

The *Charter's* Multiverse: The Marvel of Section 27

by

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ABSTRACT

Section 27 of the *Charter* should be understood as a substantive right. Both the courts and academics have diminished the role section 27 can play by failing to consider the work that the provision was meant to accomplish. A purposive approach to the interpretation of section 27 reveals extensive support for the proposition that section 27 should be given a more robust role in *Charter* litigation when it is given proper constitutional interpretation. Both the Canadian and international foundations of section 27 provide strong evidence that the provision is not being utilized in the intended manner. People of colour, newcomers to Canada, and Indigenous people have long faced barriers created by discrimination in the legal system. Recognizing section 27 as an independent right would aid Canada in accelerating actions to address systemic racism and discrimination at a systemic level.

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DEDICATION

For Asha, Daevi, and Rohan—my reasons for everything.

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PART ONE: INTRODUCTION

The *Canadian Charter of Rights and Freedoms*¹ contains a number of clauses meant to provide guidance for how this instrument should be understood. Among these provisions is section 27, which states that the “*Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”² As a statement of political and social value, section 27 is undoubtedly significant. As a legal instrument of action, its utility has been less clear. Given the complexities and potential for conflict living in Canada’s diverse society, it is crucial to understand how the *Charter* can be used as a foundation for achieving greater fairness within the judicial system, protecting vulnerable groups from discrimination, and reducing racial tensions by promoting tolerance and acceptance. Section 27 can play a significant role in advancing multiculturalism in a manner that will advance these interests.

Canadians have a complicated relationship with multiculturalism embedded deep in our history. Outwardly, we espouse the concept of multiculturalism—we preach it to our children, we promote it socially, and we legislate to legitimize it. For example, in 2021, the Manitoba Government created a five-year, 25 million dollar fund to support quality education and improve student outcomes.³ Recipients of the fund have received financial awards for initiatives such as building a digitized library for multilingual and multicultural books and supporting Indigenous

¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].

² *Ibid*, s 27.

³ See “Better Education Starts Today-Putting Students First Strategy”, online: Government of Manitoba <<https://bettereducationmb.ca/teachers-idea-fund/>>.

cultural learning.⁴ But what do our actions tell us about what we really think about multiculturalism? Do Canadians support a legally enforceable obligation to endorse a specific multicultural agenda? Absent such support, does the law provide a framework for building that support?

This tension between words and actions has played out openly across Canadian history. For example, in 1903, Prime Minister Sir Wilfred Laurier made this grand statement supporting multicultural heritage: “For here (in Canada), I want the marble to remain the marble; the granite to remain the granite; the oak to remain the oak; and out of all these elements, I would build a nation great among the nations of the world.”⁵ However, three years earlier in 1900, Prime Minister Laurier had introduced a \$100 Chinese head tax.⁶ In 1911, he would sign an order-in-council banning Black immigrants to Canada for a period of one year.⁷

More recently in June 2021, departing Nunavut Member of Parliament Mumilaqq Quaqqaq said in her farewell speech in the House of Commons that she had felt unwelcome on Parliament Hill and had been racially profiled trying to gain access to the House of Commons.⁸ She stated that diversity, inclusion, and reconciliation were all pretty words, but that nice words with no action can hurt.⁹ Never before has the message from the government around diversity and inclusion been more emphatic. In 2021, the Treasury Board of Canada Secretariat launched the Centre on Diversity and Inclusion, an entity dedicated to examining the barriers and

⁴ *Ibid.*

⁵ Minister of Supply and Services Canada, *The Charter of Rights and Freedoms: A Guide for Canadians*, 1982 at 29.

⁶ *Chinese Immigration Act*, SC 1885, c 71, as repealed by *Chinese Immigration Act*, SC 1923.

⁷ The order never came into law.

⁸ Mumilaqq Quaqqaq, House of Commons, June 15, 2021, <https://www.cbc.ca/radio/asithappens/as-it-happens-the-wednesday-edition-1.6067864/nunavut-mp-mumilaqq-qaqqaq-on-leaving-politics-and-why-she-feels-no-pride-in-canada-1.6068158>.

⁹ *Ibid.*

challenges to achieving a diverse and inclusive workplace.¹⁰ Yet a Member of Parliament did not feel safe or welcome going to work in Ottawa based on her race.

Examples of this kind of mixed messaging exist even closer to home. The president of the Manitoba Bar Association (MBA) includes a message in the organization's monthly online publication, Headers and Footers. In the November 2020 publication, the MBA president wrote about "(sometimes) well intentioned and (often) naïve 'social justice warriors' call for change with the desire of socialist utopia..."¹¹ The MBA pledges to promote fair justice systems, facilitate effective law reform, uphold equality in the legal profession, and eliminate discrimination. The disconnect between the MBA commitment and the president's message highlights the importance of continuing the conversation around constitutionally protected diversity rights.

Understanding section 27 as a substantive *Charter* right and functional legal tool is key to resolving the tension between Canada's official words and official actions. Systematically analyzing section 27's promise is the task that I have undertaken in this thesis. I begin my analysis in part two by considering a theoretical perspective for my research. I rely on an intersectional approach as a woman of colour, understanding that subordination may manifest itself in multiple ways for some people. In part three, I examine the jurisprudence that addresses section 27 of the *Charter* and what is revealed by how the courts are applying the provision. Unfortunately, despite forty years of *Charter* interpretation, this exercise reveals little about how courts should interpret and apply section 27. In part four, I begin to address that question:

¹⁰See "Centre on Diversity and Inclusion" (last modified 23/11/2021), online: Government of Canada <<https://www.canada.ca/en/treasury-board-secretariat/corporate/organization/centre-diversity-inclusion.html>>.

¹¹ Owen, Carli, "President's Message" Headnotes and Footnotes 52:9 (November 2020) 4, online: <www.cba-mb.ca>.

specifically, how should section 27 be used? I consider that question by undertaking a purposive interpretation of section 27. I start by looking at the Canadian and international foundations of the provision. These sources provide strong evidence to support a more robust interpretation of section 27. In part five, I explore academic commentary to see if it can usefully add to the interpretative exercise. The literature pertaining to section 27's relationship to, and tension with, similarly situated *Charter* rights such as section 28 is particularly instructive. In part six, I consolidate the earlier sections and propose a new understanding of section 27. I consider how both the courts and academics in underestimating section 27's constitutional purpose have misinterpreted the provision. Recognizing the pressing need to address systemic discrimination in Canada, I then show how section 27 can be employed in practice. I consider practical applications where recognizing section 27 as a standalone, substantive right would address this critical goal.

PART TWO: THEORETICAL FRAMEWORK

Diversity issues have defined much of my life. I grew up in Winnipeg, Manitoba as the child of two non-white immigrants who came to Canada from two different countries. My story is not overly unique, as Canada is known for the diversity of its people who hail from all over the world. Its history is defined by the coming together of people from many cultures who were adventurous and inventive. They came to Canada to establish a better life for themselves and to seek their fortunes and their happiness. The study of diversity issues has a further personal element to me as I am a woman of colour. I have always been acutely aware that the way I experience the world is not from a position of power or privilege.

What is intersectionality?

In identifying a theoretical framework for this thesis, I considered my own personal experience as a coloured woman, as well the reality of so many other Canadians whose lived experience is complex and nuanced. This acknowledgement dovetailed neatly with the concept of intersectionality. The concept of intersectionality underlines the fact that subordination may manifest itself in multiple ways in the lives of some people. In Canada and internationally, it is “increasingly recognized that discrimination can occur on the basis of more than one ground” and that “[s]uch discrimination can create cumulative disadvantage.”¹² For instance, women of

¹² Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (Brussels: European Commission, 2016) at 27, online: Oxford Human Rights Hub <http://ohrh.law.ox.ac.uk/wordpress/wpcontent/uploads/2016/07/Intersectional-discrimination-in-EU-gender-equality-and-non-discriminationlaw.pdf>.

colour can experience racism and sexism in the same course of events. The concept of intersectionality, or intersectional discrimination, describes the qualitatively distinct kinds of discrimination that result from the interplay or “synergy” of multiple sources of discrimination.¹³ Intersectional theory suggests that political movements and institutions including the law fail to consider these intersectional dynamics.

The term intersectionality is credited as being coined by Kimberlé Williams Crenshaw, an African American law professor, in the context of commenting on the failure of existing legal frameworks to remedy oppression against Black¹⁴ women.¹⁵ She argued that new analytical structures were necessary to address the reality of intersectional discrimination.¹⁶ Intersectionality has become somewhat of a buzz word, and its prevalence has created a multitude of definitions across numerous disciplines. Crenshaw herself sees intersectionality more as a tool than a theory, describing it as

...a metaphor for understanding the ways that multiple forms of inequality or disadvantage sometimes compound themselves, and they create obstacles that often are not understood within conventional ways of thinking about antiracism or feminism or whatever social justice advocacy structures we have. Intersectionality isn't so much a grand theory, it's a prism for understanding certain kinds of problems.¹⁷

¹³ Kimberlé Williams Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) U Chicago Legal F 139 [Demarginalizing the Intersection of Race and Sex] at 139.

¹⁴ I have intentionally capitalized the word Black when describing people and culture of African origin. Existing structures, including written language, have failed to respond to our multicultural society. For many people, the capitalization of that one letter is the difference between a colour and a culture, and I want my work to reflect that significant difference.

¹⁵ Demarginalizing the Intersection of Race and Sex, *supra* note 13 at 139.

¹⁶ *Ibid.*

¹⁷ Kimberlé Williams Crenshaw, “What is Intersectionality?” National Association of Independent Schools (22 June 2018), online: YouTube.

This perspective of intersectionality is useful when analyzing any law pertaining to multiculturalism in Canada, because it forces one to think about relationships of power and the systemic forces of marginalization.

Intersectionality in Canadian law

Focusing on the ways that the legal system is structured to support power imbalances and systemic discrimination, intersectionality is a tool that recognizes and addresses the complexity in the world, in people, and in human experiences. Sociologists and critical race scholars Patricia Hill Collins and Sirma Bilge suggest a comprehensive definition of intersectionality that addresses these undercurrents: “[w]hen it comes to social inequity, people’s lives and the organization of power in a given society are better understood as being shaped not by a single axis of social division, be it race or gender or class, but by many axes that work together and influence each other. Intersectionality as an analytic tool gives people better access to the complexity of the world and of themselves.”¹⁸ Any framework developed around section 27 must be prepared to meet these complexities if it is to have meaningful impact for all Canadians.

The question of how an intersectional interpretation of section 27 would function in actual litigation has not been defined, but not because of a lack of scenarios in which multiple grounds of discrimination or oppression have arisen in the context of *Charter* litigation. For example, there have been cases in which the claimants are women and caregivers,¹⁹ cases in

¹⁸ Patricia Hill Collins & Sirma Bilge, *Intersectionality* (Cambridge: Polity Press, 2016) at 2.

