

## Reinvigorating Section 27: An Intersectional Approach

Natasha Bakht\*

### I. INTRODUCTION

In 2005, many lawyers, academics, and activists celebrated the 20<sup>th</sup> anniversary of the coming into force of section 15 of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> An often heard theme of the conferences and discussions that year was the disappointment that the provision had not accomplished its full potential in furthering equality. In its first equality decision, the Supreme Court of Canada recognized the vital importance of the guarantee of equality when it stated in *Andrews v. Law Society of British Columbia* that section 15 “applies to and supports all other rights guaranteed by the *Charter*.”<sup>2</sup> Madam Justice L’Heureux-Dubé has said about equality:

its pursuit requires an understanding of the historical disadvantages experienced by members of some groups, an awareness of groups’ differences and unique experiences, and sensitivity to the fact that much of the law has been designed around and for those with power and privilege. It requires that in the analysis we undertake in nearly every area of law, we consider various perspectives, think about experiences and

---

\* Assistant Professor, Faculty of Law, University of Ottawa. E-mail: nbakht@uottawa.ca I am grateful to Vanessa Gruben and Carmela Murdocca for their comments on earlier versions of this article and to Andrea Skinner for her invaluable research assistance. The comments of the anonymous reviewers were also very helpful to improving this article.

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. Section 15(1) of the *Charter* provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>2</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 34 [*Andrews*].

realities of disadvantaged groups, and examine the assumptions on which our laws and jurisprudence are based.<sup>3</sup>

It is in contemplating how equality can be most fully understood and reinvigorated in other parts of the *Charter* that this paper is written. In several recent controversies in Canada, the claims by minority groups for recognition of their diverse and deep commitments to their cultural/religious specificity have produced the reaction that multiculturalism has gone too far, that it threatens the core values of Canadian society. This construction of minority rights, necessarily in opposition to Canadian values, creates a false opposition; one that many have argued permits the demonizing of a minority group typically seeking equality, while simultaneously and uncritically putting on a pedestal Canadian law and policies that continue to perpetuate inequality for many groups in Canadian society. In this article, I argue that the protection of minority rights as articulated in section 27 of the *Charter*'s multiculturalism provision need not be understood in opposition to the protection of equality. Rather, section 27 should inform all *Charter* rights through an intersectional analysis that more readily captures the lived realities of many individuals, women in particular.

In Part II of this article, I outline the theory behind intersectionality and demonstrate the way in which intersectional interests were not taken into account by opponents and proponents of faith-based family arbitration in a recent debate in Ontario. In Part III, I provide a brief description of the way in which section 27 has been used to date, and I explain the perils of comprehending culture as merely the absence of equality. In Part IV, I outline the potential of section 27. I suggest that section 27 ought to be utilized more regularly as an interpretive section that gives additional meaning to other *Charter* rights and that this interpretation should bring an intersectional lens to any analysis. The potential of section 27 is that it may assist in mediating a middle ground when interconnected and mutually enforcing oppressions are in the balance. The Supreme Court of Canada's historical failure to bring an intersectional analysis to *Charter* rights has rendered the dream of equality unfulfilled, as the *Native Women's Assn. of Canada v. Canada*<sup>4</sup> case demonstrates. However, a more recent case, *Bruker v. Marcovitz*,<sup>5</sup> suggests that perhaps a new and nuanced understanding of

---

<sup>3</sup> Claire L'Heureux-Dubé, "Conversations on Equality" (1999) 26 Man. L.J. 273 at 279 [L'Heureux-Dubé].

<sup>4</sup> *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 [NWAC].

<sup>5</sup> *Bruker v. Marcovitz*, [2007] S.C.J. No. 54 (QL) [Bruker].

intersectionality may be emerging in the court's lexicon of equality. Finally in Part V, I briefly provide an example of how intersectionality might inform a current *Charter* case, that of polygamy, using section 27.

## II: INTERSECTIONALITY IN THEORY AND PRACTICE

A ground-breaking moment in feminist and anti-racist discourses was when, in the late 1980s and early 1990s, Kimberlé Crenshaw began to write about intersectional identities. The concept of intersectionality underlines the fact that subordination may manifest itself in multiple ways in the lives of some people. Crenshaw wrote in particular about women of colour who frequently experience racism and sexism, often in the same course of events. Her work elucidated that women of colour suffered from the effects of multiple subordinations and that political movements and institutions including the law failed to consider these intersectional dynamics.

The failure of feminism to interrogate race means that the resistance strategies of feminists will often replicate and reinforce the subordination of people of color, and the failure of antiracism to interrogate patriarchy means that antiracism will frequently reproduce the subordination of women. These mutual elisions present a particularly difficult political dilemma for women of color.<sup>6</sup>

Indeed as Crenshaw and others<sup>7</sup> have argued, the sometimes contradictory agendas of anti-racist and feminist organizing, secure in their individual silos, work to the benefit of men of colour and white women, but often let women of colour fall through the cracks of progressive politics. As Crenshaw has noted, women of colour and other

---

<sup>6</sup> Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 *Stan. L. Rev.* 1241 at 1252 [Crenshaw].

<sup>7</sup> Angela Y. Davis, *Women, Race & Class* (New York: Vintage Books, 1983); Bell Hooks, *Ain't I a Woman: Black Women and Feminism* (Boston: South End Press, 1981). In the Canadian context see for example: Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto, University of Toronto Press, 1999) at 8, 11, 62; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 *Queen's L.J.* 179 at 181, 183, 192-193; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 *CJWL* 37 at 39, 58-59; Patricia Monture-Angus, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah" in *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax, Fernwood Publishing, 1995) 11 at 20.

people who share overlapping identities are situated within at least two subordinated groups. The problem of ignoring intersectionality is not only that it disregards the “additional” issue of race or patriarchy but that feminism and anti-racism on their own are inadequate in delineating the full dimensions of racism and sexism since women of colour experience racism in ways different from men of colour, and their experiences of sexism will not be comparable to those of white women.<sup>8</sup>

Crenshaw’s theory had practical implications for many areas of life including for service providers of survivors of domestic violence, for legal scholars attempting to reform rape laws, for the prosecution of obscenity crimes, and for representations of people of colour in the media. Crenshaw’s theory also revealed the inability of courts to deal with claims by women of colour seeking remedies for race and gender discrimination for injuries that were simultaneously produced. Thinking about an intersectional politics would radically alter the nature and content of scholarship for equality-seeking groups and put women of colour at the centre of such theorizing.

Another kind of intersectional discourse has occurred in the realm of minority rights. By minority rights, I am referring to the recognition and accommodation<sup>9</sup> of ethnocultural and religious diversity in liberal states; that is, how law and politics affect the linguistic and cultural identities of national sub-groups and immigrant populations alike. In Canada, the acknowledgement of minority rights has often been

---

<sup>8</sup> Crenshaw, *supra* note 6 at 1252. Sherene Razack prefers the term interlocking to intersecting. The former, she states, describes systems of oppression that are connected in that they *are* each other and give content to each other; whereas, the latter suggests that systems of oppression are discrete systems whose paths cross. “An interlocking approach requires that we keep several balls in the air at once, striving to overcome the successive process forced upon us by language and focusing on the ways in which bodies express social hierarchies of power.” Sherene H. Razack, *Casting Out: The Eviction of Muslims from Western Law & Politics* (Toronto: University of Toronto Press, 2008) at 62-63 [Razack].

