

The Charter and the constitutionalization of difference

“O CANADA” BACKLASH

Erik Millett was surely blindsided by the delayed reaction to a decision he made, as principal of an elementary school in New Brunswick, to discontinue the daily ritual of playing “O Canada.” He chose instead to reserve the anthem for monthly school assemblies. Oddly, it took more than a year for the change in policy to be noticed but when it was, the ensuing controversy assumed national proportions. A backlash whipped across the country and the matter was taken up in the House of Commons, where Millett’s treatment of “O Canada” was castigated as “political correctness run wild.” Closer to home, the reaction led to criminal charges when a member of the local community confronted Millett at the school and was convicted for uttering death threats.

Millett’s goal was to create an inclusive environment by accommodating parents who objected to their children’s participation in a daily anthem exercise. Not only did the school board overrule him and reinstate the ritual, but the legislature expedited a bill which now makes it mandatory for New Brunswick schools to broadcast “O Canada” every day. It might be difficult to understand

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why any Canadian, whether new to the country or not, could object to this modest gesture of respect for the anthem. Among those expressing a view, most were not troubled by the thought of compelling students to affirm the anthem, albeit passively. This incident shows that it is not obvious, as US author Toni Morrison claims, that “the function of freedom is to free someone else.”

BOUCHARD-TAYLOR COMMISSION

Nor was Millett’s experience an isolated example. In 2007, the municipality of Hérouxville, Quebec distinguished itself by adopting a resolution which prescribed “norms de vie” for the benefit of immigrants then resident or considering a move to the community. The code specified that in Hérouxville “a woman can . . . drive a car, sign cheques, dance, decide for herself . . . have a job,” and declared that “killing women in public beatings or burning them alive are not part of our standards of life.” Gratuitous

and offensive, the Hérouxville initiative prompted the Charest government to establish the Bouchard-Taylor Commission on Reasonable Accommodation of Minorities.

Since then, attention has shifted to issues such as the criminalization of polygamy and the status of head coverings. Here, there has been ample discussion of whether—and how—to accommodate those who cover their heads and faces for religious reasons, when it is important to verify their identity on voting day or to assess their credibility as witnesses in court proceedings. In sports, the question is whether Muslim girls and women who observe religious or cultural standards for dress can participate in activities such as soccer and swimming.

If the customs and habits of cultural communities are less problematic when practised in private, it is another matter when cultural, ethnic, religious, or racial minorities seek accommodation or claim an exemption from laws or obligations of general application. That is when cultural diversity and the “right” to be different bump up against the belief that all Canadians are the same in the eyes of the law, and will be treated the same way by the law.

MULTICULTURALISM AS PART OF THE CHARTER

Multiculturalism may be official government policy, but by design and deliberate inclusion it is also part of the *Canadian Charter of Rights and Freedoms*. Section 27 declares that the Charter “shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” Thus entrenched in the Charter,

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multiculturalism is a concept and a principle of constitutional dimensions, though not a right that is enforceable by the courts. That may explain why section 27 has played a minor role in the Supreme Court's interpretation of the Charter, and why there is little jurisprudence on multiculturalism *per se*.

That said, the Court should not hesitate to protect multicultural values and to constitutionalize the right to be different. Far from being relegated to the margins, multiculturalism and its values are vitally embedded in the Charter's key substantive guarantees. Section 15, which protects equality, prohibits discrimination against individuals on the basis of enumerated and analogous grounds. Elsewhere, section 2 guarantees the Charter's fundamental freedoms, including freedom of religion and freedom of expression. These entitlements provide a mandate for the protection of cultural diversity, and do so without invoking multiculturalism by name.

As a result, multiculturalism need not be disparaged as a form of special treatment for those who spurn "Canadian" values. Moreover, through these and other substantive guarantees, cultural diversity can be recognized as a fundamental value and incorporated into the bedrock of the Charter. In this way, the Charter can serve as a fresh institutional venue for the pledge, taken long ago and even before Confederation, that our democratic tradition will protect its minority communities.

THE DUTY TO ACCOMMODATE


It is unfortunate that the Supreme Court of Canada does not fully grasp the dynamic link between the Charter's rights and section 27's commitment to multiculturalism. Accommodation prevailed when a Sikh boy wore a kirpan (knife) to school, as well as when Jewish residents built a succah which was in breach of condominium rules. More recently, the Court faltered when a small community of Hutterites sought exemption from Alberta's requirement of photo

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ID for drivers' licenses. There, the chief justice stated that reasonable accommodation is a human rights concept which does not apply to the Charter. In other words, she seemed to be suggesting that the duty to accommodate is statutory, rather than constitutional, in nature. That insight led her to the conclusion that the Court should defer to the legislature on the photo ID requirement. In the circumstances, a majority of the Court chose not to exempt the Hutterites, and suggested that they make alternative arrangements for transportation.

In the years since the Charter's enactment there has been lively debate about

judicial activism, judicial overreaching, and the Charter's consequences for parliamentary democracy. Sensitive to this debate, the Court has retreated in many cases and on many issues. Challenging the limits of judicial review is a valid exercise, and there undoubtedly is a time and place for deference. But whether the enforcement of rights necessarily undermines "democracy" depends on what is meant by democracy and how its values are defined. Where constitutional rights are at stake, the case for deference surely loses force when the right to be different poses little risk of harm to the majority, and individuals or communities are only "included" on condition that they abandon cultural or religious beliefs and practices.

How alike Canadians must be, and how different they can be, to have an identity and ensure its survival are time-defying issues for this "community of communities." It is accepted that there are moments when multicultural values create dilemmas and force difficult choices. But on other occasions, resistance to cultural diversity is less principled. Unless there is a compelling reason, grounded in evidence, not to accommodate or to protect a fundamental freedom, cultural diversity and the right to be different should be protected by the Charter. That is not merely what multiculturalism aspires to, but also what the Charter requires. 



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