¹⁹ See for example *Symes v. Canada* [1993] 4 SCR 695 and *Fraser v. Canada (Attorney General)* 2020 SCC 28.

which claimants are children and “disabled”,²⁰ young, financially insecure and “disabled”,²¹ female, caregiver and “disabled”.²²

Intersectional arguments are slowly being made in Canadian courtrooms, primarily in federal immigration cases and human rights decisions.²³ Furthermore, intersectionality has been codified in the *Canadian Human Rights Act*, which specifies that “...a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.”²⁴ The process of applying intersectionality arguments will be a complex and context specific exercise, as no single person who shares multiple grounds of discrimination can be the definitive voice for institutional or systemic barriers that others may experience.

An intersectional understanding of section 27

Despite the complexities involved, an intersectional understanding of section 27 is imperative for both its interpretation and its application. As a framework for analysing section 27, intersectionality allows consideration of a highly nuanced approach to multiculturalism. An intersectional approach may be challenging for the courts to implement, but it would not be impossible. For example, Ontario lawyer Omar Har-Redeye suggests that one approach to raising intersectional arguments is to focus on the networks of relationships because:

²⁰ See for example *Eaton v. Brant County Board of Education* [1997] 1 SCR 241.

²¹ See for example *Gosselin v. Québec (Attorney General)* 2002 SCC 84 [*Gosselin*].

²² See for example *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519.

²³ See for example *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 (CanLII) and *Turner v. Canada (Attorney General)*, 2012 FCA 159 (CanLII).

²⁴ RSC 1985, c. H-6 at s 3.1.

...all members of society, both within discriminated groups and throughout society at large, have a joint and shared responsibility to ameliorate systemic barriers. This involves a high degree of cooperation, but also a recognition of shared advocacy towards these goals between all participants in society, irrespective of their individual identities. To achieve that goal, a process of learning, understanding, and developing of empathy towards others is a prerequisite.²⁵

These principles to support raising intersectional arguments, equally further section 27's interpretation and purpose. From this perspective, intersectionality is a useful theoretical framework for analyzing section 27 of the *Charter* as they both can be viewed as legal tools with the potential to address discrimination in an increasingly diverse society. A review of the case law indicates courts have not been using an intersectional approach to section 27.

²⁵ Omar Ha-Redeye, "Understanding Intersectionality Could Help Judicial Decisions" (12 March 2019) CanLii Connects, online: CanLii Connects <<https://canliiconnects.org/en/commentaries/66020>>.

PART THREE: A REVIEW OF THE JURISPRUDENCE

A review of the jurisprudence that addresses section 27 of the *Charter* reveals how the courts are understanding and applying the provision. My review shows that, despite forty years of *Charter* interpretation, there is very little engagement with how the provision ought to be understood and used. My methodology for this jurisprudential analysis is to take an open-ended approach to the cases, asking the broad question of how the courts are approaching the section 27 aspect of the case. My examination is informed by my life experiences and understanding of the world as a woman of colour and as the daughter of immigrants. Details that might go unnoticed in some decisions resonate deeply with me. I am acutely aware that my personal history includes a desire to maintain a connection to my ancestors' culture and a fear that living in the majority culture may override my origins. My perspective informs not only my understanding of the jurisprudence, but also how section 27 needs to operate in order to fulfill its role in the *Constitution*.

I start my analysis by examining Supreme Court of Canada decisions to determine how the stage has been set for lower court application. Then I examine how the lower courts have drawn on this foundation to identify in a comprehensive fashion how the courts understand and apply section 27. My discussion will show that the Supreme Court decisions have left the lower courts to grapple with what section 27 means and how the provision should be applied.

Supreme Court of Canada decisions

Beginning my analysis with the highest court is limited by the available body of decisions to work with. The Supreme Court of Canada has not been presented with many opportunities to

comment on section 27. For reference, the number of times section 27 has been cited by the Supreme Court is approximately two dozen. In contrast, the Supreme Court of Canada has cited section 15 in over two hundred decisions.²⁶ This limited treatment of section 27 is further narrowed by the fact that some of the decisions that cite section 27 go no further than listing the provision in the opening paragraphs as a provision that is relied on.²⁷ Another group of cases merely refers back to section 27's use in prior cases, contributing nothing further to the development of the provision.²⁸

Given the narrow scope for interpretation in the Supreme Court of Canada, I have organized my analysis of the Supreme Court case law around the results of the decisions. Specifically, The Supreme Court has used section 27 in interpreting other substantive *Charter* rights provisions, establishing section 23 of the *Charter* as an exception to section 27, contributing to the section 1 *Charter* analysis, and applying social context in judicial decision-making. Early engagement with section 27 by the Supreme Court of Canada laid the foundation for a robust approach to the provision. Later cases evidenced a more dismissive attitude towards section 27, with only a few exceptions signalling a renewed openness to recognizing a role for section 27.

²⁶ These figures are based on the results of searches done by the author in Lexis Advance Quicklaw in May 2021 and are meant for general information purposes. January 23, 2022, searched CanLII confirmed 237.

²⁷ See for example *Gosselin*, *supra* note 21, *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 [*Reference re Public Service*], and *R v Andrews*, [1990] 3 SCR 870 [*Andrews*].

²⁸ See for example *R v Sharpe* 2001 SCC 2 and *Société des Acadiens v Association of Parents* [1986] 1 SCR 549.

Section 27 to inform other Charter rights

The earliest treatment by the Court occurred in two cases: *Big M Drug Mart* and *R v Edwards Books and Art Ltd.*²⁹ *Big M Drug Mart* is considered a landmark decision as it was one of the earliest cases to be decided under the *Charter*. Among other things, the decision is noted for its use of section 52 (the supremacy clause) of the *Constitution Act, 1982*,³⁰ its interpretation of freedom of religion under section 2 of the *Charter*, and for its role in developing the *Oakes* test that governs state justification of limits to *Charter* rights.³¹ However, it should be equally noted for being one of the first instances of interpretation of section 27 of the *Charter*.

In *Big M Drug Mart*, the Court invalidated a federal statute that imposed Sunday as a day of rest for openly religious reasons. The federal statute at issue in the case was the *Lord's Day Act*.³² *Big M Drug Mart* was charged for violating the *Lord's Day Act* by carrying on business on a Sunday. Chief Justice Dickson stated that “to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians. To do so is contrary to the express provisions of s.27.”³³ In other words, the Court used section 27 to interpret 2(a) as including, at a minimum, protection against state compulsion in belief and observance. The Court emphasised this point by stating that the *Charter* “mandates that the legislative preservation of a Sunday day of rest should be secular, the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent

²⁹ *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 [*R v Edwards Books and Art Ltd.*].

³⁰ *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11.

³¹ The name of the test comes from the Supreme Court of Canada decision in which it was first formulated, *R v Oakes*, [1986] 1 SCR 103.

³² *Lord's Day Act*, RSC 1970, c. L-13, s.4.

³³ *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 [*Big M Drug Mart*] at 337-38.

for the federal Parliament to provide legislative preference for any religion at the expense of those of another religious persuasion.”³⁴ In terms of a starting point from the Supreme Court of Canada, this perspective on section 27 makes a strong argument for minorities’ freedom of religion. It also appears to indicate that, at a minimum, section 27 can be used to interpret the various rights in the *Charter*.

The Supreme Court next considered section 27 in *R v Edwards Books and Art Ltd.*, the case being an appeal of a decision from the Ontario Court of Appeal in *R v Videoflicks*.³⁵ Similar to the case in *Big M Drug Mart*, in *R v Edwards Books and Art Ltd.* various retail storeowners were charged with Sunday opening offences under the Ontario *Retail Business Holidays Act*.³⁶ This particular *Act* provided exemptions when a store had both closed on Saturday and limited its retail space and workers when open on a Sunday. The majority of the Court agreed that the *Retail Business Holidays Act* infringed religious freedom, but that it was saved by section 1 of the *Charter*. Chief Justice Dickson noted section 27 supported freedom of religion, including protection from direct and indirect coercion, and that a more restrictive interpretation of section 2(a) would not be consistent with section 27.³⁷ The majority agreed that the *Act* in question infringed religious freedom by giving an unfair economic advantage to those who were Sunday-Sabbath observers. Given the fact that the *Retail Business Holidays Act* contained an exemption in it that allowed stores of less than a certain size to stay open on Sunday if they had been closed the previous Saturday, the majority of the Court upheld the statute as a reasonable limit under

³⁴ *Big M Drug Mart*, *supra* note 33 at 338.

³⁵ *R v Videoflicks*, (1984) 5 OAC 1 [*Videoflicks*].

³⁶ *Retail Business Holidays Act*, RSO 1980, c 453 [*Retails Business Holidays Act*].

³⁷ *R v Edwards Books and Art Ltd*, *supra* note 29 at 758.

section 1 of the *Charter*. While this case does not add a new dimension to section 27, it confirms both the understanding of section 27, and its potential uses as determined in *Big M Drug Mart*.

Only Justice Wilson furthered the use of section 27 in her finding that the *Retail Business Holidays Act* was not saved by section 1 of the *Charter*. Her reasoning was that the exemption allowed some, but not all, of the members of Saturday-observing minorities to do business on Sundays. She took the position 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 or fowl of others....[T]o do so is to introduce an invidious distinction into the groups and sever the religious and cultural tie that binds them together.”³⁸ Justice Wilson reasoned that to interpret the *Charter* in that manner is precluded by the language of section 27 and could not be a reasonable limit under section 1. This treatment serves a starting point for the Supreme Court’s future use of section 27 to inform section 1.³⁹

*R v Tran*⁴⁰ is another ground-breaking Supreme Court of Canada decision in that it is the first time the Court considered the constitutional right to an interpreter as protected under section 14 of the *Charter*. This decision is also noteworthy as it is one of the few treatments of section 27 by the SCC, which has had a substantial impact on the lower courts. The decision related to a criminal law trial in which the accused spoke neither French nor English and required the use of an interpreter in the course of his legal proceeding. In considering section 14 of the *Charter*, the Court relied partially on Canada’s claim to be a multicultural society as noted in section 27. The Court stated that in the context of the decision, section 27 was particularly relevant:

³⁸ *R v Edwards Books and Art Ltd*, *supra* note 29 at 808.

³⁹ I will return to the use of section 27 to inform section 1 later in this thesis.

⁴⁰ *R v Tran*, [1994] 2 SCR 951 [*Tran*].

In so far as a multicultural heritage is necessarily a multilingual one, it follows that a multicultural society can only be preserved and fostered if those who speak languages other than English and French are given real and substantive access to the criminal justice system. Just as s. 27 has already been held to be relevant to the interpretation of freedom of religion under s. 2 (a) of the *Charter*...so too should it be a factor when considering how to define and apply s. 14 of the *Charter*.⁴¹

Therefore, reliance on section 27 had the effect of the Court applying a purposive and liberal interpretation to section 14 of the *Charter*.

