the French-Canadian culture, just as there is no such thing as the English-Canadian culture."

might be considered, out of context, to argue for a narrower definition of "culture" under s.27. His intention appears, however, to have been only to reject the concept of *monolithic* linguistic cultures:

> "It is not the case that there is one Francophone culture and a multiplicity of Anglophone cultures."

This passage is discussed more fully below, text associated with notes 47-9.

19. See also, D. Bottos, "Multiculturalism: Section 27's Application to Charter Cases-Thus Far" (1988) XXVI Alta. L. Rev. 621.
20. (1985), 18 D.L.R. (4th) 321 (S.C.C.).
21. *Ibid.* at 354-55.

> If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.

Mr. Justice Dickson made passing reference, in the same case, to the rights of nonbelievers:[22]

> Equally protected, and for the same reasons, are expressions and manifestations of religious nonbelief and refusals to participate in religious practice.

Although he did not say so explicitly, it is likely that this expansive definition of freedom of conscience for nonbelievers was also nourished by the existence of section 27.

Provincial Sunday closing legislation, enacted with a view to social rather than religious purposes, was upheld by the Supreme Court of Canada in *Edwards Books and Art Ltd.* v. *The Queen*.[23] The Ontario Court of Appeal, which had held the legislation to be valid, but inapplicable to those who genuinely observed a different Sabbath, had relied upon section 27 to support the special exception:[24]

> Section 27 determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where different religious practices are recognized as permissible exceptions to otherwise justifiable homogeneous requirements.

The Supreme Court of Canada also relied upon section 27. Wilson J., dissenting, agreed with the Court of Appeal's approach, including their resort to section 27 to shield those who celebrated a non-Sunday Sabbath from the application of the Act. While the majority of the Court was of the view that the exceptions created by the Act for small businesses offered sufficient protection for minority interests, it also referred to section 27 as a basis for taking those minority interests into account.

A considerably different attitude to religious pluralism was reflected in a decision of the Ontario Divisional Court in *Re Zylberberg*,[25] dismissing a Charter challenge to Ontario School Regulations providing for religious exercises in public schools. The exercises, which were of a predominantly, but not exclusively, Christian character, were objected to by a group of parents, some of whom were Muslims, some Jews, some nonbelievers, and some Christians who felt that education should be nonsectarian. They based their challenge on sections 2(a) (freedom of conscience and religion) and 15 (equality) of the *Charter*, supplemented by section 27. Although the decision of the Divisional Court was subsequently overturned by the Ontario Court of Appeal, its treatment of section 27 and related matters deserves discussion precisely because it was rejected by the higher court.

O'Leary J., who wrote for the majority of the Divisional Court, drew attention at the outset of his reasons for judgment to both section 27 and the recognition in the preamble to the *Charter* of "the supremacy of God."[26] He appears, however, to have given much more emphasis to the preambular statement than to section 27. In rejecting the argument that freedom of religion was

---

22. *Ibid.* at 362.
23. (1986), 35 D.L.R. (4th) 1 (S.C.C.).
24. Sub nom. *R.* v. *Videoflicks Ltd.* (1984), 14 D.L.R. (4th) 10 (Ont. C.A.).
25. (1986), 29 D.L.R. (4th) 709; rev'd, (1988), 52 D.L.R. (4th) 577 (Ont. C.A.).
26. *Ibid.* at 716.

offended by the provision, he distinguished the *Big M* case, pointing out that in this situation noone was compelled to participate in excercises if they did not wish to do so, and that, in his opinion, any inconvenience to the non-participating children was not sufficiently substantial to constitute a violation of constitutional rights. In any event, he held, any violation that might have occurred was a "reasonable limit" of a type permitted by section 1 of the *Charter*.[27] He justified the limit as follows:[28]

> Our schools have an obligation to teach morality. While some may argue that morality can be taught without associating it with God, few would deny that in the minds of most persons morality and religion are intertwined and that to associate God and morality is an effective way of teaching morality. In my view, it is as true today as it was in 1950 when these words appeared in the Hope Commission Report on Education in Ontario that 'religion and morality, though not sectarianism, must have a central place in any system of education.
>
> . . . . .
>
> In a country whose constitution is founded on the supremacy of God, but where regular church attendance is the exception rather than the rule, care must be taken not to put unnecessary obstacles in the way of the school's bringing our children into touch with God by prayer, reflection and meditation as a means of instilling in them the morality required for social order and individual happiness.