<sup>9</sup> Several scholars have argued that the language of accommodation preserves an empire where the sensible modern majority retains its privilege and “tolerates” the “special” interests of minorities. See for example Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006); Bernard Williams, “Tolerating the Intolerable” in Susan Mendes, ed., *The Politics of Toleration in Modern Life* (Durham: Duke University Press, 1999) at 65. I am conscious of the importance and impact of language, but I utilize the term accommodation in any event because it permeates the legal literature in Canada, *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 [*Amselem*] at para. 87, and because I believe it is clear that what minorities mean when accommodation is sought is equality.

associated with the commitment to multiculturalism which manifests itself in several ways. For example, Human Rights Codes across the country protect people from discrimination on the basis of their membership in diverse linguistic and religious communities,<sup>10</sup> the unwritten constitutional principle of protection of minorities was explicitly acknowledged by the Supreme Court of Canada,<sup>11</sup> and section 27 of the *Canadian Charter of Rights and Freedoms* entrenches that the *Charter* “shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”<sup>12</sup>

The recognition of group-based minority rights has generally been viewed as promoting justice for members of cultural minorities whose traditions or ways of life differ from those of the dominant majority. Thus for example, appreciating the disproportionate impact of standard national holidays coinciding with the dominant community’s religion, Christianity, burdens employees of other faiths who may wish to take time off from work in order to observe their own religious holidays.<sup>13</sup> Multicultural theorists have made compelling arguments to justify such state-sponsored measures of accommodation by expanding the traditional notion of citizenship to include individual rights to equality and differentiated rights as members of identity groups.<sup>14</sup>

Much of the early engagement with multiculturalism however, failed to recognize the effect that inter-group accommodation could have on intra-group relations. Accommodation policies by the state, aimed at

---

<sup>10</sup> See for example *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>11</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*]. Gerald Gall has argued that the articulation of the protection of minorities in the *Secession Reference* case, as one of the four essential constitutional principles, potentially provides a source of significant protection for minorities separate and apart from the protection specially granted under other constitutional instruments: “Resort to the underlying, unwritten principles may serve to buttress, complement or even replace a section 27 assertion in the protection of various cultural minorities.” See: Gerald L. Gall, “Jurisprudence under Section 27 of the *Charter*: The Second Decade” (2002) 21 Windsor Y.B. Access to Just. 307 at 329 [Gall].

<sup>12</sup> *Charter*, *supra* note 1, s. 27.

<sup>13</sup> See for example *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 where the Court held that an employer must make reasonable adjustments to the work schedules of Seventh-Day Adventist employees who observe the Saturday Sabbath so as not to discriminate against them.

<sup>14</sup> See for example, Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995) and Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990).

leveling the playing field between minority communities and the majority society, could unwittingly allow systemic maltreatment of individuals within the minority group, particularly women.<sup>15</sup> Feminist multicultural theorists such as Ayelet Shachar have written extensively about the dangers of an uncritical approach to multicultural accommodation. They have not sought to repudiate the important goals of multiculturalism altogether but rather have approached the accommodation of minority rights through an intersectional analysis that recognizes the cultural and gendered (or other) aspects of many women's identities.

Thus feminist multiculturalists have questioned the presumption that state-sponsored measures to respect cultural differences will necessarily benefit all members of a group, particularly where support for gender-based inequalities can be located in rigid interpretations of a group's traditions. Importantly, the feminist multiculturalist critique highlights the ongoing power struggles over "authentic" interpretations of a group's traditions. Where such interpretations are espoused by powerful conservative members of the group, they may well put women (or other vulnerable individuals) at risk.<sup>16</sup> The following example of religious family arbitration demonstrates the potential risk of vulnerability that women within cultural minorities could be subject to by unqualified state support for the use of religion in family matters.

From 2003-2005, Ontario became the site of a controversy that involved intersectional interests. Religious arbitration in family law became the focal point of a long and messy debate when a group of Muslims stated that they would use Ontario's *Arbitration Act*<sup>17</sup> to create a tribunal to resolve family matters in a voluntary process using sharia law. These arbitral awards, once filed with a court, would have the force of law, even if the content of the award was potentially not in keeping with equality. This debate gave rise to a public and media discourse that primarily characterized the debate as one of competing rights: the right to religious freedom, often advanced by pointing to the Canadian promise of multiculturalism, and the right to women's equality, also an overarching Canadian value. The anxiety generated by a Muslim group's announcement to do something that other Christian and Jewish groups

---

<sup>15</sup> Ayelet Shachar, "The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority" (2000) 35 Harv. C.R.-C.L. Rev. 385 at 385.

<sup>16</sup> Ayelet Shachar, "Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50 McGill L.J. 49 at 57-58.

<sup>17</sup> *Arbitration Act, 1991*, S.O. 1991, c. 17 [*Arbitration Act*].

had been engaged in since 1991 revealed that Islam and Muslims represent something particularly fearful in the public's imagination.<sup>18</sup>

Opponents and proponents of religious arbitration made legitimate arguments for and against family arbitration using the "choice of law"<sup>19</sup> provision of Ontario's *Arbitration Act*. Proponents argued that Ontario already permitted alternative dispute resolution for family law matters and that faith-based arbitration was in line with the responsibility given to all people to organize their familial disputes as they see fit. They asserted that faith-based arbitration would permit the creation of culturally sensitive venues for the resolution of emotionally fraught cases and that arbitration was a cheaper form of dispute resolution than the courts. Syed Mumtaz Ali, the original proponent of the idea of an Islamic tribunal and also a conservative Muslim, stated "to be a good Muslim," all Muslims must use these sharia courts.<sup>20</sup>

Ali's statement rightly worried feminists who feared that women within Muslim communities might feel coerced into participating in such a process, making true consent illusory. Women's groups also drew attention to the fact that the *Arbitration Act* was enacted with a view to resolving commercial and not family disputes. They argued that family law raises unique concerns as a key site of oppression for women since far more of women's time and energy goes into the preservation and maintenance of the private realm. They were critical of the trend to privatize family law generally, arguing that women did not fair well in such privatized forms of justice.<sup>21</sup> In light of the many concerns with the *Arbitration Act* and how it might be used to derogate from women's equality, particularly the equality of women within minority communities, feminists favoured an approach that utilized secularism and lobbied in favour of a ban of all faith-based arbitration in family law.

---

<sup>18</sup> Razack, *supra* note 8.

<sup>19</sup> *Arbitration Act*, *supra* note 17, s. 32(1).

<sup>20</sup> Margaret Wentz, "Life Under Sharia, in Canada?" *The Globe and Mail* (29 May 2004), online: Islamic Institute of Civil Justice <<http://muslim-canada.org/darulqadanews.html>>.

<sup>21</sup> For a more detailed examination of the problems associated with the 1991 *Arbitration Act* as it relates to women's rights see: Natasha Bakht, "Arbitration, Religion and Family Law: Private Justice on the Backs of Women", report published by Law Commission of Canada and National Association of Women and the Law, (Ottawa: LCC, 2005) 1-68. ISBN #: 0-895996-90-2, online: National Association of Women and the Law <<http://www.nawl.ca/ns/en/publications.html#research>>.

I have argued elsewhere that the “No Religious Arbitration Coalition” that utilized the slogan “One Law for All” and lobbied in favour of a prohibition of court-enforced religious arbitration was short-sighted in that it failed to consider the needs of women who may want to live a faith-based life.<sup>22</sup> For the devout, religious arbitration offers a viable means of cultivating a deep personal connection with God in an area of life that has deeply personal and relational bearing. In the same way, proponents of religious arbitration who urged the government to retain family arbitration under the *Arbitration Act* with its minimal safeguards for equality did not consider the vulnerability that women could be exposed to. Religious women were thus not served by members of their minority groups who argued in favour of their religious needs by relying on the *Arbitration Act* nor were they served by feminists who made a case to protect their sex-equality entitlements through a ban on faith-based arbitration rationalized by secularism. An intersectional analysis would have revealed that religious women required other solutions. They needed a mediated resolution that honoured both of the genuine dimensions of their identity and reflected creative proposals for such an outcome.