Even though the Court's use of section 27 to interpret section 14 has had an impact on the lower courts, substantively, the way the Court used section 27 in this case is no different from its use in *Big M Drug Mart* to help interpret another right in the *Charter*. While *R v Tran* does not substantively expand the application of section 27, it does expand the interpretation because it indicates that the Court understands culture as being tied to language.

Finally, in *Mouvement laïque québécois c. Saguenay (City)*,⁴² an appeal in which freedom of conscience and religion were at issue, the Court briefly addressed section 27. This case suggests a substantive understanding and application of section of 27. At issue in the appeal was the Mayor of Saguenay beginning public meetings of the municipal council with a prayer and the act of making the sign of the cross. An atheist member of council asked that council cease this practice, as it allegedly offended his right to freedom of conscience and religion and the state's duty of neutrality under the *Quebec Charter*. For the first time, the Supreme Court applied section 27 as a stand-alone obligation. In agreeing with the member of council, the Court noted that the “neutrality of public space therefore helps preserve and promote the multicultural nature

⁴¹ *Tran*, *supra* note 40 at 37.

⁴² *Mouvement laïque Québécois c. Saguenay (City)* [2015] 2 SCR [*Saguenay (City)*].

of Canadian society enshrined by section 27 of the *Canadian Charter*. Section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the *Canadian Charter*, but also with a view to promoting and enhancing diversity."⁴³ Therefore, in order to preserve and promote multiculturalism, the duty of neutrality prohibited the Mayor from beginning meetings with a prayer—even if it was a non-denominational prayer. This decision is illustrative of section 27 being deployed in several ways. It is being used to interpret another provision of the *Canadian Charter*, namely section 2(a); it is used to interpret a Quebec statute, namely the *Quebec Charter*; and it is used to inform the concept of state neutrality.

An exception to section 27

The Supreme Court of Canada has also considered French language rights in the context of section 27. In *R v Mahé*⁴⁴ the Supreme Court was asked to address the argument that section 23 (which protects minority language education rights) should be interpreted in light of sections 15 and 27. The conclusion, which the Court went on to endorse in the 1990 *Reference re Public Schools Act (Man.)*⁴⁵, was the following:

Section 23 provides a comprehensive code for minority language educational 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 s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada.⁴⁶

⁴³ *Saguenay (City)*, *supra* note 42 at 74.

⁴⁴ *R v Mahé*, [1990] 1 SCR 342 [*Mahé*].

⁴⁵ *Reference re Public Schools Act (Man.)*, s 79(3), (4) and (7) [1993] 1 SCR 839.

⁴⁶ *Mahé*, *supra* note 44 at 369.

This perspective treats section 23 as an exception to sections 15 and 27, the means to achieve substantive equality in the specific context of official language minority communities. It also implicitly reinforces the Court’s understanding of language as being linked to culture. The Supreme Court reaffirmed its position regarding section 23 as an exception in *Solski (Tutor of) v Quebec (Attorney General)*.⁴⁷ The Court in *Mahé* essentially recognizes that by establishing special status for English and French-speaking minorities in Canada, the *Constitution* creates inequalities between linguistic groups. English and French minority communities enjoy a right denied to other linguistic minorities and section 27 of the *Charter* cannot be used to dilute the right provided in section 23 or extend that right to other language groups.

Section one analysis

Two Supreme Court of Canada decisions applied section 27 in considering the constitutionality of the criminal prohibition of hate propaganda. In both decisions, section 27 impacted upon the section 1 analysis. In the first decision, *R v Andrews*,⁴⁸ the Supreme Court upheld an Ontario Court of Appeal decision, which found that “multiculturalism cannot be preserved let alone enhanced if free rein is given to the promotion of hatred against identifiable groups.”⁴⁹ In the second decision, *R v Keegstra*,⁵⁰ the Supreme Court considered section 27 in the context of a challenge to the *Criminal Code* proscription of hate propaganda as a violation of the right to freedom of expression guaranteed under section 2(b). In analyzing whether the

⁴⁷ *Solski (Tutor of) v Quebec (Attorney General)* [2005] 1 SCR 201.

⁴⁸ *R v Andrews*, [1990] 3 SCR 870.

⁴⁹ *R v Andrews*, [1988] 65 OR (2d) 161 at 181.

⁵⁰ *R v Keegstra* [1990] 3 SCR 697 [*Keegstra*].

infringement was a reasonable limitation demonstrably justified in a free and democratic society, Chief Justice Dickson observed that:

The value expressed in s. 27 cannot be casually dismissed in assessing the validity of s. 319(2) under s. 1, and I am of the belief that s. 27 and the commitment to a multicultural vision of our nation bear notice in emphasizing the acute importance of the objective of eradicating hate propaganda from society.⁵¹

While the Court was split in *Keegstra* and there were three dissenting Justices, the minority agreed with the majority that section 27 could be employed to inform the interpretation and application of section 1.⁵²

Early uses of section 27 by the Supreme Court indicate how it could be used: to inform the interpretation of other rights in the *Charter* and to inform whether specific limits to *Charter* rights are reasonable and demonstrably justified in a free and democratic society under section 1. The Supreme Court has also held that there are ways in which section 27 cannot be used, namely to dilute the particular language right enshrined in section 23.

In *R v Zundel*⁵³ the Supreme Court of Canada again considered the validity of a section of the *Criminal Code*,⁵⁴ this time prohibiting the spreading of false news. The Court found the section at issue to be a violation of section 2(b) rights. Section 27 of the *Charter* was applied in the course of the section 1 analysis. The dissenting Justices, who would have upheld the

⁵¹ *Ibid.*

⁵² *Ibid* at 759.

⁵³ *R v Zundel*, [1992] 2 SCR 731 [*Zundel*].

⁵⁴ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

Criminal Code provision, described Canadian multiculturalism as entitling equal recognition to people of all cultures:

Section 27 of the *Charter* is not merely the reflection of a fleetingly popular concept. Rather it is a magnificent recognition of the history of Canada and of an essential precept for the achievement of those elusive goals of justice and true equality...Section 27 strives to ensure that in this land there will be tolerance for all based on a realization of the need to respect the dignity of all.⁵⁵

The dissent applied section 27 to confirm that the objective underlying the *Criminal Code* provision was pressing and substantial. This dissent is powerful in that it promotes the idea that a multicultural society will not tolerate inciting conflict through the publication of lies that attack basic human dignity and the security of individuals.

The Supreme Court of Canada again factored section 27 of the *Charter* into part one of the *Oakes* test in the *Canada (Human Rights Commission) v Taylor*⁵⁶ decision. Chief Justice Dickson found that the objective of promoting equal opportunity unhindered by discriminatory practices based on race or religion was pressing and substantial.⁵⁷ Moreover, he concluded that sections 15 and 27 strengthen the "substantial weight" to be given to the objective of preventing the harmful effects associated with hate propaganda.⁵⁸ This strengthening factor was applied later in *Ross v New Brunswick School District No. 15*⁵⁹ when assessing the importance of the objective of an impugned order that infringed freedom of expression. Section 27 was used in both cases to emphasize the fundamental commitment of the international community to the eradication of

⁵⁵ *Zundel*, *supra* note 53 at 817-818.

⁵⁶ *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 [*Ross*].

discrimination in general and to acknowledge the pernicious effects associated with hate propaganda that undermines basic democratic values and are antithetical to the "core" values of the *Charter*.⁶⁰ These decisions confirm what the first Supreme Court cases made clear in *Big M Drug Mart* and *R v Edwards Books and Art Ltd.* recognizing religion as an element of multiculturalism.

Social context

*R v S (RD)*⁶¹ is a leading decision of the Supreme Court from 1997 that sheds some light on the Court's perspective on section 27 at that time. The decision affirms earlier approaches to reasonable apprehension of bias in the court system,⁶² and considers limits to the application of social context in judging. A Black youth was arrested in Halifax, Nova Scotia for allegedly interfering in the arrest of another young person. Judge Sparks, the trial judge, made the following comment after she had acquitted the accused youth: "I believe that probably the situation in this particular case is the case of a young police officer who overreacted. And I do accept the evidence of Mr. S. that he was told to shut up or he would be under arrest. That seems to be in keeping with the prevalent attitude of the day."⁶³ This statement underpinned a number of appeals of the trial decision based on apprehension of bias.

While the Supreme Court was much fractured in its reasoning, the decision to acquit the accused was ultimately restored. In recognizing that all judges, regardless of their diverse

⁶⁰ *Ibid* at 97-98.

⁶¹ *R v S (RD)* [1997] 3 SCR 484 [*R v S (RD)*].

⁶² *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369.

⁶³ *R v S (RD)*, *supra* note 60 at 4.

characteristics, are entitled to the same presumption of judicial integrity and high threshold for a finding of bias, Justice Cory made reference to section 27 as being a touchstone for recognizing the diversity of Canadian society:

Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the *Charter*. Section 27 provides that the *Charter* itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin. This is a far more difficult task in Canada than it would be in a homogeneous society. Remarks which would pass unnoticed in other societies could well raise a reasonable apprehension of bias in Canada.⁶⁴

This application of section 27 suggests that Justice Cory understands race, nationality, ethnicity, and religion to be relevant to culture. It also appears that he is applying section 27 to inform his understanding of the principle of judicial impartiality, taking it beyond a limited application to other provisions of the *Charter* alone. Interestingly, Justice Cory's application also creates a chilling effect on its application by not recognizing the distinct challenges faced by the specific members of Canada, specifically people of colour, aboriginal people, and immigrants. Justice Cory's interpretation of section 27 suggests that judges should pay particular attention not to say anything that would upset white Canadians. His perspective may have contributed to the start of a new direction for section 27, which reflects a lack of understanding of the provision and what it should require.

⁶⁴ *R v S (RD)*, *supra* note 61 at 95.

In his decision, Justice Cory labelled Justice Sparks' comments as being "unfortunate and unnecessary".⁶⁵ In spite of this characterization, he concluded that the comments did not give rise to a reasonable apprehension of bias.

Justices L'Heureux-Dubé and McLachlin also agreed that the comments did not give rise to a reasonable apprehension of bias. However, they emphasized that it was inevitable and appropriate that the different experiences of judges aid in their decision-making process and consequently will be reflected in their judgments.⁶⁶ Justices L'Heureux-Dubé and McLachlin also disagreed with Justice Cory, finding that the comments of Judge Sparks were neither unfortunate, unnecessary, nor close to the line.⁶⁷ Justices L'Heureux-Dubé and McLachlin found that the comments reflected "an entirely appropriate recognition of the facts in evidence in this case and of the context within which this case arose -- a context known to Judge Sparks and to any well-informed member of the community."⁶⁸ This perspective recognizes that judges can never be neutral, but must still strive for impartiality so as not to prevent fair and just outcomes. The recognition of the multicultural heritage of Canada espoused in section 27 of the *Charter* supports this perspective in recognizing the unique ability of a judge to reflect the social and political context of their cases when explaining their reasons for judgement. Therefore, contrary to Justice Cory's decision, section 27 should have been used to support recognizing Judge Sparks' comments as appropriate and useful. This understanding of section 27 was evident in the reasons of Justices L'Heureux-Dubé and McLachlin whose substantive decision reflects an appropriate contextual use of section 27.