The claim that equality rights were violated by the religious exercises requirement was rejected on the ground that the material used for the religious exercises was nonsectarian, being representative of a broad range of religious beliefs. While it was acknowledged there might be an interference with the rights of non-believers, this too was found to constitute a "reasonable limit" under section 1:[29]

> I am satisfied that [the regulation] does not require or encourage religious discrimination so far as believers are concerned.
>
> Nonbelievers, on the other hand, may argue that the mere holding of religious exercises gives believers an opportunity to reinforce their beliefs that is not afforded nonbelievers. If this is religious discrimination then it constitutes a reasonable limit or infringement under section 1 of the *Charter* . . .
>
> Where a country is founded on the principle of the supremacy of God there is no obligation on the schools to spend the same effort reinforcing the belief of nonbelievers that God does not exist as in teaching believers about the nature of God. Religious exercises for those who wish to take part, in the absence of any attempt to support the proposition God does not exist is no more than a reasonable limit, prescribed by law, reasonably justified in a free and democratic society, on the right of a nonbeliever to equal educational benefit.

The preference given by Mr. Justice O'Leary to the *Charter*'s preambular monotheism over section 27's mandatory direction to recognize multiculturalism (which he never mentioned again after the first reference, by the way) was disturbing to those who, like the writer, think that section is entitled to more legal significance than the preamble.

The Ontario Court of Appeal rejected this misallocation of priorities when it reversed the ruling of the Divisional Court.[30] In striking down the impugned regulations as a violation of religious freedom under section 2(a) of the *Charter*,

---

27. *Ibid.* at 720.
28. *Ibid.* at 720-21.
29. *Ibid.* at 723.
30. (1988), D.L.R. (4th) 577 (Ont. C.A.). The British Columbia Court of Appeal reached a similar conclusion in *Re Russo* (1989), 62 D.L.R. (4th) 98 (B.C.C.A.). It chose to base its conclusion solely on s.2(a) of the *Charter*, and explicitly declined to comment on the effect of s.27; at 101.

the majority of the Court of Appeal pointed out the subordinate role preambles play in both statutory and constitutional interpretation:[31]

> Counsel for the board submitted that s.28(1) of the Regulations was consistent with the preamble of the *Charter* which declares:
>
> > . . . *Canada is founded upon principles that recognize the supremacy of God and the rule of law.*
>
> It is a basic principle in the construction of statutes that a preamble is rarely referred to and, even then, is usually employed only to clarify operative provisions which are ambiguous. The same rule, in our view, extends to constitutional instruments. There is no ambiguity in the meaning of s.2(a) of the *Charter* or doubt about its application in this case. Whatever meaning may be ascribed to the reference in the preamble to the "supremacy of God", it cannot detract from the freedom of conscience and religion guaranteed by s.2(a) which is, it should be noted, a "rule of law" also recognized by the preamble.

Although its decision on the substantive issue before it was based primarily on section 2(a) of the *Charter*, the Court of Appeal also relied on section 27, to negate the argument that the regulations about religious exercises were "good for minority pupils":[32]

> [A] psychologist in supporting the Board's case — said that it was salutary for minority pupils to confront "the fact of their difference from the majority". This insensitive approach, in our opinion, not only depreciates the position of religious minorities but also fails to take into account the feelings of young children. It is also inconsistent with the multicultural nature of our society as recognized by s.27 of the *Charter* . . . .