In the next part of this article, I describe the historical use of section 27 of the *Charter* with a view to proposing that it may assist us in recognizing intersectional interests in future litigation.

### III: AN ACCOUNT OF SECTION 27

Despite over 25 years of *Charter* jurisprudence, judicial interpretation of section 27 remains relatively scant. Section 27 of the *Charter* reads: “This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”<sup>23</sup> The mandatory language of section 27 which seems to extend to the entire *Charter* has not produced the quantity of case law one might expect. And of those cases that do apply section 27, the quality of the analysis has also left much to be desired. Some have suggested that the paucity of case law utilizing section 27 may be because courts view the section as declarative,<sup>24</sup> a symbolic gesture by Parliament during the first constitutional roundtables to appease certain

---

<sup>22</sup> Natasha Bakht, “Religious Arbitration in Canada: Protecting Women by Protecting them from Religion” (2007) 19 C.J.W.L. 119 at 136.

<sup>23</sup> *Charter*, *supra* note 1, s. 27.

<sup>24</sup> Dino Bottos, “Multiculturalism: Section 27’s Application in *Charter* Cases Thus Far” (1987-1988) 26 Alta. L. Rev. 621 at 632 [Bottos].

ethnic groups.<sup>25</sup> Constitutional expert Peter Hogg has stated that section 27 “may prove to be more of a rhetorical flourish than an operative provision.”<sup>26</sup> However, there is evidence to suggest that courts understand section 27 to be interpretive; that is, a provision which assists in deciphering a substantive right.

A plain reading of section 27 indicates that unlike other provisions in the *Charter*, section 27 does not independently confer any rights. Legal scholars have described section 27 as providing an adjectival capacity to assist in the interpretation of rights contained elsewhere in the *Charter*.<sup>27</sup> Essentially, section 27 serves to modify or add meaning to other rights set out throughout the *Charter*. I do not wish, in this article, to challenge the interpretative nature of section 27. My purpose here is to advance the way in which section 27 might interpret other *Charter* rights by reinvigorating the multiple dimensions of such rights. Section 27’s language of “preservation and enhancement” suggests a dual capacity. The reference to “preservation” could refer to the protection of old constitutional settlements from the impact of the *Charter*,<sup>28</sup> while the mention of “enhancement” invokes a forward-looking requirement of positive action as it pertains to cultural minorities.<sup>29</sup>

---

<sup>25</sup> Section 27 was added to the *Charter* by a Special Joint committee of the Senate and House of Commons in response to lobby efforts by various ethnic societies in Canada. Bottos argues that although this was not a simple appeasement scheme, the courts may have interpreted it as such. Bottos, *ibid*.

<sup>26</sup> Peter Hogg in Joseph E. Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham, Ont.: LexisNexis Butterworths, 2004) at 175, n. 12 [Magnet, “Modern Constitutionalism”].

<sup>27</sup> Gall, *supra* note 11 at 308.

<sup>28</sup> Section 27 should not be used to alter the privileged relationship that the four constitutionally protected groups, (Anglophones and Francophones (s. 23), Roman Catholics (s. 93) and Aboriginals (s. 35)) have in relation to the Constitution. Magnet, “Modern Constitutionalism”, *supra* note 26 at 216, 220. However, this does not necessarily mean that s. 27 is irrelevant to these four constitutionally protected groups. It has been used to reinforce the entitlements of the Francophone community in *Lalonde v. Ontario (Commission de restructuration des services de santé)* (1999), 48 O.R. (3d) 50 (Div. Ct.).

<sup>29</sup> Magnet, “Modern Constitutionalism”, *ibid.* at 174. In a dissenting opinion, Lacourciere J.A., held that “it is clear that s. 27 of the Charter cannot be invoked by a majority that wants to impose its cultural norms or standards on the rest of society.” *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (C.A.) at 676 [Zylberberg C.A.].

To date section 27 has been used to interpret the following *Charter* rights. Section 2(a) (freedom of religion): In *R. v. Big M Drug Mart Ltd.*, section 27 was used to strengthen minorities' freedom of religion where the federal *Lord's Day Act* which prescribed Sunday closing for all businesses was held to infringe the accused's freedom of religion.<sup>30</sup> Section 2(b) (freedom of expression): In *R. v. Keegstra*, ss. 15(1) and 27 were combined to support the finding that freedom of speech does not include the commission of the willful promotion of hatred toward an identifiable group per s. 281.2(2) of the *Criminal Code*.<sup>31</sup> Section 14 (right to an interpreter): In *R. v. Tran*, the Supreme Court of Canada gave a "purposive and liberal interpretation" to the right to the assistance of an interpreter using section 27. "[S]ection 27...should...be a factor when considering how to define and apply s. 14 of the Charter."<sup>32</sup> Section 23 (minority language education rights): In, *Reference Re Education Act of Ontario and Minority Language Rights*, section 27 was used to enhance minority language education rights.<sup>33</sup> Section 15(1) (right to equality): In *Andrews*, the Supreme Court of Canada used section 27 to support the view that the *Charter's* equality guarantee does not mandate identical treatment. "If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage)...and other such provisions

<sup>30</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [*Big M Drug Mart*]. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [*Edwards Books*], the Court again used s. 27 to enhance the protection of s. 2(a) in a case where four Ontario retailers were charged with failing to ensure that no goods were sold or offered for sale by retail on a Sunday contrary to the *Retail Business Holidays Act*. *Re Zylberberg et al. and Director of Education of Sudbury Board of Education; League for Human Rights of B'Nai Brith Canada et al., Intervenors* (1986), 55 O.R. (2d) 749 (Ont. H.C.J.) involved a challenge to the *Ontario Education Act* that ordered the "reading of Scripture or other suitable readings and repeating of the Lord's Prayer..." in public schools. The court noted that minority students could use the opportunity provided by section 27 to opt out of the readings. Thus, section 27 was used to require minority groups to act to preserve their culture rather than providing them with a remedy. Bottos, *supra* note 24 at 625-626. This decision was reversed in *Zylberberg C.A.*, *supra* note 29 at 656-657 where the court noted: "The effect of religious exercises cannot be glossed over with the comment that the exercises may be 'good' for minority pupils... This insensitive approach...depreciates the position of religious minorities...It is also inconsistent with the multicultural nature of our society as recognized by s. 27 of the Charter..."

<sup>31</sup> *R. v. Keegstra* (1985), 19 C.C.C. (3d) 254 (Alta. Q.B.).

<sup>32</sup> *R. v. Tran*, [1994] 2 S.C.R. 951 at 977.

<sup>33</sup> *Reference Re Education Act of Ontario and Minority Language Rights* (1984), 47 O.R. (2d) 1 (C.A.). But, the Supreme Court of Canada held that the rights guaranteed in section 23 were an exception to ss. 15 and 27 in that section 23 accords to the official language groups' "special status in comparison to all other linguistic groups in Canada." *Mahé v. Alberta*, [1990] 1 S.C.R. 342 at 369.

designed to safeguard certain distinctions.”<sup>34</sup> Finally, Section 1 (the limitations clause): In *R. v. Keegstra*, the Supreme Court of Canada used section 27 to inform section 1 in order to limit the use of hate speech protected by section 2(b) of the *Charter*.<sup>35</sup>

The degree of the court’s analyses in these cases varies, but section 27 has never brought about a comprehensive discourse in the adjudication of *Charter* rights. Joseph Magnet has argued that an examination of the text of section 27 reveals no coherent principles which courts can apply. “There is no readily apparent meaning to be gleaned from the words of the text—no intelligible or agreed upon content for the multiculturalism principle. Nor does investigation of the constitutional sources behind s. 27 yield much in the way of a coherent multiculturalism principle...”<sup>36</sup> Perhaps this lack of agreement as to the content of multiculturalism or its “preservation and enhancement” explains judicial reluctance to rely on the provision in anything more than a peripheral or “shotgun” way.<sup>37</sup> But this ambiguity may provide the latitude necessary to apply section 27 in imaginative ways.<sup>38</sup> The language of the section may in fact, reveal more than it conceals. I hope to offer one such reading of section 27.