⁶⁵ *Ibid* at 158.

⁶⁶ *R v S (RD)*, *supra* note 61 at 29.

⁶⁷ *Ibid* at 30.

⁶⁸ *Ibid*.

Superficial application, avoidance, and dismissal

Beyond the mid-1990s, the Supreme Court of Canada has only considered section 27 of the *Charter* in a handful of decisions. In those instances, the Court has not contributed substantively to its legal significance or to a framework for analysis. In *R v Kapp*,⁶⁹ the Court considered the rights of commercial fishers in the context of section 15. In comparing section 27 and section 25, the Court described section 27 as “the only general provision in the *Charter* that has been clearly identified as a simple interpretive clause.”⁷⁰ This statement is overly broad, as well as inaccurate given that the section had been given a complex identity with respect to multiculturalism in some of the cases previously discussed. The decision in *R v Kapp* seems to embody the Court’s post 1997 understanding of section 27; one that is at odds with its earlier decisions.

In *Baier v Alberta*,⁷¹ the Court merely reiterated that in *Keegstra*, the majority held that it was more appropriate to balance section 2(b) against the guarantee of equality, section 15, and the recognition of multiculturalism in section 27 at the section 1 stage of the *Charter*.⁷²

In *R v N.S.*,⁷³ the Supreme Court considered the question of whether a witness who wears a niqab could be required to remove it when testifying in court. In this case, the Court was required to balance a witness’s freedom of religion with an accused’s right to a fair trial. Despite being a clear instance in which multiculturalism issues were at play, the Court reduced its analysis of section 27 to a brief paragraph. The Court noted that the:

...“living tree” keeps growing, but always from its roots. Today, we may rightly say that, in s.27 of the Charter, Canada accepts the importance of

⁶⁹ *R v Kapp*, [2008] 2 SCR 483 [*Kapp*].

⁷⁰ *Ibid* at 88.

⁷¹ *Baier v Alberta*, [2007] 2 SCR 673 [*Baier*].

⁷² *Ibid* at 74.

⁷³ *R v NS*, [2012] 3 SCR 726 [*R v NS*].

multiculturalism in its social life. In s.27, Canada signals its acceptance that it's changing through every day of its history. At the same time, however, the recognition of multiculturalism takes place in the environment of the Constitution itself, and is rooted in its political and legal traditions.⁷⁴

The Court continued that the *Constitution* requires an openness to new differences that appear in Canada, but also an acceptance of the principle that it remains connected with the roots of Canada's contemporary democratic society.⁷⁵ The matter was ultimately returned to the preliminary inquiry judge to determine whether the wearing of her hijab was based on NS's sincere religious beliefs. The Court's treatment of section 27 of the *Charter* in this case is non-substantive and serves to limit the concept of multiculturalism to nothing more than a statement about the social sphere in Canada which is (or may be) unconnected to the legal sphere.

After four decades of *Charter* interpretation, a few observations are apt with respect to the Supreme Court's treatment of section 27. The earlier decisions of the Court generally engaged in a more meaningful discussion and useful interpretation of the provision. Later decisions generally, although not inevitably, tended to dismiss the application of section 27.

However, no legal framework has been developed that would require standardized or formal engagement in applying the multiculturalism provision. The result has been a dismissive, generic approach in most later decisions of the Court. The decision in *Tran* is an exception to the general approach to section 27, and it has produced some helpful later jurisprudence in the lower courts. The decision holds promise as it identifies a unique relationship between two *Charter* provisions, sections 14 and 27. The relationship serves to create more than a simple connection, but instead a relationship of reliance. This treatment of section 27 is highly aligned with a

⁷⁴ *Ibid* at 72.

⁷⁵ *Ibid*.

purposive and contextual interpretation of the provision, directly addressing the growing diversity within Canada. The scope and importance of section 27 may hinge on its application in criminal law given the high stakes involved for the parties and the over representation of immigrants, racialized individuals, and Indigenous peoples in the Justice system. I argue that section 27 has application well beyond the criminal law.

The Supreme Court of Canada decisions that I have reviewed suggest that the Court planted seeds for section 27 to be used to interpret other *Charter* rights, to interpret section 1, and to inform which sorts of limits on *Charter* rights may be reasonable. The Court also seemed open to the application of section 27 to constitutional or common law principles such as judicial impartiality, and to have section 27 apply indirectly to legislation as it did in *Mouvement laïque québécois c. Saguenay (City)*. However, the Court has not really developed these specific areas. Outside of the section 14 context, the Court's treatment of section 27 appears to be sporadic and erratic rather than systematic.

There is a lot to be gleaned from the Supreme Court decisions with respect to how it understands multiculturalism. A review of the decisions above suggests that the Court understands that language, religion, race, nationality, freedom of conscience, and ethnicity are all relevant to culture. Lower court decisions have reflected and further expanded on these components in their section 27 jurisprudence.

Application of section 27 in the lower courts

This section provides an overview and analysis of a selection of the lower courts' consideration of section 27 of the *Charter* to determine whether the lower courts go beyond the

principles previously discussed. Unfortunately, the Supreme Court mostly leaves the lower courts to grapple with what section 27 means and, largely, how to apply it. Further, as in the Supreme Court, the lower courts also tend to make reference to section 27, but don't perform any analysis when applying it. As the late Professor Gall points out, "[o]ne must discount a large number of cases in which Section 27 was advanced in argument but not really taken into account by the court in rendering its decision."⁷⁶ A review of the lower court decisions substantiates this point with over half of the reported decisions invoking section 27 showing no analysis whatsoever.⁷⁷

The absence of analysis is surprising, as a foundation does exist upon which to build momentum for the use of section 27 in the lower courts. This argument stems from the fact that some *Charter* rights seem more logically connected to section 27 and has been illustrated by the Supreme Court's earliest engagement with the provision. For example, there is a rational connection between the idea of multiculturalism and both sections 2 and 15 of the *Charter*. Section 2(a) of the *Charter* protects freedom of religion; religion is integral to one's cultural identity as recognized by the Supreme Court decisions reviewed above. Section 15 protects equality rights, specifically with respect to the enumerated grounds of race, national or ethnic origin, colour, and religion. At least some of those characteristics appear to be understood as related to culture from the Supreme Court decisions reviewed above. These grounds tend to be associated with minority groups and can be viewed as elements of a multicultural society.

Accordingly, one might expect the connection between section 27 and sections 2(a) and 15 to be

⁷⁶ Gerald L Gall, "Jurisprudence under Section 27 of the Charter: The Second Decade" (2002) 21 Windsor YB Access Just 307 at 309.

⁷⁷ See for example *Volzhenin v Haile*, 2007 BCCA 317 (CanLII), *Gerrard v Saskatoon (City)*, 1987 CanLII 4971 (SKCA), and *McAteer v Canada (Attorney General)*, 2014 ONCA 578 (CanLII).

more frequently made by the courts. However, examination of the lower court decisions illustrates that this has not been the case. The lower court decisions invoking section 27 can be categorized as decisions where section 27 is unaddressed despite being raised, criminal law decisions that apply section 27 in the context of an accused's right to a fair trial, and decisions that contain strong statements that attempt to define section 27.

Section 27—an argument advanced, but not addressed

There are numerous instances in the lower courts where section 27 is mentioned, but not meaningfully addressed.⁷⁸ Instead, the courts have dismissed, avoided, or entirely ignored the section.⁷⁹ In *Roach v. Canada*,⁸⁰ the Trial Division of the Federal Court was faced with determining whether the taking of an oath or the making of an affirmation within the context of the *Citizenship Act*⁸¹ violated a number of *Charter* provisions including sections 2(a), 15, and 27. Interestingly, despite seeming to fall squarely within the subject matter of multiculturalism, the Court ignored the section 27 argument. In the Federal Court of Appeal, the Court did address section 27, but only to note that the argument under section 27 should be struck as the provision was “merely an aid to interpretation and not a substantial provision that could be violated.”⁸² This finding is problematic from a number of perspectives. First, the law on this point is at best uncertain since some Supreme Court of Canada decisions seem to suggest section 27 is only

⁷⁸ See for example *Olumide v Saskatchewan Human Rights Commission*, 2019 SKQB 227 and *Mahmoud v Ottawa (City)*, 2017 ONSC 5138.

⁷⁹ See for example *R v Church of Scientology of Toronto*, [1997] OJ No 1548 CA where section 27 is mentioned only in passing and *R v TLK*, [2001] SJ No 184 where section 27 was raised, but not addressed.

⁸⁰ *Roach v. Canada (Minister for Multiculturalism and Culture)*, 1992 2 FC 173 TD [*Roach*].

⁸¹ *Citizenship Act*, RSC 1985, c C-29.

⁸² *Roach*, *supra* note 80 at 95.

interpretive (for example *Big M Drug Mart*, discussed above) while others suggest it may be more (for example *Saguenay (City)*, discussed above). Second, employing the word “merely” is clearly dismissive and results in avoidance of a provision, which objectively should have been invoked given the subject matter. Finally, the conclusion is inaccurate as it is conceivable that an interpretive provision could be violated by not applying it appropriately.

Sections 2(a), 15, and 27 were again examined in a case concerning the wearing of turbans by Sikh members of the Royal Canadian Mounted Police⁸³. The Federal Court opted not to rely on section 27 on the basis that it found no ambiguity in the relevant provisions of the *Charter*. This interpretation suggests that section 27 should only be relied on where there is an ambiguity. Again, this conclusion results in the application of section 27 being avoided on grounds that have no merit as most *Charter* provisions are necessarily ambiguous and context specific in their application, and it is unclear whether section 27 can add to the interpretation unless the provision is actually considered.

There is no clear explanation as to why courts do not substantially address section 27 arguments, especially in cases where *Charter* rights seem so logically connected to the provision. The litigants are clearly signalling to the courts that they want to make submissions with respect to section 27 by raising it. However, this may not be enough for judges. Having been raised, section 27 is on the forefront, but judges have not been told what to do with the section and are left to fill a void for which they have no framework. This point is illustrated in *R v Fehr*,⁸⁴ where the Court of Queen’s Bench of Alberta considered whether cannabis is part of Canada’s multicultural heritage. The Court stated that section 27 could not be applied and that “[n]o

⁸³ *Grant v Canada (Attorney General)*, [1994] FCJ No. 1001 TD QL.

⁸⁴ *R v Fehr*, 2004 ABQB 859.

evidence was presented that would allow any serious consideration of this argument.”⁸⁵ Had the applicant presented his argument with analysis of how section 27 should be applied in the circumstances, the result may have been different. At the very least, the defendant may have been provided a more meaningful response to his section 27 argument, rather than the outright rejection he received.