A case in which section 27 appears to have been given short shrift, though perhaps for better reason than by the Divisional Court in *Zylberberg*, is *Hothi* v. *R.*[33] This was a ruling that Sikh persons may not bring their traditional Kirpans into the courtroom. A Kirpan is a short knife which Sikh men are under a religious obligation to wear. Although purely symbolic in purpose, Kirpans are physically capable of being used as weapons. For that reason, Dewar C.J. ruled that a Provincial Court judge was justified in excluding Kirpans from the courtroom. Any violation of the religious rights of the individuals affected was, he held, a reasonable limit under section 1 of the *Charter*. Although section 27 was raised, together with the religious freedom section of the *Charter*, Dewar C.J. made no reference to it in his reasons for judgment.

It is doubtful that the *Hothi* case should be interpreted as a putdown of section 27. It is no more, I think, than a finding that freedom of religion, even when reinforced by section 27, does not justify practices which a court views as imposing risks on persons outside the faith in question. The decision can be usefully contrasted with *Bearshirt* v. *The Queen*[34], in which Dea J. of the Alberta Court of Queen's Bench allowed a native person to have a prayer bundle in his jail cell despite the fact that it contained items that could possibly have been used to harm others. The risk was not apparently regarded as significant. Although the judge mentioned only the right of religious freedom, it is not unlikely that the existence of s.27 in the *Charter* influenced his interpretation of that right.

---

31. *Ibid.* at 593.
32. *Ibid.* at 592-3.
33. [1985] 3 W.W.R. 256 (Man. Q.B.); Aff'g 35 M.R. 159 (Man. C.A.).
34. [1987] 2 C.N.L.R. 55 (Alta. Q.B.).

III. EQUALITY RIGHTS

Section 27 will probably have its greatest influence with respect to the "equality rights" guaranteed by section 15.[35] The concept of equality is sometimes equated with "sameness". By that standard it could be contended that equality is achieved by making everyone observe a Sunday Sabbath, or by ensuring that all schools have uniform curricula. In a pluralistic society, however, true equality involves more than sameness; it requires equal respect and reasonable accommodation for the differing values and needs of the many groups that make up the society. So far as cultural differences are concerned, section 27 confirms that it is a pluralistic conception of equality that has been entrenched in the *Charter*.

While the *Big M* case[36] did not deal directly with section 15 of the *Charter*, the reasons for judgment of Mr. Justice Dickson, on behalf of the majority of the Supreme Court of Canada, clearly indicate an acceptance of a pluralistic approach to equality. In the course of striking down the *Lord's Day Act* as a violation of the freedom of religion of those who do not share the tenets upon which the legislation was founded, Dickson J. commented, as a prelude to his earlier quoted remarks about section 27, that: "A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct."[37] Later in his reasons he rejected the view expressed by a member of the Court in a pre-*Charter* case that "religions are on a footing of equality". He continued as follows:[38]

> The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

An interesting use of section 27 to provide a cultural context within which to examine the equality guarantee under section 15 occurred in two decisions relating to juries in the Northwest Territories. The judges' reasoning was closely connected to the cultural makeup of northern communities, and drew heavily upon section 27 of the *Charter* for support. In *R.* v. *Punch*,[39] De Weerdt J. made the following comments in the course of striking down a law that called for six person juries in the Northwest Territories in cases where juries of twelve would be used elsewhere in Canada:[40]

> Having come down to us through the centuries as part of our multicultural heritage, though modified over the last hundred years in the Territories, the jury of twelve deserves to be considered . . . (in the context of) section 27 . . . . It cannot be said that the modern jury, be it one of six or twelve, is part of the indigenous aboriginal cultures of the Northwest Territories. However, the ancient traditions of mutual consultation, reliance upon the wisdom of the elders, and community decision making, are not essentially foreign to . . . the criminal trial jury. The jury as an institution allows for a measure of mutual consultation and com-

---

35. See: Clare F. Beckton, "Section 27 and Section 15 of the Charter" in *Multiculturalism and the Charter*, *supra*, note 4 at 1; J. Woehrling, "Minority Cultural and Linguistic Rights and Equality Rights in the Canadian Charter of Rights and Freedoms" (1985) 31 McGill L.J. 50. As to equality rights under the Charter generally, see, Dale Gibson, *The Law of the Charter: Equality Rights*, (Calgary, Alberta: Carswell, 1990).