Traditionally, section 27 has been advanced in combination with other *Charter* rights in order to further the recognition of diversity or pluralism in Canadian society, to draw the court’s attention to the ways in which laws of general application differentially impact certain minority groups, and to call for special measures that may be required in order to achieve equality or to maintain or promote a group’s distinctive

---

<sup>34</sup> *Andrews*, *supra* note 2 at 171.

<sup>35</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 758 [*Keegstra*, SCC]. The Court cited with approval the dicta of Cory J.A. in *R. v. Andrews* (1988), 65 O.R. (2d) 161 at 181: “Multiculturalism cannot be preserved let alone enhanced if free rein is given to the promotion of hatred against identifiable cultural groups.”

<sup>36</sup> Joseph E. Magnet, “Multiculturalism in the Canadian Charter of Rights and Freedoms” in Gerald-A. Beaudoin & Errol Mendes, eds., *The Canadian Charter of Rights and Freedoms* 3d ed. (Toronto: Carswell, 1996) at 18:23 [Magnet, “Multiculturalism in the Charter”].

<sup>37</sup> Gall, *supra* note 11 at 330.

<sup>38</sup> Magnet, “Modern Constitutionalism”, *supra* note 26 at 180.

characteristics. “Section 27 tells us that our constitutional commitment to individual liberty must be appreciated in a multicultural context.”<sup>39</sup>

A major criticism of multiculturalism is that the concept of complying with it knows no bounds.<sup>40</sup> How far should one go in accommodating cultural difference? Some have suggested that this enhanced respect for cultural identity may be applied to limit individual rights when found to be in competition with the needs of cultural groups. The possibility that section 27 could be “an instrument capable of lowering minimum standards flowing from the individual rights sections of the Charter”<sup>41</sup> apparently prompted the feminist framers of the Constitution to lobby for the creation of section 28. Section 28 provides that: “Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.”<sup>42</sup> At least one of the many impulses behind section 28’s inclusion in the *Charter* was the fears of some gender equality activists that section 27 would serve to protect cultural traditions “harmful to women.”<sup>43</sup>

<sup>39</sup> *Ibid.* at 211. This may mean that section 27 promotes an acknowledgement of collective rights despite the clear predominance of the *Charter* as a document that privileges individual rights.

<sup>40</sup> H.R. Hosein in Vern W. DaRe, “Beyond General Pronouncements: A Judicial Approach to Section 27 of the Charter [forthcoming?] (1995) 33 *Alta. L. Rev.* 551 at 552 and n. 8.

<sup>41</sup> Magnet, “Multiculturalism in the Charter”, *supra* note 36 at 18:45.

<sup>42</sup> *Charter*, *supra* note 1, s. 28.

<sup>43</sup> Sonia Lawrence, “Equality’s Shield? Notes on the Promise and Peril of Section 28” (Paper presented at the Women’s Legal Education and Action Fund (LEAF) Colloquium, “In Pursuit of Substantive Equality,” September 2003) [unpublished, on file with author][Lawrence, “Equality’s Shield”]. The feminist framers of section 28 were among other things, apprehensive over the potential of what is now Section 27 to “protect such customs as polygyny or clitoridectomy”. *Ibid.* at 3. See also Mary Eberts, “Sex-based Discrimination and the Charter” in Anne F. Bayefsky & Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 183 at 202. Sonia Lawrence has argued that section 28 may speak to the impulse to create a hierarchy of oppressions, that is, to entrench not merely the importance of gender discrimination, but the primacy of gender discrimination. Lawrence worries that “an intersectional analysis of discrimination will be severely compromised by an interpretation that prioritizes gender.” *Ibid.* at 8. By contrast Beverley Baines suggests that by combining a section 15(1) ground “other than sex with the promise of sex equality in section 28,” this intersectional approach may “reach an outcome neither could achieve alone”. Beverley Baines, “Section 28 and the *Canadian Charter of Rights and Freedoms*: A Purposive Interpretation” (2005) 17 *C.J.W.L.* 45 at 65-66 [Baines, “Section 28”]. Baines also views section 28 as restricting sections 1, 27 and 33. Thus multiculturalism is necessarily positioned in opposition to gender and equated with the limitations and override sections that typically constrain *Charter* rights. *Ibid.* at 61.

Beverley Baines has argued that the feminist framers had in mind what Ayelet Shachar has coined the “paradox of multicultural vulnerability” wherein “individuals inside the group can be injured by the very reforms that are designed to promote their status as group members in the accommodating multicultural state.”<sup>44</sup> Baines suggests that the feminist framers of section 28 understood women’s vulnerability in the context of multicultural groups, particularly religious ones:<sup>45</sup>

We are concerned that the multiculturalism provision might be interpreted to limit women’s equality and this concern led us to lobby for the second sex equality provision that ultimately became section 28 of the Charter. However, I do not think we fully grasped the threat that the major religions...posed for women’s equality...In fact, all major religions continue to proselytize men’s domination over women, whether through perpetuating unbroken chains of male leadership or by ascribing secondary familial roles to women.<sup>46</sup>

Section 27 has in fact, never been applied in litigation to further gender inequality. Even in criminal cases where one might expect a self-serving interpretation of culture, an explicitly gendered construction of cultural rights has not been promoted using section 27.<sup>47</sup> In the criminal context, section 27 has been used to counter the promotion of hatred against minority groups,<sup>48</sup> to challenge the homogenous composition of a

---

<sup>44</sup> Shachar in Baines, “Section 28”, *ibid.* at 52.

<sup>45</sup> Baines, “Section 28”, *ibid.* at 52.

<sup>46</sup> Beverley Baines, “Equality’s Nemesis” (2006) 5 J.L. & Equality 57 at 57, 67 [Baines, “Equality’s Nemesis”].

<sup>47</sup> Criminal defendants charged with murder have however, been able to utilize the defence of provocation in ways that perpetuate gender inequality and homophobia. Sheila Galloway & Joanne St. Lewis, “Reforming the Defence of Provocation” Ontario Women’s Directorate 7 (1994) [on file with author].

<sup>48</sup> For example, in *R. v. Soles*, [1998] O.J. No. 5061 (Ont. Ct. J. Gen. Div.) (QL) [Soles] the accused was convicted of knocking over monuments and damaging a building in a Jewish cemetery. Justice Taliano held that the “willful persecution of a visible Canadian minority is the very antithesis of the essential values sought to be protected by section 27 of the *Charter* because in the words of Mr. Justice Cory in *R. v. Andrews*, ‘multiculturalism cannot be preserved, let alone enhanced, if free rein is given to the promotion of hatred or violence against identifiable cultural groups.’” *Soles* at para. 21. See also the sentencing decision of *R. v. Lankin*, [2005] B.C.J. No. 10 (B.C. Prov. Ct) (QL).

jury,<sup>49</sup> and to support a claim of reasonable apprehension of bias.<sup>50</sup> In a sentencing case, section 27 was unsuccessful in providing the Chinese defendant with a more lenient sentence for the offence of cruelty to an animal.<sup>51</sup>

I am more inclined to believe that the feminist concerns around section 27 at the formation of the *Charter* stemmed from a deeper conviction that cultural groups have a greater propensity to discriminate against women. Indeed many understandings of a minority group's claims for recognition ultimately hone in on the probability of the group acting in illiberal or oppressive ways. It is trite to state that certain cultural groups, much like mainstream culture, have engaged in practices and purport ideas that derogate from women's equality. The problem with this overarching description is that the absence of equality appears to become the defining feature of the minority group's identity. Moreover, the majority group's recognition of equality in legal instruments such as the *Charter* are held up to be the pinnacle of individual sovereignty in spite of the ineffectiveness of the guarantee or the lack of consensus as to the meaning of equality in many contexts. Sonia Lawrence notes that the focus on difference does not merely construct an 'Other', it also shores up some idea of mainstream culture, whether explicitly or implicitly.<sup>52</sup> Thus, culture

---

<sup>49</sup> For example, in *R. v. Kent* (1986), 27 C.C.C. (3d) 405 the Manitoba Court of Appeal held that section 27 could not assist the Aboriginal appellant in his request for a jury consisting of Aboriginal persons.