Section 27—in the criminal context

A less obvious application of section 27 has arisen in the criminal context. For instance, as noted in *Tran*, the Supreme Court of Canada determined that the right to an interpreter under section 14 is related to Canada’s claim to be multicultural. Accordingly, section 27 was applied to support the determination that a multicultural society can only be preserved and fostered if those who speak languages other than English and French are given real and substantive access to the criminal justice system. In *R v Andre*,⁸⁶ the right to private counsel under section 10(b) of the *Charter* was raised in the context of an accused whose duty counsel did not speak his language and whose interpreter was a police officer. Relying on the decision in *Tran*, the Ontario Court of Justice held in favour of a reasonably generous systemic approach to language issues in light of the multicultural heritage referenced in section 27.⁸⁷ This decision is consistent with Supreme Court decisions in which the Court applied section 27 to inform the scope and content of other *Charter* rights.

⁸⁵ *Ibid* at 28.

⁸⁶ *R v Andre*, [1995] OJ No 4249 (QL).

⁸⁷ *Ibid* at 63.

In fact, a line of criminal law cases has developed that places heavy reliance on the decision in *Tran* and specifically the comments of Chief Justice Lamer that the right of an accused person who does not speak or understand the language of the proceedings to obtain the assistance of an interpreter gives substantive content to section 27.⁸⁸ In *R v Ajiboye*,⁸⁹ the Ontario Superior Court of Justice underscored the decision in *Tran* explaining that the right to an interpreter where need is shown is a right closely tied to our societal conceptions of justice, fairness and multiculturalism, as expressed in part through section 27 of the *Charter*.⁹⁰ The BC Superior Court in *R v Thim*⁹¹ followed the *Tran* decision as well and expressed that the right to an interpreter is a right intimately related to our society's claim to be multicultural, expressed in part through section 27 of the *Charter*. The decision in *Tran*, and particularly the comments of Chief Justice Lamer, have become embedded in jurisprudence pertaining to the right to an interpreter, and both are consistently cited in lower court decisions.⁹²

The decision in *R v Gadam*⁹³ went beyond simply following the principle espoused in *Tran*. The Ontario Superior Court of Justice acknowledged that section 14 should be interpreted and applied with regard for the defendant's right to a fair trial under section 11(d) and the need to preserve and enhance the multicultural heritage of Canadians under section 27. The Court also noted that section 14 had the potential to give practical effect to the multicultural and multilingual character of Canada. The Court explained that the relationship between sections

⁸⁸ See for example *R v Kaunak*, 1997 NWTJ No 1404, *R v Johal*, 2001 BCJ No 1404 CA, *R v Ruprai*, [2002] AJ No 364, *R v Sidhu*, [2005] CanLII 42491, *R v Wong* [2011] OJ No 2325, and *R v Abrha-Beyene* [2012] OJ No 5908.

⁸⁹ *R v Ajiboye*, 2014 ONSC 7280.

⁹⁰ *Ibid* at 5.

⁹¹ *R v Thim*, 2015 BCSC 1677.

⁹² See for example *R v Rybak*, 2008 ONCA 354 (Can LII), *R v Arjun*, 2013 BCSC 2076 (Can LII), *R v Ansary*, 2001 BCSC 1333 (Can LII), *R v Manaloto*, 2002 ABQB 1091 (Can LII), *R v Olawale*, 2012 ONSC 655 (Can LII), *R v KM* 2016 ONSC 5638 (Can LII), *R v Adeagbo*, 2016 (Can LII) 89402 (NLSC), and *R v Dryneck*, 2018 NWTSC 85 (Can LII).

⁹³ *R v Gadam*, 2016 ONSC 2555 [*Gadam*].

11(d), 14, and 27 is integral to the “access of the complainant to justice, the fairness of the defendant's trial, the potency of the adversarial system, the integrity of the administration of justice and the appearances of justice.”⁹⁴ This recognition is significant because in the context of a criminal proceeding, the stakes are extremely high for all parties involved—the accused, the complainant and everyone related to them. The recognition of the need for an interpreter may just be about ensuring a fair trial, but it may also imply recognition of the close connection between culture and language and the importance of individuals being able to speak and preserve their languages. The judge’s reasoning in this decision went beyond simply applying section 27 to inform other rights. He recognized that language is an expression of culture, and its preservation stretched beyond an individual right to upholding the integrity of the judicial system.

Another area of criminal law where section 27 has been raised in the lower courts is with respect to jury selection. Despite being raised in a number of cases,⁹⁵ no accused has successfully argued in favour of jury diversity based on their multicultural heritage. This line of cases has created a specific limit on the applicability of section 27. In *R v Kent*, a decision of the Manitoba Court of Appeal, a request for a jury made up of Aboriginal people was rejected. The decision in *R v Kent* was later relied on in *R v Poucette*,⁹⁶ where the accused argued his right to a jury had been violated in that it was not made up of individuals from the community applicable to his case.⁹⁷ The Court held that applying section 27 would subject the jury system to “unreasonable

⁹⁴ *Ibid* at 7.

⁹⁵ See for example *R v Kent* [1986] MJ No.239 (Man CA) [*R v Kent*] and *R v Teerhuis-Moar*, [2007] MJ No 257 [*R v Teerhuis-Moar*].

⁹⁶ *R v Poucette*, [1993] AJ No 1058 [Poucette].

⁹⁷ *Ibid* at 2.

constraints.”⁹⁸ Arguably, the jury system itself was placing unreasonable constraints on the accused’s right to a fair trial.

In *R v A. F.*,⁹⁹ a decision of the Ontario Court of Justice (General Division), the Court engaged in some discussion with respect to the application of section 27 to jury composition. Again, the accused was an Indigenous person seeking to have representation of his cultural peers serve on the jury that would hear his case. The Court outright rejected this argument stating that section 27 could not assist the accused, and in fact supported the position of the Crown in their argument that every qualified Canadian should be entitled to be serve on a jury. The judge further held that courts “should pause before they decide to act as instruments of change with respect to cultural rights...”¹⁰⁰ This comment suggests that the courts should remain neutral when considering the cultural rights in the context of a case. The Court’s use of section 27 to find that all Canadians have a right to serve on a jury rather than using section 27 to interpret what an accused’s right to a jury trial means is diametrically opposed to a liberal and purposive approach towards the provision. The fact that the *Charter* contains specific protection for multicultural rights suggest that the Courts are the very place where individuals should be able to defend those rights and freedoms, or at the very least initiate a legal conversation about the growth and development of multicultural rights.

Most of the lower court decisions involving applicants who request a particular composition of the jury to hear their case involve Indigenous people.¹⁰¹ In these cases, the accused persons asked to be tried by a jury representative of individuals who were culturally similar to

⁹⁸ *Ibid* at 29.

⁹⁹ *R v AF*, [1994] OJ No 1392 (QL) [*R v AF*].

¹⁰⁰ *Ibid* at 113.

¹⁰¹ See for example *R v AF*, *supra* note 99, *R v Kent*, *supra* note 95, and *R v Teerhuis-Moar*, *supra* note 95.

themselves, sharing an appreciation of distinct cultural, linguistic and racial differences. The courts have persistently refused to interpret and apply section 27 to permit such a result.

In *R v West*,¹⁰² the accused asked for a change in venue so that jurors would possess cultural features similar to his own community. Section 27 was raised by the accused, but the argument was rejected. In *R v Redhead*,¹⁰³ a decision of the Manitoba Court of Queen's Bench, the same argument was again rejected. Systemic racism and the inequities faced by Indigenous people in the criminal justice system are known realities. The Government of Canada invests tens of millions of dollars into addressing the systemic barriers for Indigenous peoples in the criminal justice system.¹⁰⁴ In spite of that, the courts have not adopted an approach towards section 27 that recognizes its potential for addressing systemic racism and supporting Canada's reconciliation efforts where Indigenous people are concerned. Given this unfortunate reality, section 27 has not assisted an accused seeking an independent right to a jury composed of jurors of their own ethnicity.

It is worth noting that the Supreme Court of Canada has not been presented with arguments on the impact of section 27 of the *Charter* specifically in jury selection cases. Therefore, the outcomes that have been illustrated above may be a result of lack of precedent. Since the Supreme Court has not been presented with relevant section 27 arguments, the lower courts are not bound by the Supreme Court of Canada's approach to jury diversity and in fact should be considering the impact of section 27 in this context, particularly given the way the Supreme

¹⁰² *R v West* [1992] BCJ No 2958 (QL).

¹⁰³ *R v Redhead*, [1995] MJ No.243.

¹⁰⁴ For example, in the fall of 2000, the Government of Canada has pledged \$49.3 million over five years to support the application of *Gladue* Principles and integration of *Gladue* report writing in the justice system. See "Addressing Systemic Racism: Fall Economic Statement support for Criminal Justice Reform" (last modified 18/02/2021), online: Department of Justice Canada < <https://www.canada.ca/en/departement-justice/news/2021/02/addressing-systemic-racism-fall-economic-statement-support-for-criminal-justice-reform.html>>.

Court has applied section 27. The Supreme Court decision in *Canada (Attorney General) v Bedford*,¹⁰⁵ affirmed that the common law principle of *stare decisis* is subordinate to the *Constitution* and cannot require a court to uphold a law that is unconstitutional. In *Bedford*, the Supreme Court stated that a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach.¹⁰⁶ The threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence.¹⁰⁷ Following this argument, there is no binding precedent to follow from the Supreme Court with respect to applying section 27 to the jury selection process. Further, nothing prevents raising the argument that specific jury selection rules are unconstitutional even if section 27 had been raised in an earlier case but was left unaddressed.

These lower court decisions offer very little analysis of section 27 beyond what the Supreme Court has already provided. The approach has been largely to avoid engaging with the section altogether. The decision in *R v Tran* has been followed in a number of cases and there has even been recognition of language preservation extending beyond the individual right to upholding the integrity of the judicial system. There has been no success in using section 27 to advance the argument of a jury composed of specific ethnicities resulting in the creation of another specific limitation on the interpretation and application of section 27. However, the lower courts have provided some interesting and strongly worded statements about the purpose of section 27.

¹⁰⁵ *Canada (Attorney General) v Bedford* SCC 72 [*Canada (Attorney General) v Bedford*].

¹⁰⁶ *Ibid* at 43.

¹⁰⁷ *Ibid* at 44.