36. *Supra*, note 20.

37. *Ibid.* at 353.

38. *Ibid.* at 362.

39. (1986), 22 C.C.C. 289 (N.W.T.S.C.).

40. *Ibid.* at 303-305.

> munity involvement in decision making . . . and can therefore be recognized as fostering continuation of this important element of our indigenous aboriginal cultures within our criminal justice system . . .
>
> . . . . .
>
> (The accused) should not be deprived of a jury of twelve, on the ground that such a jury will be more likely to include men and women of whom at least some may be of similar ethnic origin and background to him.

Oddly enough, section 27 and cultural considerations were relied upon by another judge of the same Court to arrive at the opposite conclusion in the second case: that a six person jury should be retained. In *R.* v. *Fatt*,[41] the Crown sought a change of venue for a criminal trial, because the community where the accused lived was so small that it wasn't possible to find a jury of twelve persons who were not related to the accused. The accused, who wanted to be tried in his own community, argued that a six person jury would be sufficient in the circumstances. Marshall J. agreed:[42]

> In the north, where a relatively homogeneous group, culturally and traditionally, lives in a distinct geographic area, the jury will fulfil its role as the conscience of the community and as an educational institute only if the jurors reflect the cultural mores of the community. . . . (Section 27) is a mandate for the preservation of the pluralistic society, and especially, it would seem, in the north, with vast distances and vast differences. It would direct us not to use the judicial system, as it were, as a tool for integration, but rather to recognize as best we can the distinct culture and community in such groups as this unique Chipeweyan of the Dene.

It is important to understand that the *Punch* and *Fatt* cases do not mean that accused persons have the right to be tried by juries composed exclusively of their cultural peers. What section 27 instructs the judges to work toward in their interpretations of the Constitution is the preservation and enhancement of a society that is culturally *diverse*, not culturally uniform. This was underlined by a decision of the Manitoba Court of Appeal, *R.* v. *Kent*,[43] in which an application by an accused native person for a jury of natives was denied. Matas J.A. pointed out that the constitutional guarantee of aboriginal rights does not encompass the right of native persons to be tried exclusively by members of the native community. He continued as follows:[44]

> Nor does section 27 . . . assist the Appellant. On the contrary, (section 27) supports the position of the Crown that every qualified citizen is entitled to be called for jury duty.

IV. LANGUAGE RIGHTS

The Ontario Court of Appeal invoked section 27 in support of its ruling, in the *Ontario Minority Language Education Reference*,[45] that the minority educational language guarantee in section 23 of the *Charter* implies the right of linguistic minorities to control the administration of educational facilities for their children. After finding that the purpose of the guarantee in section 23

---

41. [1986] N.W.T.R. 388 (N.W.T.S.C.).
42. *Ibid.* at 398.
43. (1986), 40 M.R. (2nd) 160 (Man. C.A.).
44. *Ibid.* at 175.
45. (1984), 10 D.L.R. (4th) 491 (Ont. C.A.). See also, *Marchand* v. *Simcoe County Board of Education* (1986), 29 D.L.R. (4th) 596 (Ont. H.C.).

is to permit minorities to "strengthen and develop their own cultural heritage," the Court continued:[46]

> In the light of section 27, section 23(3)(b) should be interpreted to mean that minority language children must receive their instruction in facilities in which the educational environment will be that of the linguistic minority. Only then can the facilities reasonably be said to reflect the minority culture and appertain to the minority.

When the Manitoba Court of Appeal dealt with similar questions in *Reference Re Public Schools Act*,[47] one judge, O'Sullivan J.A., took issue with the Ontario court's use of section 27 to import cultural protection into section 23. He construed the *multi*cultural thrust of section 27 as prohibiting a *bi*cultural interpretation of *Charter* rights:[48]

