THE IMPACT OF THE CHARTER
on Multiculturalism



BY Catherine Christopher

AN UNDERSTANDING OF THE CANADIAN POLITICAL LANDSCAPE INVOLVES A BALANCING OF THE COMPETING AND, AT TIMES, DIAMETRICALLY OPPOSED, IDENTITIES AND INTERESTS. THESE COMPETING IDENTITIES AND INTERESTS INCLUDE THE QUEBECOIS, ENGLISH SPEAKING CANADIANS, FRENCH SPEAKING CANADIANS, ABORIGINAL PEOPLES AND THOSE WHO CONSIDER THEMSELVES TO BE OF OTHER ETHNIC ORIGIN, AND WHO ARE AT TIMES REFERRED TO AS THE DIVERSE COMMUNITY. THE BALANCING OF THESE IDENTITIES AND INTERESTS IS MORE APPARENT IN SECTION 27 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (THE "CHARTER") THAN IN ANY OTHER SECTION OF THE *CHARTER*, FOR SECTION 27 HAS SERVED TO ADVANCE THE POSITION OF A NUMBER OF COMPETING INTERESTS IN A VARIETY OF SITUATIONS. IN THE PROCESS, IT HAS CREATED ALLIANCES WHERE HISTORICALLY NONE WOULD EVER HAVE BEEN CONTEMPLATED, SUCH AS THE ALLIANCE BETWEEN MINORITY LANGUAGE EDUCATION RIGHTS AND MULTICULTURALISM OR THE ALLIANCE BETWEEN ABORIGINAL JUSTICE INITIATIVES AND MULTICULTURALISM.

Section 27 states that the *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada. Section 27 is a seemingly insignificant section in the *Charter*, included without the tremendous debate and anticipation that accompanied, for example, section 7 or section 15. Initially, section 27 was criticized and downplayed. However, over the past twenty years, it is arguable that section 27 has fulfilled its mandate. The presence of section 27 in the *Charter* has prompted the inclusion of a constitutional value of multiculturalism in subsequent proposals for constitutional reform, and it has facilitated federal and provincial legislation addressing multiculturalism. Section 27 has also brought together a diverse and seemingly unrelated cast of litigants including pastors, penitents, Athapaskan Indians, a British born lawyer, retail book, video and pharmaceutical stores, Christian and non Christian parents and those who seek to carry ceremonial daggers in provincial court to shape various *Charter* rights.

This article will discuss the impact of the *Charter* on multiculturalism since 1982. Preliminary to this, however, it is important to address the historic origins of multiculturalism and how multiculturalism came to be included in such a significant document as the *Charter*. Within the context of its historic origins, multiculturalism can be understood as an ideology that replaced the norm of anglo conformism, (Palmer, H., 1976) a federal policy and, ultimately, as a constitutional value. For the greater part of Canada's history, anglo conformism provided the benchmark, defining English speaking Canadians. This was a beneficial situation for those who really did have British origins. However, for those people who had other ethnic origins, such as people of colour, the situation was not positive. The history of Canadian civil liberties is littered with incidents of overt racism, such as the

$500.00 head tax that was imposed on Chinese immigrants in 1903 and the arrest, dispossession and internment of the Japanese Canadian living on the West Coast in the 1940s.

There were a number of intangible factors that contributed to the weakening of the strictures of anglo conformism and, ultimately, the recognition that Canada had evolved into a pluralistic society. Internationally, these factors included the wide spread horror over the concentration camps and other atrocities that arose out of racism during the Second World War and the American struggle over race relations and civil liberties. In Canada, the diverse community was growing in numeric strength and this was accompanied by increasing economic and political power.

As a result, when former Prime Minister Lester B. Pearson created the Royal Commission on Bilingualism and Biculturalism in 1964 to examine conflict between the French and English in Canada, he also directed the Royal Commission to consider the contribution of "other" ethnic groups in Canada. Book IV of the Report of the Royal Commission on Bilingualism and Bilculturalism, entitled *The Cultural Contribution of the Other Ethnic groups*, was released in 1969. Book IV made a number of recommendations, such as the recommendations that the teaching of languages other than English and be initiated in primary schools. Almost 20 years later, this recommendation was to surface in the form of the heritage languages rights provisions of the federal *Multiculturalism Act*.