<sup>50</sup> In *R. v. Brown* (2002), 57 O.R. (3d) 615 (Sup. Ct. J.) at para. 18, the accused attempted to exclude the results of a breathalyzer test on the basis that his arrest or detention were the result of racial profiling. In determining whether a reasonable apprehension of bias arose in the case, the court effectively suggested that the presence of section 27 lowered the standard required to establish a reasonable apprehension of bias. Gall, *supra* note 11 at 326.

<sup>51</sup> In *R. v. Chan*, [1999] A.J. No. 910 (Prov. Ct. Crim. Div.) (QL) [*Chan*] the defendant attempted to rely on his Chinese background to justify a more lenient sentence when convicted with cruelty to an animal under the *Alberta Animal Protection Act*. The court noted the importance of section 27 of the *Charter*, but stated that "the diverse cultural practices of all persons physically within Canada are subservient to the laws enacted by Parliament and the legislatures of the Provinces and Territories." *Chan* at para. 16.

<sup>52</sup> Sonia N. Lawrence, "Cultural (in)Sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom" (2001) 13 C.J.W.L. 107 at 117 [Lawrence, "Cultural (in)Sensitivity"]. Sherene Razack has argued that when we talk about culture, we often mean race: cultural differences perform the same function as a more biological notion of racial differences—they mark inferiority. Razack in *ibid.* at 112, n. 29. Razack has later argued that the focus on religion in our post-9/11 world, in particular Islam and its harmful effects on women, are simply a newer manifestation of the same problem where religion or Islam has become the new race. Razack, *supra* note 8.

tends to be considered only against the unarticulated, unexamined norm of North American mainstream culture. Legal institutions produce distorted views of “Other” cultures as an intriguing shadow picture of mainstream culture—both of which reveal a deeply held belief in the mainstream tradition’s superiority. This process can be particularly harmful for women from non-mainstream culture. Not only does it construct their own cultural traditions as being dangerously misogynist, it also refuses to recognize those elements of mainstream culture that subordinate and endanger women.<sup>53</sup>

Benjamin Berger reminds us that law itself is not a neutral culture-less phenomenon, but one that is endowed with its own assumptions of superiority. “The conventional story of legal multiculturalism fails to reflect the nature of the interaction between religious conscience and the rule of law as what it is—a cross cultural encounter.”<sup>54</sup> If law does not merely “preside over cultural pluralism, but is itself one of the cultural players”,<sup>55</sup> then arguably the rigid distinction between culture and equality, apparently created by law, is arbitrary. Where section 27 is understood as protecting only cultural rights, while section 28 protects no more than women’s rights, as though these two categories are mutually exclusive, it is no more than an imperfect way of articulating concepts that define and negotiate each other.

Baines’ essentialized view of religion for example, that positions “religion as sex equality’s nemesis”,<sup>56</sup> obscures and effaces dissent among believers. It simplifies by blurring differences not only within religion but also across time such that religious views are perceived not

---

<sup>53</sup> Lawrence, “Cultural (in)Sensitivity”, *ibid.* at 108.

<sup>54</sup> Benjamin Berger “The Cultural Limits of Legal Tolerance” (2008) 24 Can J. L. & Juris. 245 at para. 11 [Berger]. Berger’s very fine essay that contests the operation of the law as set “above culture” suggests that attending to deep cultural diversity may require an entirely new form of constitutionalism, one where law and culture are actually on equal footing, engaging in a dialogic cross-cultural encounter. While I am inclined to agree with Berger’s analysis, this article situates itself firmly within the current legal framework, trying to use the law’s current tools to its most progressive potential.

<sup>55</sup> *Ibid.*

<sup>56</sup> Baines, “Equality’s Nemesis”, *supra* note 46 at 79.

only as monolithic, but also static.<sup>57</sup> Thus the treatment of culture/religion lacks nuance, internal diversity is ignored and the tired, unexamined dichotomy of multiculturalism versus women's rights is perpetuated.<sup>58</sup>

#### IV: THE INTERSECTIONAL POTENTIAL OF SECTION 27

A truly multicultural interpretation of section 27 would require one to take into account women's understanding of their cultures.<sup>59</sup> Women may construct their culture differently from men, they may understand their positions as more than just subordination, they may explain certain practices in different ways<sup>60</sup> and they may disagree with one another about each of these constructions.<sup>61</sup> "The content of tradition is contested and contestable, (re)constructed and reinforceable, and becomes different things in different situations."<sup>62</sup> Feminist multicultural

<sup>57</sup> Lawrence, "Cultural (in)Sensitivity", *supra* note 52. Anver Emon has argued that the rhetoric of the religious arbitration controversy in Ontario began with the inaccurate premise that the underlying concept of Sharia was one of code-like inflexibility. Anver Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation" (2006) *Singapore Journal of Legal Studies* 331.

<sup>58</sup> Susan Moller Okin, "Is Multiculturalism Bad for Women?" in Joshua Cohen, Matthew Howard, & Martha C. Nussbaum, eds., *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999) at 7.

<sup>59</sup> In their examination of the defence of provocation and its capacity to serve racialized women, Joanne St. Lewis and Sheila Galloway argue: "A non-critical incorporation of culture as defined by only half of the community and excluding the perspective of the majority of its victims, may mean that racialized women will find themselves doubly silenced: once by the operation of patriarchal conditions within their culture and again by the operation of non-critical incorporation of their values and a 'refurbishing' of these values under the guise of 'sensitivity to diversity'. St. Lewis and Galloway, *supra* note 47 at 46.

<sup>60</sup> Lawrence, "Cultural (in)Sensitivity", *supra* note 52 at 133.

<sup>61</sup> Mohammad Fadel suggests that in addition to the differences between various schools of Islamic law, the religious views of Muslims are also mediated through individual beliefs. "Religious beliefs, at least in the contemporary context, operate as a wild card in determining the behavior of individual Muslims: some religious Muslims may be traditionalist in their view of marriage, while other religious Muslims may adopt a much more egalitarian view of the family. In any case, the presence of subjective religious belief further exacerbates the problem of family law pluralism within the Muslim community because it reinforces the normative gap between the norms of an objective legal system (whether or not minimally Islamic) and the subjective moral norms of individual Muslims." Mohammad H. Fadel, "Political Liberalism, Islamic Law and Family Law Pluralism: The Contrasting Examples of New York and Ontario" (2008) [unpublished, on file with author] at 24.

<sup>62</sup> Lawrence, "Cultural (in)Sensitivity", *supra* note 52 at 122.

theorists such as Shachar<sup>63</sup> have broadened the understanding of what minority accommodation must mean if minority women are not to be subjected to the impossible dilemma of choosing between their culture and their rights. And it is this understanding of multiculturalism that must be brought to section 27.