Defining statements

The strongest statement from the lower courts with respect to section 27 comes from the Prince Edward Island Supreme Court. In *Ayangma v Prince Edward Island*,¹⁰⁸ the Prince Edward Island Supreme Court took a more purposive approach to the provision than is seen in many cases in rendering its decision. The case involved a member of a visible minority who had applied to be a race relations consultant for the Prince Edward Island Department of Education. An advisory committee formed by the Department of Education screened candidates and held interviews. The individual did not get the position and complained that the committee was not made up of any member of a visible minority. The Court made the following comments with respect to the plaintiff's section 27 argument:

[S]ection 27 of the *Charter* supports the prohibition of indirect or systemic discrimination, as well as cultural discrimination. Even if the role of Section 27 is limited to an internal, constitutional canon of interpretation or [sic] the substantive sections of the *Charter*, its effect on section 15 is to read it into the fourfold equality rights, and the protection against discrimination in sub-Section 15(1). It would be inconsistent with enhancement of the multicultural heritage of Canadians to uphold a law or practice whose effect on individuals of specified ethnic origins was arbitrary denial of the prospect to advancement. If section 27 is to have even the interpretive effect described above, it must operate to apply sub-Section 15(1) to cultural discrimination, in which the very evil being addressed is the failure of public institutions (such as the media and educational systems) to recognize ethnic diversity. To permit cultural discrimination under sub-Section 15(1) would be the antithesis of “preservation and enhancement” of Canada’s multicultural heritage.¹⁰⁹

¹⁰⁸ *Ayangma v Prince Edward Island*, [2000] PEIJ No. 97 (QL) [*Ayangma v Prince Edward Island*].

¹⁰⁹ *Ibid* at 34.

This powerful statement from the Court represents a clear recognition that section 27 has potential to play a larger role in combatting discrimination. It also signals a potential openness to the earlier, substantive approaches used in *Big M Drug Mart* and *Keegstra*.

The decision in *Ayangma v Prince Edward Island* is in line with a number of earlier lower court decisions that affirm multiculturalism as a constitutional concept. For example, in the 1988 decision *Zylberberg v Sudbury Board of Education*,¹¹⁰ the Ontario Court of Appeal emphasized that difference was the very essence of a multicultural society and should be worn with pride and not hidden.¹¹¹ The Court noted that “while 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, it is also clear that section 27 does not mandate the homogenization of all public life.”¹¹² In the 1992 decision *Kane v Church of Jesus Christ Christian-Aryan Nations (No. 3)*,¹¹³ the Alberta Board of Inquiry noted that: “[m]ulticulturalism is not a tentative notion or vague proposal for public policy. It is a legislated, constitutional concept. Similarly, equality between persons of different races, colours, and religious beliefs is not a new concept open to debate. It is basic law.”¹¹⁴

Based on the above, lower courts appear to be fully cognizant of the fact that section 27 is part of the *Charter*. However, a gap exists in understanding how and when to apply the provision, as evidenced by courts asking critical questions such as the extent to which the cultural background of an accused should be considered in light of section 27.¹¹⁵ It is clear that,

¹¹⁰ *Zylberberg v Sudbury Board of Education*, 1988 Can LII 189 (ONCA) [*Zylberberg v Sudbury Board of Education*].

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Kane v Church of Jesus Christ Christian-Aryan Nations (No.3)*, 1992 CanLII 14249 (ABHRC).

¹¹⁴ *Ibid* at 310.

¹¹⁵ *R v Chan*, 1999 ABPC 68 (CanLII) at 16.

even while recognizing the considerable importance of section 27 when interpreting issues involving the *Charter* and multicultural considerations, lower courts struggle with the limited written authority considering section 27.¹¹⁶ Substantively, these cases suggest a use for section 27 beyond that of interpreting other provisions of the *Charter*. The lower courts have relied on section 27 to recognize multiculturalism as a legislated constitutional principle which may suggest additional applications.

There is evidence to suggest that *Ayangma v Prince Edward Island* created momentum for lower courts to find a link between section 27 and its use in combatting discrimination. The decision in *R v Feltmate*¹¹⁷ supports this argument. That case involved a woman in rural Nova Scotia of Pakistani heritage who had been assaulted for wearing a headscarf. In his decision, the judge noted that the sentencing of the accused was one of the most difficult sentencings he had ever presided over, despite having sentenced people for murder, assault, and robbery in his almost two decades on the bench.¹¹⁸ In his reasons, the judge highlighted the role that intolerance and discrimination had played in the case and the role section 27 should play in a diverse society such as Canada:

Section 27 of the *Canadian Charter of Rights and Freedoms* specifically enshrines our multicultural heritage as one of the basic constitutional tenets. The mere fact that it is in the *Charter*, and says that the *Charter* is to be interpreted in a manner consistent with the preservation and enhancement of multicultural heritage of Canadians, is indicative of the importance of that diverse heritage in this country. We are getting more and more diverse all the time... This country is getting more and more diverse. Multiculturalism is not just a word. It's a philosophy which speaks to the obligation that each Canadian has to respect the dignity, privacy and integrity of all fellow citizens in this country. Respect, respect. That's what it's all about. Respect which allows all Canadians to choose a specific religion, to pray to a specific God, to

¹¹⁶ *R v WH Smith*, 1983 Can LII 3652 (ABPC).

¹¹⁷ *R v Feltmate*, 2012 NSSC 319 (CanLII).

¹¹⁸ *Ibid* at 1.

wear a Hijab, to wear a scarf on your head, to wear a long dress, to wear a short dress.¹¹⁹

The judge in this decision did not shy away from the discriminatory overtones involved in the case and the oppression faced by members of Canadian society. Linking this crime motivated by discrimination to section 27 of the *Charter* strengthens the provision's use as a tool to recognize and foster diversity and to fight discrimination. Further, the judge identified multiculturalism as an underlying constitutional principle and as a legal principle that can be applied to inform a sentencing decision, uses of section 27 that the Supreme Court has not yet made.

The closest section 27 has come to being recognized as a stand-alone substantive right in the lower courts is in the decision of *Prus-Czarnecka v Alberta*.¹²⁰ In that decision, section 3 of the Province of Alberta's *Vital Statics Act* was challenged on the basis that a child's name could not be registered in accordance with the parents' culture and tradition. Specifically, the parents wanted to use the female version of the father's family name. In allowing the child's name to be registered in accordance with the parent's application, the Court held that the Director of Vital Statistics in the Province of Alberta has:

...an obligation to interpret the *Vital Statistics Act* according to reliable evidence on cultural issues. Parliament has ordered, in s. 27 of the *Charter of Rights and Freedoms*, that all government legislation, including provincial legislation, be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. These parents and this daughter, and indeed any parents whose children are born in Canada but within a specific cultural tradition have a constitutional right to have the *Vital Statistics Act* interpreted in a manner consistent with that heritage.¹²¹

¹¹⁹ *Ibid* at 9-10.

¹²⁰ *Prus-Czarnecka v Alberta*, 2003 ABQB 698 (CanLII) [*Prus-Czarnecka v Alberta*].

¹²¹ *Ibid* at 7.

The Court recognized that a purposive interpretation of section 27 of the *Charter* required that the provision be applied in relation to a fundamental matter such as an individual's name, as the name of an individual can be an important component of that individual's identity and multicultural sensitivity is particularly required in such fundamental matters.¹²² Importantly for my purposes, in *Prus-Czarnecka v Alberta*, the Court concluded that section 27 requires that legislation be interpreted in a manner consistent with Canada's multicultural heritage. This is a significant departure from other decisions in that these reasons suggest that section 27 is not an interpretive principle internal to the *Charter*, but that it can have external force in operating on statutes. Aspects of this decision may be flawed; however, the ultimate result is correct. The decision is primarily weakened by the fact that the judge directly applied section 27 to the legislation without explaining how that application was the correct one. Her decision would have been strengthened by detailing the steps that led her to directly apply section 27 to the provincial legislation. In my thesis, I will walk through the steps that support the judge's conclusion and demonstrate that the Court's section 27 application was well-grounded in the context of this case.

A final lower decision to consider in analyzing the courts' understanding towards section 27 of the *Charter* is *R v Videoflicks*,¹²³ which was the Ontario Court of Appeal decision appealed to the Supreme Court in *R v Edwards Books and Art Ltd.* At the Court of Appeal, Justice Tarnopolsky traced the history of section 27 including its connection with Article 27 of the *International Covenant on Civil and Political Rights*.¹²⁴ He stated that it is the "clear purpose of s.27 that, where applicable, any right or freedom in the *Charter* shall be interpreted in light of

¹²² *Ibid* at 31.

¹²³ *Videoflicks*, *supra* note 35.

¹²⁴ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

this section. Religion is one of the dominant aspects of a culture which it is intended to preserve and enhance.”¹²⁵ He continued that, “[s]ection 27 determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where different religious practices are recognized as permissible exceptions to otherwise justifiable homogeneous requirements.”¹²⁶ The Court of Appeal held that the *Act*¹²⁷ in question was an infringement on freedom of religion and not a reasonable limit under section 1 of the *Charter*, an outcome that was later overturned by the Supreme Court. An important aspect of Justice Tarnopolsky’s decision is the reminder that section 27, as a *Charter* provision, needs to be interpreted purposively which the courts have generally failed to do. Since, as Justice Tarnopolsky recognized, international law is fundamental to understanding section 27 and it is an important element of the purposive interpretation of that provision, I will consider the international origins of section 27 to help inform my own interpretation of section 27.

Despite significant avoidance of the provision, the lower court decisions reveal that the courts recognize there is a role for section 27 to play in the jurisprudence. There are cases that are in line with earlier Supreme Court decisions suggesting section 27 can be used to interpret other *Charter* provisions. However, there are cases that suggest the provision has a use beyond mere interpretation. The lower courts have identified section 27 as recognizing multiculturalism as an underlying constitutional principle, as a legal principle that can be applied to inform a sentencing decision, and as a tool for upholding the integrity of the judicial system. These strands lay important foundations for my own interpretation of section 27, and I will return to

¹²⁵ *Videoflicks*, *supra* note 35 at 385-386.

¹²⁶ *Ibid* at 386.

¹²⁷ *Retails Business Holidays Act*.

them but, first, it is necessary to consider the sources, including the international roots, of section 27 since those sources will inform my analysis.

PART FOUR: SOURCES OF SECTION 27

While the text of the *Constitution* has primacy (something I will address more fully below), considering the sources of section 27 of the *Charter* is necessary for a proper, purposive interpretation of the provision. Sources of section 27 include international and domestic laws, statutes, and statements. Constitutional interpretation in Canada relies on these sources when searching for the meaning of specific constitutional texts. In this section, I will examine both international sources and the Canadian foundation for section 27.

International sources

International instruments are frequently used in *Charter* interpretation.¹²⁸ In *R v Videoflicks*, Justice Tarnopolsky engaged in a careful examination of the constitutional record leading up to the inclusion of section 27 in order to illuminate its meaning. A specific source of international law that Justice Tarnopolsky referred to directly in his examination of section 27 is Article 27 of the *International Covenant on Civil and Political Rights*.¹²⁹ A closer examination of Article 27 reveals insights that can be applied to the interpretation of section 27, especially in light of guiding principles of interpretation such as the principle of conformity.¹³⁰

The model for section 27 of the *Charter* was Article 27 of the *ICCPR*, an international treaty acceded to by Canada in 1976.¹³¹ Article 27 of the *ICCPR* explicitly addresses the

¹²⁸ See for example *Big M Drug Mart*, *supra* note 33.

¹²⁹ *ICCPR*, *supra* note 124.

¹³⁰ The principle of conformity will be discussed and applied at later points in this thesis.