In 1971, Prime Minister Pierre Trudeau introduced the policy multiculturalism to the House of Commons. The objectives of the official policy of multiculturalism were as follows: to provide financial assistance to ethnic groups to aid in growth and development; to offer assistance to members of ethnic groups to overcome barriers to full participation in Canadian society; to promote exchanges between ethnic groups to strengthen national unity; and to assist immigrants to Canada to acquire one of Canada's two official languages. A senior government official expressed the view that the government was concerned by the potentially unstable dichotomy posed by bilingualism and biculturalism, and hoped that the concept of 'unity in diversity' would provide a stabilizing factor. (Jaworsky, 1979, p. 57)

The reaction to the official policy of multiculturalism was mixed. The official policy of multiculturalism was equated with a policy of Balkanization by *Le Droit*. (October 9, 1971) Robert Bourassa, then premier of Quebec, stated that multiculturalism: "seems scarcely compatible with the facts of Quebec, where the predominant population groups is linguistically and culturally French, where a large minority is linguistically and culturally English, and where there are many minorities having other linguistic and cultural origins. In a word, with the federal government assuming responsibility for all the cultures which are to be found in Canada, Quebec must take on within its own territory the role of prime defender of the French language and culture." (Palmer, H., 1975, p. 152)) Outside of Quebec, the reaction to the official policy of multiculturalism was mixed. For example, the concern was expressed that the policy was mere window dressing that would encourage folk dancing and Easter egg painting at the expenses of the public purse. Despite these criticisms, the federal government created the position of Minister of State for Multiculturalism under the auspices of the Secretary of State. The Multiculturalism Directorate is responsible for carrying out policy initiatives at the direction of the Minister of State for Multiculturalism, such as program analysis. Subsequently, a number of provinces introduced official policies that recognized and facilitated the existence of multiculturalism within that province.

Thus, there were a number of developments, such as the weakening of Anglo conformity and the emergence of an official policy of multiculturalism, that provided a background for section 27 of the *Charter*. A review of the literature and reports surrounding the origins of the *Charter* indicate that initial drafts of the *Charter* did not include any reference to multiculturalism. However, after a number of submissions to the Special Joint Committee on the Constitution by organisations such as the Polish Canadian Association or the German Canadian Council of Kitchener Waterloo, section 27 was included in the final draft. Section 27 was criticized by a number of commentators. Some were concerned that the inclusion of section 27 was an overt political move intended to appease ethnic groups and garner their vote. This may have been the case; however, there were political undertones and covert political bargaining in any number of other proposed constitutional amendments at that time. This did not lessen the wisdom of including those sections in the constitutional reforms that were passed. Other commentators expressed concern over the wording of section 27. Section 27 is an interpretive section only. It confers no positive or absolute rights; there is no right to be or to exist in a multicultural state. The concern expressed was that, absent any substantive right to multiculturalism, section 27 would carry no weight. For example, the German Canadian Council of Kitchener Waterloo urged the Special Joint Committee to adopt the following wording: "All Canadians are guaranteed the right of choice in the preservation and development of cultural and linguistic heritage" which is considerably stronger than an interpretive statement regarding the enhancement and preservation of one's multicultural heritage. *Charter* scholars have now had the benefit of 20 years of case law to assess whether section 27 as an interpretive

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aid has been less significant than section 27 would have been as a substantive section conferring rights. With the benefit of the past 20 years, it can not reasonably be said that section 27 as an interpretive aid has carried no weight and has not had a significant impact on Canadian society. This is clear from a brief review of the case law.

Section 27 does not confer any substantive rights, (*Roach v. Canada* (1994) 113 D.L.R. (4th) 67(Ont. C.A.)) nor does it apply to private litigants. (*Saleh v. Reichert* (1993) 104 D.L.R. 384) Section 27 has been used in the interpretation of fundamental freedoms, including freedom of conscience and religion in section 2(a) and freedom of thought, belief, opinion and expression in section 2(b); equality rights in section 15; minority language education rights in section 23; and in certain legal rights, such as the right to an interpreter in one's own language. Section 27 has, in theory, the potential to advance claims for Aboriginal justice initiatives; however, Aboriginal peoples do not consider themselves, rightly, to be another ethnic group, and have not relied on section 27.