As Madam Justice Wilson has stated in *Edward Books*:

[I]t seems to me that when the Charter protects group rights such as freedom of religion, it protects the rights of all members of the group. It does not make fish of some and fowl of the others. For, quite apart from considerations of equality, to do so is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together. It is, in my opinion, an interpretation of the Charter expressly precluded by s. 27 which requires the Charter to be interpreted ‘in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians’.<sup>64</sup>

In adversarial *Charter* litigation perhaps the pitting of claims against one another, freedom of religion against women’s equality for example, is to be expected. However, it is unlikely that this produces the best results. The potential of section 27, if understood as promoting intersectionality, is that it may mediate a unique middle ground. For women facing multiple vectors of discrimination, any argument that purports the primacy of a certain aspect of their identity will fail to account for women’s multiple affiliations “public/private, official/unofficial, secular/religious”,<sup>65</sup> leaving women vulnerable to a uni-dimensional understanding of oppression. We know from

---

<sup>63</sup> Ayelet Shachar outlines the important work of several feminist scholars engaged in the multiculturalism debate. Ayelet Shachar, “Feminism and Multiculturalism: Mapping the Terrain” in Anthony Simon Laden & David Owen, eds., *Multiculturalism and Political Theory* (New York: Cambridge University Press, 2007) at 115.

<sup>64</sup> *Edwards Books*, *supra* note 30 at para. 202, Wilson, J., dissenting in part [emphasis added]. In this case, Wilson J, was in fact, insisting that all Sabbatarians be treated equally, as a homogenous group rather than distinguishing between large and small Sabbatarian retailers. Such an assumption about homogeneity may not always comport well with an intersectional account of culture or religion.

<sup>65</sup> Ayelet Shachar, “Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law” (2008) 9 *Theoretical Inquiries in Law* 573 at 578 [Shachar, “A Cautionary Tale”].

intersectional theory that women's experiences of subordination are not simply a compilation of different rights violations. *Charter* claims that implicate more than one right are often a way to communicate an infringement of rights that occur simultaneously and that are distinctive from each alone. Section 27 may offer a tangible device by which to redress these interconnected and mutually enforcing forms of oppression by ensuring that individual *Charter* rights are infused, where relevant, with the experiences of culture as experienced by women.<sup>66</sup>

In its section 15(1) jurisprudence, the Supreme Court of Canada has unfortunately, rarely recognized intersectionality.<sup>67</sup> "The Court is mired in categorical analysis, forcing litigants to choose among the personal characteristics that have led to their unequal treatment."<sup>68</sup> In *Law v. Canada (Minister of Employment and Immigration)*, Justice Iacobucci stated that it "is open to a s. 15(1) claimant to articulate a discrimination claim on the basis of more than one ground."<sup>69</sup> Several claimants and interveners have developed and argued approaches to section 15(1) in contexts where sex inequality is compounded by other

---

<sup>66</sup> Kerri Froc has argued that section 28 of the *Charter* may provide a conceptual tool that recognizes and redresses an integrative approach to *Charter* litigation. Kerri Froc, "Will 'Watertight Compartments' Sink Women's *Charter* Rights? The Need for a New Theoretical Approach to Women's Multiple Rights Claims under the Canadian Charter of Rights and Freedoms" (LL.M. Thesis, Faculty of Law, University of Ottawa, 2008) [unpublished, on file with author] at 90-91. She states that the aim of section 28 would be to ensure that the multidimensional oppression experienced by women as whole persons is given due recognition with respect to all applicable *Charter* rights (Froc at 97). Perhaps ss. 27 and 28 can provide complementary ways of introducing intersectional interests into the *Charter*.

<sup>67</sup> According to Froc, the Court has acknowledged that an intersectional analysis can be accomplished by section 15(1). In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 the court found that the voting restrictions in the *Indian Act*, limiting eligible voters to those "ordinarily resident on reserve" discriminated on the basis of "aboriginality-residence." Froc argues that this "intersectional" ground has direct implications for Aboriginal women given their historic expulsion from reserves due to discriminatory "marrying out" provisions under the *Indian Act*. Froc, *ibid.* at 95, n. 455.

<sup>68</sup> Baines notes that two provincial appellate courts have tried to reconcile the categorical imperatives in section 15(1) with litigants' real life experiences of intersectional discrimination. Baines, "Section 28," *supra* note 43 at 65. See *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, [1993] N.S.J. No. 97 (N.S.C.A.) (QL) and *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, [2002] O.J. No. 1771 (Ont. C.A.) (QL).

<sup>69</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 37.

prohibited grounds of discrimination.<sup>70</sup> Yet despite deciding several equality cases that have potentially involved an analysis of discrimination based on more than one personal characteristic, such as *Lavoie v. Canada*<sup>71</sup> or *Gosselin v. Quebec (Attorney General)*,<sup>72</sup> the Court has applied the section 15(1) test in a manner that is impervious to intersectionality.

Although the Court has stated in *Andrews* that equality is a right that “applies to and supports all other rights guaranteed by the *Charter*”,<sup>73</sup> attempts by claimants to have their multiple *Charter* claims read in light of each other have often failed. Intersectional interests were clearly at play in *Native Women’s Assn. of Canada v. Canada*,<sup>74</sup> in which the Native Women’s Association of Canada (NWAC) challenged the federal government’s decision to fund four other national Aboriginal groups<sup>75</sup> who were invited to participate in a multilateral process of constitutional reform discussions which eventually led to the Charlottetown Accord. The government provided \$10 million in funding to these Aboriginal groups of which NWAC received \$130,000 because the government had earmarked part of the funds for women’s issues. The government asked NWAC to advance its issues regarding the right to self-government through the four funded groups. NWAC alleged that the four funded Aboriginal groups were male-dominated and it was concerned that the proposals for constitutional reform would not include the requirement that the *Charter* be made applicable to any form of Aboriginal self-government. NWAC argued that through its actions, the government had violated Aboriginal women’s freedom of expression and right to equality as guaranteed by ss. 2(b), 15 and 28 of the *Charter*.

---

<sup>70</sup> See for example the work of LEAF in Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund* (Vancouver: UBC Press, 2004) at 149.

<sup>71</sup> *Lavoie v. Canada*, [2002] 1 S.C.R. 769 [*Lavoie*]. In *Lavoie*, the applicants were female non-citizen candidates for lower level government positions.

<sup>72</sup> *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429. In *Gosselin*, the applicant was a young, female welfare recipient with a psychiatric history.

<sup>73</sup> *Andrews*, *supra* note 2.

<sup>74</sup> NWAC, *supra* note 4.

<sup>75</sup> The four groups funded by the Federal Government were the Assembly of First Nations, the Native Council of Canada, the Métis Council of Canada, and the Inuit Tapirisat of Canada.

Although the claimant in this case, NWAC, framed its constitutional argument on multiple grounds in the *Charter*, the Supreme Court of Canada decided the case using a non-gendered analysis of s. 2(b), freedom of expression, and dismissed the equality claims out of hand. Kerri Froc has argued that the separation of Aboriginal women's freedom of expression and equality rights allowed the Court to obscure the particular oppression Aboriginal women experience and to reject NWAC's claim.<sup>76</sup> The Court characterized NWAC's claim as a positive right, enabling it to construe Aboriginal women's demands as falling outside the boundaries of traditional freedom of expression claims. Moreover, the Court described the provision of funding and invitation to participate in constitutional discussions as facilitating and enhancing Aboriginal groups' expression, not stifling it.<sup>77</sup> NWAC's exclusion, though in line with historic colonial strategies of displacing women as leaders of Aboriginal communities,<sup>78</sup> simply became rationalized by the impossibility of the government funding "so many people".<sup>79</sup>

As Froc compellingly argues, the Court isolated male domination as the only system of oppression relevant to the analysis. Thus, NWAC's and the funded group's collective experience of racism and colonization disappeared and the "social context of patriarchal colonization, which was (is) nourished by the silencing of Aboriginal women's political expression" flourished.<sup>80</sup>

Despite this and other disappointing decisions by the Court, in a recent case, not directly involving the *Charter*, but nonetheless invoking the concept of equality, the Court has shown some willingness to comprehend the way in which the multiple affiliations of women can affect their everyday lived realities and as result, the kinds of legal arguments they must make in order to obtain justice. At issue in *Bruker v. Marcovitz*,<sup>81</sup> was a separation agreement signed by a Jewish couple before their civil divorce. One clause in the agreement required Mr. Marcovitz to appear before rabbinical authorities upon the granting of the civil divorce in order to give Ms. Bruker the *ghet*, or a religious divorce. Mr. Marcovitz refused to perform this obligation for 15 years, rendering Ms. Bruker still married in accordance with her Jewish beliefs. Ms.