> As to the principle of biculturalism, it is disturbing to find the Court of Appeal of Ontario embracing that concept in face of s.27 of the *Charter*.
>
> . . . .
>
> With respect, I do not think it can be said that s.23 gives effect to the principle of biculturalism in Canada. On the contrary, the fundamental thesis of the Commission on Biculturalism was repudiated in Canada by the adoption of the principle of multiculturalism.
>
> There is no such thing as the French-Canadian culture, just as there is no such thing as the English-Canadian culture. — What has been protected by s.23 of the *Charter* is the language of the minority, not the culture of the minority. Granted that language is part of culture, it by no means follows that language is a determinative of culture. It is not the case that there is one Francophone culture and a multiplicity of Anglophone cultures. The Constitution recognizes that there may be more than one Francophone culture.
>
> . . . .
>
> The principle of monoculturalism as applied to the French-speaking people of Canada has led, in my opinion, the Ontario Court of Appeal into error. In my opinion, we must interpret s.23 in light of s.27. . . .

This line of argument involved a mistaken characterization of the Ontario Court of Appeal's position. The passage quoted above from the latter court's reasons did not assert, or even imply, a monolithic approach to French-Canadian culture; nor did it constitute an attempt to favour biculturalism over multiculturalism. It simply concluded that section 23, read "in the light of section 27", as Mr. Justice O'Sullivan contended it should be read, must be construed in a manner that will permit the greatest possible cultural benefit to be derived from minority language education. While language can admittedly be only a "part of culture," to use Justice O'Sullivan's words again, it can be a highly significant component. Recognition of the fact appears to have prompted the Ontario Court of Appeal's ruling that section 27 of the *Charter* mandates, not a *bicultural* approach to constitutional interpretation, but a construction of *all* rights that will permit them to yield, within their particular ambits, *as much cultural advantage as possible*. This led that court to find that section 23 calls for "facilities in which the educational environment will be that of the linguistic minority."

Interestingly enough, even O'Sullivan J.A., despite his discourse on multiculturalism, arrived at a similar conclusion:[49]

---

46. *Ibid.* at 528-29.

47. *Supra*, note 18. The writer was counsel in that case, contending for a generous interpretation of s.23.

48. *Ibid.* at 19-28, per O'Sullivan J.A.

49. *Ibid.* at 27, per O'Sullivan J.A.

> [Section 23(3)(b)] . . . means that distinctly-organized facilities must be made available for French-language instruction. Those facilities must be in a distinct setting, but not necessarily a separate building unless numbers also warrant such a building.

The majority of Justice O'Sullivan's colleagues on the Manitoba Court of Appeal reached the same result on that point, and Twaddle J.A., who wrote for the majority, expressly approved the contention of the Ontario Court of Appeal that:[50]

> . . . duty on the Legislature to provide for educational facilities which, viewed objectively, can be said to be of or appertain to the linguistic minority — can be regarded as part and parcel of the minority's social and cultural fabric.

O'Sullivan J.A. was the only member of the Manitoba court to consider the impact of section 27 in that connection, however.

The Supreme Court of Canada, in *Andrews* v. *Law Society of British Columbia*,[51] made use of section 27, along with certain other *Charter* provisions, to support its view that the *Charter*'s equality guarantee does not prohibit all distinctions between people:[52]

> If the *Charter* was intended to eliminate all distinctions, then there would be no place for sections such as s.27 (multicultural heritage); s.2(a) (freedom of conscience and religion); s.25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s.15(2), which states that the equality rights in s.15(1) do 'not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups . . . .

Section 27 was clearly not crucial to that conclusion, however. The same result was dictated by the other provisions cited, as well as by common sense.

V. OTHER RIGHTS

The day is still very young so far as the application of section 27 of the *Charter* is concerned. There are several types of constitutional rights with respect to which section 27 might well play a useful role, but which have not yet been judicially examined in that context. The guarantees of free expression,[53] association, and assembly under section 2 of the *Charter* could be assisted by section 27 in many circumstances. A variety of language rights are in the same situation. Educational rights under section 93 of the *Constitution Act, 1867* and its provincial equivalents could possibly also be affected by section 27.[54] Aboriginal rights under section 25 of the *Charter* are intensely cultural questions about which section 27 may well have something significant