With respect to fundamental freedoms, section 27 was argued in conjunction with freedom of conscience and religion in section 2(a) in *R. v. Videoflicks*. ((1994) 5O A.C. 1) This case involved a challenge to the Sunday closing legislation, which mandated that businesses be closed on Sunday. This was offensive to those faith groups that did not adhere to the Christian understanding that Sunday was a day of worship but rather considered Saturday, for example, as a day of worship. The Ontario Court of Appeal stated that: "a law infringes freedom of expression if it makes it more difficult and costly to practise one's religion, [and this] is supported by the fact that such a law does not help to preserve and certainly does not serve to enhance or promote that part of one's culture which is religiously based." (at p. 25) *R. v. Videoflicks* has been applied in other decisions striking down Sunday closing laws, including *R. v. Big M Drug Mart*, ((1985) 1 S. C.R. 295 (S.C.C.)) *R. v. W. H. Smith* ((1983) 5 W.W.R. 235 (Alta. P. C.)) and *Edwards Books and Art Ltd. v. The Queen*. ((1987) 35 D.L.R. (4th) 1 (Ont. C.A.)) However, in *Re Zylberberg et al*, the court refused to find that Jewish and other non Christian school children's right to freedom of religion had been compromised by the *Ontario Education Act*, which compelled all children to read the Lord's Prayer. (55 O.R. (2d) 749 (Ont. H. C. J.))

Elsewhere, in *R. v. Gruenke*, the accused person argued on appeal from her conviction for first degree murder that her confession to her pastor and a lay counsellor at the Victorious Faith Centre Church was privileged and should not have been admitted into evidence, relying on the established rules of evidence. ((1991) 67 C.C.C. (3rd) 289 (S.C.C.) The Supreme Court of Canada called for a case by case analysis, as follows:

In applying the Wigmore criteria to particular cases, both section 2(a) and section 27 must be kept in mind. This means that the case-by-case analysis must begin with a "non-denominational" approach. The fact that the communications were not made to an ordained priest or minister or that they did not constitute a formal confession will not bar the possibility of the communications being excluded. All of the relevant circumstances must be considered and the Wigmore criteria applied in a manner which is sensitive to the fact of Canada's multicultural heritage. This will be most important at the second and third stages of the Wigmore inquiry. (at pp. 305 - 206)

Section 27 has been argued in conjunction with various legal rights. In *Hothi v. R.*, a Sikh person accused of assault sought to carry his kirpan, which is a four inch ceremonial dagger, into the courtroom. ((1985) 3 W.W.R. 256 (Man. Q.B.)) The judge refused to allow his application to carry the kirpan into the courtroom. On appeal, this decision was upheld by both the Manitoba Court of Queen's Bench and the Manitoba Court of Appeal, on the basis that the denial was an infringement that was justified by section 1 of the *Charter*. In *R. v. Fatt*, the accused person was an Athapaskan Indian who argued that his right to be tried for murder by a jury of his peers under the *Criminal Code* meant that the jurors who all speak his dialect. (*R. v. Fatt* (1986) N.W.T. 388 (S.C.C.))This argument was accepted by the Supreme Court of the North West Territories, which stated that section 27 was a mandate for; "the preservation of the pluralistic society and especially, it would seem in he 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 of this unique Chipewayan group of the Dene." In *R. v. Pinch and R. v. Kent, Sinclair and Gode*, the accused Aboriginal persons argued that based on section 7 and section 27, they had a right to a jury comprised of the same race, culture and language group. (*R. v. Kent, Sinclair and Gode* (1986) 21 C.R.R. 372 (Man. C.A.)) This was rejected by the Manitoba Court of Appeal on the basis that to do so would be contrary to the multicultural heritage of Canada and would result in the imposition of inequality. Section 27 has the potential to assist in the development of Aboriginal justice initiatives, although Aboriginal peoples resist any interpretation that places them within the multicultural fabric of Canadian society.

For the some of the same reasons, the relationship between official language rights enumerated section 16, minority language education rights enumerated in section 23 and section 27, is a strained one. Commentators from Quebec did not respond in a positive manner to the emergence of the official policy of multiculturalism or the inclusion of section 27 in the *Charter*. However, for those isolated and remote French language communities outside of Quebec, the situation is dire. Studies of French language communities point to such significant assimilation rates of 43.6% in Manitoba, 49.6% in Saskatchewan and 51.2% in Alberta. In *Re Societe des Acadiens du Noveau-Brunswick v. Association of Parents for Fairness in Education*, Wilson, J., in dissent, recognized this strained relationship, as follows: "I do not believe that section 27

was intended to deter the movement towards 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."