---

<sup>76</sup> Froc, *supra* note 66 at 50.

<sup>77</sup> NWAC, *supra* note 4 at para. 47.

<sup>78</sup> Froc, *supra* note 66 at 45-49.

<sup>79</sup> NWAC, *supra* note 4 at para. 54.

<sup>80</sup> Froc, *supra* note 66 at 56.

<sup>81</sup> *Bruker*, *supra* note 5.

Bruker, knowing that a court would not force Mr. Marcovitz to give the ghet,<sup>82</sup> sought a remedy of damages to compensate her for the detrimental religious consequences on her real life circumstances. It might be tempting to understand this case, although it was argued outside the *Charter* context, as one involving freedom of religion set in opposition to equality. Indeed Mr. Marcovitz did argue that his freedom of religion would be infringed should he be forced to comply with the separation agreement.<sup>83</sup> However, Ms. Bruker's claim was not an equality argument *simpliciter*.

Her claim for equality cannot be seen as one that is devoid of her own religious convictions. Had she not been a religious person, the fact that she remained married in the eyes of her religion would have had no discernible impact on her life since civilly she was divorced. Ms. Bruker sought a remedy from the court that would acknowledge the harm experienced by women affected through multiple frameworks of authority and "whose lives genuinely manifest overlapping and potentially conflicting belongings".<sup>84</sup> Ms. Bruker was essentially seeking recognition and a remedy for both her religious entitlements *and* her equality rights. The court in recognizing the impact of the religious and secular aspects of divorce for people such as Ms. Bruker generated a nuanced result that was intersectional. They stated: "Any infringement of Mr. Marcovitz's freedom of religion is inconsequential compared to the disproportionate effect on Ms. Bruker's ability to live her life fully as a Jewish woman in Canada."<sup>85</sup> Decisions such as this, that are sensitive to the multifaceted contexts, and their interface, of women's lives will undoubtedly make for better law.

The hope is that the lessons from *NWAC* and the precedent from *Bruker* will serve to inform future *Charter* cases involving intersectional interests.

---

<sup>82</sup> In *Morris v. Morris* (1974) 42 D.L.R. (3d) 550 (Man. C.A.), the court refused to grant the wife mandamus of a *ketubah* or Jewish marriage agreement because it would require the court to engage in an analysis of a Jewish religious law.

<sup>83</sup> *Bruker*, *supra* note 5 at para. 14.

<sup>84</sup> Shachar, "A Cautionary Tale", *supra* note 65 at 605. Shachar has also noted that Ms Bruker's claim involved an "intersectionist" argument: "The substance of her argument was that the nonintervention in the name of her ex-husband's freedom of religion under these circumstances amounted to a license to deny her, and similarly situated women, the right to *their* religious freedom (to comply with what they perceive as obligations of their faith) and to equality in family law." *Ibid.* at 596.

<sup>85</sup> *Bruker*, *supra* note 5 at para. 93 [emphasis added].

## V: INTERSECTIONAL ANALYSIS IN THE FUTURE *CHARTER* CASE OF POLYGAMY

How an intersectional interpretation of section 27 will function in actual litigation remains to be seen. I offer however, an example of how section 27 might be useful in interpreting a *Charter* right in a case that is soon to be heard in the hopes that it will influence a sophisticated articulation of the issues.

On January 7<sup>th</sup> 2009, Winston Blackmore and James Oler, members of the Mormon community of Bountiful, British Columbia, were charged with one count each of breaching section 293 of the *Criminal Code*, which prohibits polygamy.<sup>86</sup> Polygamy is broadly defined in the *Code* and can simply mean entering into a “conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage”.<sup>87</sup> Although the charges against the men of Bountiful are relatively recent, the history of the investigations against them dates back to 2005. The arrests were the culmination of three intense investigations by special prosecutors. The first two special prosecutors Richard Peck and later Len Doust recommended against prosecuting the men of Bountiful until the government obtained a ruling on the constitutionality of section 293. The third prosecutor, Terrence Robertson, apparently gave the government the recommendation they had been hoping for; that section 293 would withstand *Charter* scrutiny.<sup>88</sup>

The government’s concern with polygamy though currently directed at the Mormons of the Fundamentalist Church of Jesus Christ of Latter Day Saints in Bountiful, British Columbia will likely open the door to more vociferous investigations of the already besieged and

---

<sup>86</sup> “B.C. religious leaders charged with polygamy” *CBC News* (7 January 2009), online: <<http://www.cbc.ca/canada/british-columbia/story/2009/01/07/bc-blackmore-polygamy-charges.html>>.

<sup>87</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 293(1)(a)(ii).

<sup>88</sup> Since the writing of this article, the charges against Oler and Blackmore were quashed by the Supreme Court of British Columbia. *Blackmore v. British Columbia (Attorney General)*, [2009] B.C.J. No. 1890 (QL). The government decided not to appeal this decision opting instead to send reference questions to the B.C. Supreme Court to test the constitutionality of the polygamy provisions. Ministry of the Attorney General, British Columbia, News Release, 2009AG0012-000518, “Province to Seek Supreme Court Opinion on Polygamy” (22 October 2009), online: <[http://www2.news.gov.bc.ca/news\\_releases\\_2009-2013/2009AG0012-000518.htm](http://www2.news.gov.bc.ca/news_releases_2009-2013/2009AG0012-000518.htm)>.

racialized Muslim community in Canada, some of whom may practice polygamy as an incident of their faith.

This case has the potential to be played out as a simple pitting of competing rights against one another wherein the men charged with polygamy argue that section 293 violates their freedom of religion and the government, supported by mainstream women's groups,<sup>89</sup> argues that their commitment to protecting women's equality justifies the provision. The concern is that the diversity of all women's voices, including those women living in Bountiful who might have a different understanding of polygamy as it relates to equality, will be lost.

Blackmore and Oler are likely to rely *inter alia*<sup>90</sup> on section 2(a) of the *Charter* during their prosecutions in order to make the argument that the prohibition of polygamy infringes their freedom of religion. Section 2(a), which protects adherents' religious belief and conduct, has been interpreted broadly by the Court, only requiring a sincerely held religious belief that a practice conforms to one's religion.<sup>91</sup> Since the sincerity of Blackmore and Oler's belief is unlikely to be contested and because section 293 clearly interferes with the practice of their faith by criminalizing polygamous relationships and potentially subjecting them to jail terms, a section 2(a) infringement will easily be found.

The litigation would then proceed to the section 1 analysis where infringements of *Charter* rights can be sustained if "demonstrably justified in a free and democratic society."<sup>92</sup> The government, carrying

---

<sup>89</sup> Alison Brewin, executive director of West Coast LEAF, said in a news release: "The lack of action to protect the fundamental freedoms and rights of the women of Bountiful has been contrary to the women's *Charter* rights...These charges will allow the courts, the government, the women of Bountiful and all Canadians to determine the boundaries of religious freedom when women's equality is at stake." West Coast LEAF, Press Release, "West Coast LEAF welcomes criminal charges against key Bountiful leaders" (7 January 2009), online: <<http://www.westcoastleaf.org/userfiles/file/bountiful%20press%20release.pdf>>.