---

50. *Ibid.* at 28, per Twaddle J.A.
51. (1989), 56 D.L.R. (4th) 1 (S.C.C.).
52. *Ibid.* at 15-16, per McIntyre J.
53. The Ontario Court of Appeal referred to s.27 when interpreting freedom of expression in *R.* v. *Andrews*, *infra*, note 58. See text associated with note 59 below.
54. See D. Schmeiser, "Multiculturalism in Canadian Education" in *Multiculturalism and the Charter*, *supra*, note 4 at 167. Section 27 applies only to *Charter* rights, so it would be directly applicable only if s.19, which states that the *Charter* is not to derogate from pre-existing denominational school rights, could be said to extend s.27 to s.93 — a doubtful proposition. As Professor Schmeiser points out, however, many *Charter* rights (conscience, religion, expression, equality, etc.) arise in educational contexts.

to say.[55] No doubt resourceful counsel will find cultural ramifications to other entrenched rights as well.

VI. REASONABLE LIMITS

An important function for section 27 will be to assist the courts in determining whether particular limits on *Charter* rights are "reasonable" and "demonstrably justifiable in a free and democratic society" within the meaning of section 1 of the *Charter*. A limitation on a constitutional right might be justified if intended to serve the purpose of protecting or enhancing the multicultural nature of Canadian society.

In *R.* v. *Keegstra*,[56] for example, section 27 was relied upon, in part, to buttress a finding by the Alberta Court of Queen's Bench that the "promotion of hatred" provisions of the *Criminal Code* do not violate the *Charter*'s guarantee of freedom of expression. That finding was later reversed by the Alberta Court of Appeal, which held that the provisions in question do contravene the *Charter*, and cannot be considered "reasonable limits", even in the light of sections 15 and 27 of the *Charter*:[57]

> I agree with . . . [the trial judge] that the promotion of hatred against the target groups can do violence to their *Charter* rights, and can cause them real injury. As I have already said, I cannot agree that the existence of ss.15 and 27 forbid Canadians from disagreeing with the ideas expressed in those [*Criminal Code*] sections. I say again therefore that to forbid the expression of an idea merely because the idea is bad is a contradiction of s.2, and not a valid object for the purposes of s.1.

The Ontario Court of Appeal has expressed strong support for the trial decision in *Keegstra*, however. In *R.* v. *Andrews and Smith*[58] it upheld the same "promotion of hatred" provisions that the Alberta Court of Appeal had struck down. The majority did so without relying on section 1 of the *Charter*, holding that restrictions like those contained in the impugned *Criminal Code* sections do not even constitute a prima facie violation of freedom of speech. In reaching that conclusion the majority judges made some use, albeit rather half-hearted, of section 27:[59]

> The wilful promotion of hatred . . . is entirely antithetical to our very system of freedom. It is perhaps not necessary to refer to s.27 of the *Charter*, which provides:
>
> > 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
>
> but if that section is to be of assistance in the interpretation of s.2(b), it can only reinforce my view that no protection is offered by s.2(b) to the conduct of the . . . [accused].

The majority also agreed, in the alternative, however, with the section 1 observations of Cory J.A., who, though not prepared to exclude racial propaganda from the prima facie ambit of free expression, was nevertheless of the view that

---

55. See D. Sanders, "Article 27 and Aboriginal Peoples of Canada" in *Multiculturalism and the Charter*, *ibid.* at 155. As Professor Sanders points out however, s.27 does not affect the more important aboriginal rights set out in sections 35 and 37 of the *Constitution Act, 1982*, because they are outside the scope of the *Charter*, and it is only the *Charter* to which s.27 applies.

56. (1984), 19 C.C.C. (3d) 254 (Alta. Q.B.).

57. (1988), 43 C.C.C. (3d) 150 at 168 (Alta. C.A., per Kerans J.A.).

58. (1988), 65 O.R. (2d) 161 (Ont. C.A.).