¹³¹ United Nations Treaty Collection: see online <https://indicators.ohchr.org/>.

question of the cultural rights of minorities. For this reason, it has been valued by some scholars as “the most important guarantee of such rights on the universal level and the only one that constitutes applicable “hard” law.¹³² Article 27 states that:

[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹³³

As the model for section 27, careful examination of Article 27 casts light on the intended meaning of section 27 of the *Charter*. Comparing the specific language of these two provisions, examining the drafting history of Article 27, and considering primary sources of Article 27 reveal a likelihood that section 27 was not intended to be a merely interpretive provision.

Text of Article 27 and section 27

At the outset, it is important to examine the language of the two provisions, coincidentally both numbered 27. This is a critical step given that language is a powerful tool; it shapes the way we think. Furthermore, the Supreme Court of Canada has recently underscored the primacy of the language of a given constitutional provision to the interpretive exercise.¹³⁴ Examining the wording used in both provisions reveals some similarities. This is not surprising given that draft

¹³² R Hoffman, “Minority Rights: Individual or Group Rights? A Comparative View on European Legal Systems” 40 *German Yearbook of International Law* (1997) at 379.

¹³³ *ICCPR*, *supra* note 124 at Article 27.

¹³⁴ *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32 [9147-0732 *Québec Inc.*] at 8.

versions of the *Charter* expressly referred to the *ICCPR* in explanatory notes.¹³⁵ There are also some differences in linguistic choices, which are revealing, but not necessarily problematic.

Returning to the text of Article 27, it addresses the obligation of states not to deny members of minorities the right to enjoy their culture, to profess their religion, or to use their own language. Rather than refer specifically to the idea of multiculturalism, Article 27 refers to culture and points to specific components of culture such as language and religion. Preventing the denial of these components of culture would in effect promote and support multiculturalism. Section 27 refers to the “multicultural heritage of Canadians” but leaves open to interpretation how multiculturalism should be understood. My review of the case law related to section 27 indicates that the courts have already suggested that an understanding of culture includes religion and language.

While the text of Article 27 is vague in relation to defining minorities, it is clear from the language used that minorities are unequivocally entitled to the stated rights. Article 27 recognizes that “persons belonging to such minorities shall not be denied the right ... to enjoy their own culture, to profess and practise their own religion, or to use their own language”. On its face, this text suggests that the identified beneficiaries have the specified rights, and State parties cannot refuse or withhold these rights. Persons belonging to such minorities shall have the right to enjoy their own culture, to profess and practise their own religion, or to use their own language. Arguably, using the expression ‘shall not be denied’ is synonymous to saying ‘shall have.’ The result of either expression is that the right described becomes an obligation. This

¹³⁵ R Elliot “Interpreting the Charter—Use of Earlier Versions as an Aid” (1982) UBC L Rev (Charter Edition) 11.

argument is consistent with the idea that the *ICCPR* is an agreement as to how States parties shall or will conduct themselves.¹³⁶

A close examination of the language of Article 27 of the *ICCPR* reveals some potential fragilities for its utility in interpreting section 27 of the *Charter*. The Article does not define “minorities” although the term is qualified by the adjectives ethnic, religious, and linguistic. This absence of defined criteria creates a problem with respect to how the rights that are ascribed can be claimed and exercised if the beneficiaries of the rights are not articulated. A State party would have to admit that ethnic, religious, or linguistic minorities exist. It is also unclear from the language who qualifies as a minority group: does it refer to long established minority groups or recent immigrant groups? Article 27 expressly refers to persons belonging to minorities in community with other members of the group leaving open the question of whether it is the rights of the person or the collective rights of the minority group that are protected.

Comparing the language of Article 27 to section 27 reveals that while related, there are distinctions. To begin with, section 27’s protection of culture is expansive and applies to all Canadians rather than select minority groups. There is no need to identify the recipients of section 27’s protection because of this application. Section 27 is defensive in terms of the way it is written. It calls for the *Charter* specifically to be used as a means to preserve the multicultural heritage of Canadians. There is also an element of action required by the provision. It is active in that it calls upon those interpreting the *Charter* to contribute to the enhancement of Canadian multiculturalism.

¹³⁶ *ICCPR*, *supra* note 124 at Preamble.

Section 27 says specifically “[t]his Charter shall be interpreted...” while Article 27 is not, according to the language used, an interpretive provision for other rights in the *ICCPR*.

However, closer examination of the phrasing of the section 27 suggests that the provision may be both the affirmation of a constitutional principle and an interpretive direction. The wording of section 27 can be read as an affirmation that a substantive principle exists, the principle being the “preservation and enhancement of the multicultural heritage of Canadians.”¹³⁷

The specific text of Article 27 is located in a section of the *ICCPR* in which all of the provisions enshrine substantive rights. The text of section 27 is, however, found under the heading “General” in the *Charter*. Further, most of the provisions under the “General” heading appear to be interpretive rather than substantive. That said, the heading “General” does not mean that substantive rights are not part of that section. To do so would be to conflate the term “general” with “interpretive.” This understanding of the heading “General” would not be exceptional as section 28, which requires that the rights and freedoms guaranteed in the *Charter* be implemented without discrimination between the sexes and is also found under the “General” heading, has been strongly argued by scholars not be strictly interpretive, as discussed later in this thesis.

Comparing the text of the two provisions suggests that there is a stronger right attached to Article 27, but the potential for limited access weakens the protection it purports to afford minorities. Section 27 of the *Charter* is available to ‘all,’ but it is less clear what specific right is engaged. The history and application of Article 27 clarifies its meaning and can be used to inform, and clarify, the meaning of section 27 of the *Charter*.

¹³⁷ I will expand on this idea in my purposive analysis of section 27.

Travaux préparatoires

The “travaux préparatoires” is the term used to describe the documentary evidence of the negotiation, discussions, and drafting of a final treaty text. The travaux préparatoires is the most commonly used term for these types of documents, however they are also sometimes referred to as the negotiating history, the drafting history, or the preparatory documents. According to Article 32 of the *Vienna Convention on the Law of Treaties*,¹³⁸ recourse may be had to these supplementary documents in the interpretation of a treaty when the meaning remains ambiguous after attempts to interpret the treaty using the primary means listed in Article 31 or to confirm an interpretation arrived at using the materials identified in Article 31. In the case of *ICCPR* Article 27, the ambiguity created by a lack of definition of the term “minorities” could find recourse in the travaux préparatoires.

The Human Rights Committee is the body of independent experts established by the *ICCPR* that monitors implementation of the treaty by its State parties. While not binding, the comments and communications of the Human Rights Committee are persuasive and, I argue, should influence the interpretation and application of section 27.¹³⁹ A Canadian court should find the Committee’s views persuasive for numerous reasons. The majority in *9147-0732 Quebec Inc.*, the Supreme Court’s most recent comprehensive treatment on the use of international law in *Charter* cases, did not explicitly address the work of the Human Rights Committee. However, the majority noted that reference can be had to instruments like the *ICCPR*, which preceded the

¹³⁸ *Vienna Convention on the Law of Treaties*, 23 May 1969, No. 18232 at 1980, at 32 (entered into force 27 January 1980) [VCLT].

¹³⁹ *9147-0732 Québec Inc.*, *supra* note 134 at 22.

Charter and informed it drafting.¹⁴⁰ The Human Rights Committee is an expert committee¹⁴¹ and members serve in their personal capacity, not as State representatives.¹⁴² The Committee's roles include studying reports on compliance with the Convention submitted by State Parties,¹⁴³ and transmitting its own reports and general comments.¹⁴⁴ Given that the Human Rights Committee is the body established for carrying into effect the *ICCPR*, its decisions should be considered persuasive.

Some academics have shied away from the *travaux préparatoires* in favour of these interpretive sources: "it is correct and important to regard the work of the HRC as a primary means of interpretation, giving this priority over supplementary means of interpretation such as the *travaux préparatoires* and the writings of international law experts."¹⁴⁵ In spite of what these scholars say, I will begin with a consideration of the *travaux préparatoires* because, unlike the Committee's comments, the *VCLT* does identify them as a subsidiary means of interpreting the *ICCPR* text.

During the formative years of the United Nations, there was an emphasis on the prohibition of discrimination against individuals.¹⁴⁶ Concern regarding minorities led to a detailed consideration of their position by United Nations' bodies.¹⁴⁷ The Sub-commission on the Prevention of Discrimination and Protection of Minorities was formed in 1950.¹⁴⁸ A

¹⁴⁰ *Ibid* at 41.

¹⁴¹ *ICCPR*, *supra* note 124 at Article 28.

¹⁴² *Ibid* at Article 28.

¹⁴³ *Ibid* at Article 40.

¹⁴⁴ *Ibid* at Article 40.

¹⁴⁵ Athanasia Akermark, *Justifications of Minority Protection in International Law* (London: Kluwer Law International, 1966) at 127.

¹⁴⁶ Francesco Capotori, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (1979) UNR 1 (UN Doc E/CN 4/Sub 2 /384 Rev 1) [Capotori].

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid*.

proposed resolution of this body was adopted as Article 27 by the General Assembly at its 21st session in 1967, but not before going through various drafting stages.¹⁴⁹ In the drafting process, a number of points were raised about Article 27 that are helpful in understanding the scope this provision was meant to have. The drafting stage also sheds light on the nature of the obligations it was meant to impose on member states.

Francesco Capotori, special rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities, provides a detailed account of the legislative history of Article 27 in his study on the rights of persons belonging to ethnic, religious and linguistic minorities.¹⁵⁰ Capotori recounts that, despite the provisions of Article 2 of the draft *ICCPR* that related to non-discrimination, and those of Article 19 that related to the equality of all persons before the law, the members of the Commission on Human Rights agreed that it was necessary to guarantee the rights of members of minority communities by means of a specific clause.¹⁵¹ The Commission believed it was required to insert in the draft *ICCPR* a supplementary provision ensuring the protected persons, independently of other rights, the possibility of using their own language, of professing and practising their own religion, and of enjoying their own culture.¹⁵²

Several representatives, however, stressed the need to prevent discrimination against members of minority groups on the pretext that as a minority they enjoyed certain special rights.¹⁵³ They maintained that the granting of a special status to persons belonging to a minority

¹⁴⁹ *Ibid.*

¹⁵⁰ Capotori, *supra* note 146.

¹⁵¹ *Ibid* at 33.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

should not deprive those persons of the enjoyment of the rights of the other citizens of the same State.¹⁵⁴

During the drafting of Article 27, there was considerable debate about the term “minority” and the scope of the word. Some representatives supported the idea of “ethnic, religious, or linguistic groups within States”¹⁵⁵ while others preferred “national minorities.”¹⁵⁶ National minorities had wider scope as it could encompass the former and this debate landed on the expansion of protection. There was also debate about whom the term minority would include in terms of recency. Concern was expressed that special rights would be afforded to a group settled in the territory of a State as result of immigration to form within that State separate communities, which might impair its national unity or security.¹⁵⁷ Other representatives stressed the need to take account of minority groups who, because of dispersion in different parts of a single state in isolation from each other, were unable to take full advantage of the right to develop their own culture.¹⁵⁸ On the basis of the travaux préparatoires, Article 27 provides protection only to “separate or distinct groups, well-defined and long established on the territory of the state.”¹⁵⁹ Latin American Nations insisted on the inclusion of “in those States in which ethnic, religious or linguistic minorities exist.”¹⁶⁰ This would mean that immigrant communities subsequently created do not fall under the protection of Article 27 of the *ICCPR*.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid* at 34-35.