<sup>90</sup> Blackmore and Oler are also likely to argue that section 293 is a violation of their liberty interests under section 7 of the *Charter* since section 293 contemplates custody and is overbroad in its application. They may also make an argument under section 15(1) of the *Charter*, arguing that the *Criminal Code* prohibition of polygamy discriminates against them on the basis of religion.

<sup>91</sup> *Amselem*, *supra* note 9.

<sup>92</sup> *Charter*, *supra* note 1, s. 1. Section 1 of the *Charter* provides:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

the burden of proof, would undoubtedly rely on favourable social science data and interviews by women who have left Bountiful to demonstrate that polygamy is harmful to women and indeed derogates from their equality rights.<sup>93</sup> As Berger has argued, the law's approach to whether a limit on religious freedom is justified, "is assessed within the values, assumptions, and symbolic commitments of the rule of law itself."<sup>94</sup> Indeed the issue of polygamy is likely to expose the law's own preoccupation with morality. It is at this stage that I imagine an intersectional analysis of section 1 might be useful.

Section 27 of the *Charter* could assist in interpreting the limitations clause by elucidating the views of women's experiences from within Bountiful,<sup>95</sup> as diverse or even contradictory as they may be. "Perhaps we could see a more nuanced consideration of what should be done when practices within a cultural group are challenged from within, and both the practice and the challenge claim to be based in tradition."<sup>96</sup> Section 27 would be used to enhance a section 1 analysis that respects women's interpretation of their cultural needs, preferences and heritage while perhaps simultaneously challenging the cultural assumptions that law brings to its encounters with cultural others. If section 1's "doctrinal framework serves as the rules of engagement...wherein the boundaries of tolerance are always already set",<sup>97</sup> section 27 may in its urging to attend to details assist us in better understanding and recognizing cultural minorities.

---

<sup>93</sup> Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2005) [Status of Women Canada Report]. There appears in fact, to be no conclusive data on polygamy's effects on women in Bountiful. As Angela Campbell notes "it is impossible to draw a single, unqualified conclusion as to whether polygamy harms women." Angela Campbell, "How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? And International, Comparative Analysis?" in *ibid* at 1.

<sup>94</sup> Berger, *supra* note 54 at para. 30.

<sup>95</sup> Although the practice of polygamy in Bountiful is typically justified on religious grounds, I would argue that religion can be subsumed within the larger category of culture and thus the use of section 27 is easily rationalized. Recall that s. 27 has been used by the court to enhance section 2(a) in for example *Big M Drug Mart* and *Edwards Books*, *supra* note 30.

<sup>96</sup> Lawrence "Cultural (in)Sensitivity", *supra* note 52 at 134.

<sup>97</sup> Berger, *supra* note 54 at paras. 28, 47.

Theoretically, there is no reason why section 27 could not influence each aspect of the *Oakes*<sup>98</sup> analysis. In practice however, it has become evident that certain aspects of the *Oakes* test are more rigorously tested than others. In this case, the government is likely to claim that their objective with the criminalization of polygamy is to protect women and children and the courts are likely to accept this legitimate proposition without too much questioning. Section 27 could certainly influence how the protection of women and children is defined and applied – that is, in a manner not inconsistent with multiculturalism understood intersectionally<sup>99</sup> – but this is most likely to be done at the proportionality stage, with the section on minimal impairment exacting the most thorough scrutiny. Indeed at the minimal impairment stage, the government must show that the measure employed, in this case the criminalization of polygamy, impairs the right, to freedom of religion, as little as reasonably possible in order to achieve the legislative objective of protecting women and children. To be characterized as minimal, the impairment must be “carefully tailored so that rights are impaired no more than necessary.”<sup>100</sup> Presumably then, a careful tailoring requires that the protection of women’s equality does not derogate from their religious freedom, particularly when women themselves may not see the two as incompatible. The separation of women’s freedom of religion and equality rights would simply allow the Court to obscure the particular oppression of the women of Bountiful.

At the final stage of the proportionality analysis, the negative effects of the infringement are balanced against the actual benefits derived from the legislative measure.<sup>101</sup> Here too, an examination of these benefits and drawbacks can only fully be appreciated by reference to the multiple interests at stake. Angela Campbell’s extensive interviews with the women of Bountiful suggest that while instances of vulnerability and exploitation may well exist (as they do in any

---

<sup>98</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

<sup>99</sup> Recall that in *Keegstra* the court relied on s. 27 to influence the pressing and substantial objective proffered by the government. *Keegstra*, SCC, *supra* note 35.

<sup>100</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 160.

<sup>101</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37 at para (QL). 150, Abella J., dissenting.

community), the practice of plural marriage does not seem to be the inherent cause of systemic exploitation.<sup>102</sup>

In questioning how the particular evidence of religion as portrayed by the defendants is informed by the perspectives of the women from Bountiful, and in questioning how the evidence of equality portrayed by the government is informed by these same women's understanding of culture, section 27 may succeed in providing a complex and comprehensive understanding of these women's cultural identity. Depending then on the divergent viewpoints presented by defence counsel, Crown lawyers and expert witnesses, the court ought to rely upon an intersecting analysis in determining how section 27 will influence section 1; it may well restrict the scope of the justification made by the government. "Adapting to the messiness of overlapping commitments would be more consistent with protecting human dignity, the overarching *Charter* value, than is expunging intersectional claims."<sup>103</sup>

## VI: CONCLUSION

The guarantee of equality in the *Charter* must reach beyond the mere application of section 15. "Though we have long since recognized that the language of equality can be spoken in different ways; only recently and after much delay have we finally committed ourselves to learning to speak in terms of *meaningful* equality."<sup>104</sup> We know that meaningful equality does not always require identical treatment. We also know the folly in assuming that women form a homogenous category or that strategies for change will be alike for women who experience multiple and therefore distinctive forms of oppression. The full potential of equality can be realized with resort to the interpretive tools that currently exist in the *Charter*, if these tools are understood through an intersectional lens.

---

<sup>102</sup> Angela Campbell, "Listen to the Women of Bountiful" *The Globe and Mail* (10 January 2009) online: <<http://www.theglobeandmail.com/servlet/story/LAC.20090110.COPOLY10/TPStory/?query=bountiful>>. See also Status of Women Canada Report, *supra* note 93.

<sup>103</sup> Beverley Baines, "Must Feminists Identify as Secular Citizens? Lessons from Ontario" in Linda C. McClain & Joanna L. Grossman, eds., *Gender Equality: Dimensions of Women's Equal Citizenship* (Cambridge: Cambridge University Press, 2009), online: Social Sciences and Research Network <<http://ssrn.com/abstract=1303563>> at 42.

<sup>104</sup> L'Heureux-Dubé, *supra* note 3 at 281.

The potential of section 27 is that an intersectional analysis of cultural rights will offer a more nuanced approach to rights analyses and be more likely to reflect the multiple and complex affiliations of people's lives. Intersectionality insists that the multiple identities and corresponding consequences for such people are not ignored. For women of colour and religious women such an approach will be particularly significant since their plight is often the result of multiple forms of subordination. Indeed such women should not have to choose between their cultural rights and gender equality. Legal instruments such as the *Charter* must be used in such a way as to promote the interests of those most marginalized. The Supreme Court in *Braker* appears to have appreciated the thorny effects that can occur for women entangled in multiple attachments. Section 27's interpretative capacity offers the Court a constitutional instrument with which to further equality, understood in its most purposive, meaningful, fulsome and substantive way.