59. *Ibid.* at 191-2, per Grange J.A.

the *Criminal Code* provisions in question constituted "reasonable limits" under section 1. Those observations attributed considerable significance to section 27:

> Section 27 of the *Charter* provides that 'this *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians'. It is our multicultural background that gives richness, depth and vibrance to Canadian society. The *Charter* has recognized and emphasized the importance of our background by providing that the *Charter* itself is to be interpreted so as to preserve and enhance our multicultural heritage. That clause in itself gives a very clear indication that s.1 of the *Charter* should be applied in this case. The clause coupled with the Canadian multicultural heritage gives the strongest possible direction to apply s.1.[60]
>
> . . . .
>
> Multiculturalism cannot be preserved let alone enhanced if free rein is given to the promotion of hatred against identifiable cultural groups. What a strange and perverse contradiction it would be if the *Charter* was to be used and interpreted so as to strike down a law aimed at preserving our multicultural heritage by limiting in a minimal and reasonable way freedom of expression. This would be to construe the *Charter* in a manner prohibited by s.27.[61]
>
> Section 27 of the *Charter* indicates that enactments which preserve and enhance the multicultural heritage of Canada should if appropriately framed constitute a reasonable limitation upon the guarantee of freedom of expression.[62]

Another role that section 27 could play in a section 1 context would be to ensure that limits which are placed on constitutional rights do not in themselves have an unduly adverse effect on Canada's multicultural character.

VII. BICULTURALISM vs. MULTICULTURALISM

Constitutional biculturalism lives. The addition of section 27 to the *Charter* did not erase the several substantive provisions of the Constitution which mandate favoured treatment for the French and English languages, and for the Protestant and Roman Catholic religions.

Can section 27 be used as a basis for restrictive interpretations of those preferential guarantees? Could a court conclude that section 27 calls upon it to place the narrowest possible interpretation upon guarantees that give favourable preference to certain cultural groups? The answer seems, despite Mr. Justice O'Sullivan's remarks on the subject, to be "No".

In *Société des Acadiens* v. *Association of Parents*,[63] for example, Madam Justice Wilson commented, in the course of concurring with her colleagues in a decision relating to the meaning of the language guarantee in section 19(2) of the *Charter*, that section 27 should not be construed as standing in the way of laws or practices which give preferment to English and French over other languages:[64]

> I do not believe that section 27 was intended to deter the movement toward the equality of status of English and French until such time as a similar status could be attained for all the other languages spoken in Canada. This would derogate from the special status conferred on English and French in section 16.

---

60. *Ibid.* at 179.
61. *Ibid.* at 181.
62. *Ibid.* at 188.
63. (1986), 27 D.L.R. (4th) 406 (S.C.C.).
64. *Ibid.* at 457.

In the *Ontario Separate Secondary Schools Reference*,[65] the dissenting judges in the Ontario Court of Appeal contended that section 27, along with sections 15 and 2, had the effect of prohibiting any extension of special preference for Roman Catholic and Protestant separate schools, because such extensions would not be consistent with the Constitution's recognition of "the multicultural mosaic of contemporary society".[66] The majority of the Court held, however, making no reference at all to section 27, that such an extension is constitutionally valid. The Supreme Court of Canada upheld the Court of Appeal, again without mentioning section 27.[67] Madam Justice Wilson, speaking for a majority of her colleagues, commented that:[68]

> It was never intended . . . that the *Charter* could be used to invalidate other provisions of the Constitution, particularly a provision such as s.93 which represented a fundamental part of the Confederation Compromise.

One can conclude, therefore, on the basis of early results, that while section 27 will be employed to support measures which positively enhance Canada's cultural diversity, it will not be used negatively to restrict those cultural rights already given special recognition by the Constitution. Although section 27 will materially assist Canada's multicultural garden to flourish, those hardy perennials, French and English, Protestantism and Catholicism, will continue to occupy the choicest locations in the garden.

65. (1986), 25 D.L.R. (4th) 1 (Ont. C.A.).

66. *Ibid.* at 42.

67. [1987] 1 S.C.R. 1148 (S.C.C.).

68. *Ibid.* at 1197-8. As to the significance to the reference to the "Confederation Compromise", which the writer regards as surplusage, see: D. Gibson, case comment, (1988) 67 Can. Bar Rev. 142.