Section 27 has historically been argued in conjunction with section 23 to advance minority language education rights; however, the case law is clear that official language rights and minority education language rights are not easily reconciled with Canada's multicultural heritage. In *Mahe v. Alberta*, applicant parents sought the right to establish and supervise French language schools in Alberta. In granting the parents the right to establish and supervise schools, the Supreme Court of Canada commented on the differences between section 23 and section 27, as follows:

Section 23 provides a comprehensive code for minority language education rights; it has its own internal qualifications and its own method of internal balancing. A notion of equality between Canada's official language groups is obviously present in section 23. Beyond this, however, the section is, if anything, an exception to the provision of sections 15 and 27 in that it accords these groups, the English and the French, special status in comparison with all other linguistic groups in Canada. (1990 1 S.C.R. 342 at p. 369 (S.C.C.))

In the 1996 Supreme Court of Canada decision in *Alder v. Ontario*, section 23 and section 27 of the *Charter* were argued in support of the applicant parent's right to establish their own Christian school systems. ((1996) 3 S.C.R. 609(S.C.C.)) Partly in dissent, McLaughlin, J., (as she then was), addressed the relationship between section 23 and section 27, as follows:

The decision to fully fund public secular schools while denying any funding to independent religious schools (other than the constitutionally mandated funding for Roman Catholic schools) is at base a political decisions. Its objective, the record shows, is to foster a strong public secular school system attended by students of all cultural and religious groups. Canada in general and Ontario in particular is a multicultural, multireligious society. A multicultural, multireligious society can only work, it is felt, if people of all groups understand and tolerate each other. According to the *Shapiro Report* (Report of the Commission on Private Schools in Ontario (1985), submitted in evidence, "the public school represents... the most promising potential for realizing a more fully tolerant society. Children of all races and religions learn together and play together. No religion is touted over any other. The goal is to provide a forum fore the development of respect for the beliefs and customs of all cultural groups and for their ethnic and moral values. (at p. 718)

With respect to legislation, it was only after section 27 of the *Charter* was passed that any legislation addressing multiculturalism came into existence. In 1977, six years after the official policy of multiculturalism was introduced in the House of Commons, there was an unsuccessful attempt to introduce a reference to multiculturalism into the preamble of the *Immigration Act*. This was followed by Bill C-28, entitled *An Act Respecting Multiculturalism*. The Liberals were defeated in the 1984 general election and Bill C-48 was not passed. In 1988, six years after the *Charter* came into force and effect, *An Act for the Preservation and Enhancement of Multiculturalism in Canada*, known as *The Multiculturalism Act*, came into force.

In addition to the federal legislation, a number of provinces have passed legislation intended to facilitate multiculturalism. Legislation such as the Manitoba Inter-Cultural Council Act (Manitoba), the Saskatchewan *Multicultural Act* and the *Department of Culture and Multiculturalism Act* (Alberta), share common features by establishing an administrative framework to facilitate multiculturalism and by facilitating program development through funding and other initiatives.

What has been the impact of the *Charter* on multiculturalism from the perspective of the other ethnic groups, the diverse community whose heritage section 27 was intended to preserve and enhance? Here, it is difficult to measure the impact in any tangible manner. Some diverse communities thrive; some communities falter; identities are retained at the same time they evolve into something not likely contemplated at the place of origin. In terms of practical results, the other ethnic groups may be less concerned in an abstract way with the competing identities and interests of the Quebecois, English speaking Canadians, French speaking Canadians and Aboriginal peoples. However, the position of the other ethnic groups is shaped and perhaps enhanced, whenever section 27 is invoked.

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In terms of the perception by the other ethnic groups of the impact of the *Charter* on multiculturalism, a cartoon drawn by Frank Cotham in the December 17, 2001 edition of the *New Yorker* may be illustrative. In this cartoon, two old time prospectors are walking together, dressed in period costume and leading mules carrying their packs. One prospector remarks to the other that he out for the gold; he is not really interested in nation building. To an extent, this is representative of the impact of section 27 of the *Charter* on the other ethnic groups.

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