¹⁵⁶ *Ibid* at 34-35.

¹⁵⁷ *Ibid* at 33.

¹⁵⁸ *Ibid* at 33.

¹⁵⁹ Annotation on the Draft International Covenants on Human Rights (summarizing the work of the Commission on Human Rights, ninth Commission, 1955 (UN Doc A/29829) at 63 para 184.

¹⁶⁰ Capotori, *supra* note 146 at 33.

The travaux préparatoires also reveal that the *ICCPR* was designed to benefit individuals in spite of the fact that the wording (“in community with other members of the group”) suggests a collective aspect. This argument is evidenced by the fact that the representative from India noted that the Article did not apply to “minorities considered as groups.”¹⁶¹ Finally, the travaux préparatoires reveal that the *ICCPR* was intended to primarily prevent State interference with minority culture, religion and language, and not to impose on States the burden of implementing specific programs to protect those elements.¹⁶² Capotori summarized that: “[i]t was generally agreed that the text...would not, for example, place States and governments under the obligation of providing special schools for persons belonging to linguistic minorities.”¹⁶³ Based on this analysis, Article 27 would appear to be narrow in scope, confined to historically established minorities, and not imposing any form of positive obligations on states to foster the development of these groups. The negotiating history establishes a limited right but, a substantive right. Moreover, it is only one element in a complete interpretation of Article 27; there is more to consider in reaching a definitive understanding.

Work of the Human Rights Committee

Recognizing that the work of the Human Rights Committee is not binding in Canadian law, it has nonetheless provided two additional contributions that provide greater interpretation of Article 27. Both General Comment Number 23 and a body of decisions assist in understanding the intended purpose of the provision. The wording of Article 27, as supplemented by the

¹⁶¹ Third Committee of the General Assembly, 1961 (UN Doc A/C.3/SR 1103) at 215 para 39.

¹⁶² Capotori, *supra* note 146 at 36.

¹⁶³ *Ibid* at 36.

interpretive work done by the Human Rights Committee, suggests that Article 27 has four important elements. First, contrary to what some states argued in the negotiations, it embeds an individual and group dimension. Second, it applies to any minority group regardless of size or recency of arrival, contrary to the position of some states in the negotiations. Third, it recognizes that culture can have an economic dimension. Finally, it imposes positive obligations of protection and not just a negative obligation of non-interference contrary to the position of some states in the negotiations. These elements all point towards an interpretation of Article 27 that demonstrates progressive growth, recognizing the need to interpret decisions in a manner that can comprehensively meet the growing complexities of a diverse society.

Interpretation by the Human Rights Committee

In its decision in *Lovelace v Canada*,¹⁶⁴ the Human Rights Committee upheld the complaint of an Aboriginal woman who had lost her right to live on a reserve after marrying a non-Indian,¹⁶⁵ by operation of section 12(1)(b) of the *Indian Act*.¹⁶⁶ Sandra Lovelace (the author) was born and registered as a member of the Maliseet Nation, but lost her status and rights as an Indian when she married a non-Indian.¹⁶⁷ The Human Rights Committee noted that it had to decide whether the author as an ethnic Maliseet Indian who had been denied the legal right to reside on the Tobique Reserve was thereby denied a right under Article 27.¹⁶⁸ The question for

¹⁶⁴ Sandra Lovelace v Canada, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 83 (1984) [Lovelace].

¹⁶⁵ The term “Indian” as applied to the Indigenous peoples of Canada is generally recognized as being offensive, but I use it where it applies to the term used in the specific statute.

¹⁶⁶ *Indian Act* RSC 1970, cl-6.

¹⁶⁷ Lovelace, *supra* note 164 at 1.

¹⁶⁸ *Ibid* at 13.2.

the Human Rights Committee was whether the author was a person belonging to an ethnic minority. The Human Rights Committee stated the following:

The right to live on a reserve is not as such guaranteed by Article 27 of the Covenant. Moreover the Indian Act does not interfere directly with the functions which are expressly mentioned in that article. However, in the opinion of the Committee the right of Sandra Lovelace to access to her native culture and language “in community with the other members” of her group, has in fact been, and continues to be interfered with, because there is no place outside of the Tobique reserve where such a community exists.¹⁶⁹

Clearly, Aboriginal language and culture are deserving of protection under Article 27. The finding in this decision of the Human Rights Committee recognizes the fact that the author was in effect forcibly severed from her community and her rights. By the express terms of Article 27, her culture should be enjoyed in concert with her community. The decision also underscores the role that institutions provide an individual with respect to access to their culture and language, specifically in this case the role of the reserve.

Chief Ominayak and the Lubicon Lake Band v Canada,¹⁷⁰ involved a First Nation member invoking Article 27 to find protection for traditional rights to fish and hunt. The Lubicon Lake Band, a people indigenous to Canada, alleged that the exploitation of oil, gas and timber in areas traditionally used by the Band resulted in destruction of the resource base of their traditional way of life such as hunting and fishing. The Human Rights Committee found a violation of the right of ethnic, religious or linguistic minorities to enjoy their culture in violation of Article 27. In its view of the case, the Human Rights Committee recognized that “the rights protected by Article 27 include the rights of persons, in community with others, to engage in

¹⁶⁹ *Ibid* at 15.

¹⁷⁰ No. 167/1984, <<http://hrlibrary.umn.edu/undocs/session45/167-1984.htm>> (date accessed February 23, 2022).

economic and social activities which are part of the culture of the community to which they belong.”¹⁷¹

In *Kitok v Sweden*,¹⁷² the Human Rights Committee added a further dimension. It allowed that the “regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under Article 27 of the Covenant.”¹⁷³

These cases are foundational and have been relied on in numerous decisions of the Human Rights Committee. Based on the forgoing, Article 27 encompasses within its scope traditional economic activities and ways of life, which is a far broader use of the provision than had been considered in the travaux préparatoires. The manner in which the provision is expanded by the Committee response to these Communications is evidence that Article 27 was not meant to remain static, but instead is capable of being adapted to a range of broader applications. These decisions are indicative of a more comprehensive understanding of what Article 27 rights include. As I argued above, even though these international sources are not binding on Canadian courts, they should “assist in delineating the breadth and content”¹⁷⁴ of section 27.

The interpretation of Article 27 demonstrates that a dynamic interpretation is possible while respecting the primacy of its text. Given the relationship between Article 27 and section 27 of the *Charter*, an increasingly dynamic interpretation that remains faithful to the text can, and I argue should, also inform section 27. Section 27 should be understood as capable of being deployed to a broad scope of applications that may arise in a society as diverse as Canada,

¹⁷¹ *Ibid* at 32.2.

¹⁷² No 197/1985 < <https://juris.ohchr.org/Search/Details/543> > (date accessed February 23, 2022).

¹⁷³ *Ibid* at 9.2.

¹⁷⁴ 9147-0732 *Québec Inc.*, *supra* note 134 at 36.

providing more and better protection to Canadians. Such an interpretation is fully consistent with the text of section 27, a matter to which I will return below. Before returning to the terms of section 27, one more interpretive source for Article 27 falls to be considered.

General Comment Number 23

The Human Rights Committee adopts General Comments, which can be considered authoritative interpretative instruments that give rise to a normative consensus on the meaning and scope of the provision of the *ICCPR*.¹⁷⁵ In other words, while not legally binding, general comments are informative notes adopted by the body that monitors the implementation of the *ICCPR*'s provisions. General Comment Number 23 on the Rights of Minorities¹⁷⁶ is a highly instructive document. More importantly, its clarification assists in expanding the scope of the protection of minorities.

General Comment Number 23 makes very clear that Article 27 “establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.”¹⁷⁷

The Human Rights Committee also states that the Article 27 enshrines rights whose protection imposes specific obligations on states parties: “The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and

¹⁷⁵ Economic, Social and Cultural Rights Handbook for National Human Rights Institute, United Nations, New York 2005 at 6.

¹⁷⁶ Human Rights Committee, General Comment No 23: The Rights of the Minorities (Article 27) UN Doc CCPR /C/21 Rev1/Add 5, 8 April 1994 [General Comment No 23].

¹⁷⁷ *Ibid* at 1.

social identity of the minority concerned, thus enriching the fabric of society as a whole.”¹⁷⁸

Accordingly, the Human Rights Committee observed that the exercise of these rights should be fully protected and State parties should be able to demonstrate measures that have been adopted to this end.¹⁷⁹ What this suggests is that these minority rights are independent of all other rights and impose positive obligations on state actors.

The Human Rights Committee also clarified that “the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by the State party but requires to be established by objective criteria.”¹⁸⁰ This statement is very protective of minorities as even if a State denies the existence of a minority group this does not dispense with the State having to comply with Article 27. Emphasis is being put on the very existence, not on any sort of state recognition, of a minority group. The Human Rights Committee clearly states that migrant workers or even visitors in the State could constitute a minority and are entitled to the minority rights set out in Article 27.¹⁸¹ What this means again is that the scope of the term minority is very broad, beyond even citizenship requirements. With respect to recent or historic minorities, Article 27 applies to “all ethno-cultural minorities, on all continents, no matter how large or small, recent or historic, territorially concentrated or dispersed.”¹⁸² Most importantly, the General Comment clarifies the question of obligation for States in relation to rights set out in Article 27. There is an obligation on States to create the environment in which these rights can be exercised:

¹⁷⁸ *Ibid* at 9.

¹⁷⁹ *Ibid* at 9.

¹⁸⁰ *Ibid* at 5.2.

¹⁸¹ *Ibid* at 5.2.

¹⁸² W Kymlicka, “National Cultural Autonomy and International Minority Rights Norm,” 6 *Ethnopolitics* (2007) at 382.

[a]though article 27 is expressed in negative terms, that article nevertheless, does recognize the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.¹⁸³

What this means is that positive measures are to be taken to correct conditions that prevent or impair rights established by Article 27.

The Human Rights Committee clarifies that while the rights in Article 27 are individual, they depend on the ability of the minority group to maintain its culture, language and religion.¹⁸⁴ The Human Rights Committee recognizes that culture has a collective dimension and is referring to the minorities as a group. The Human Rights Committee states that, “positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.”¹⁸⁵

What is also clear is that there is a positive dimension to Article 27. Article 27 does not state that persons belonging to minority groups will be given rights, but rather that they shall not be denied these rights. On its face, Article 27 appears to be a negative formulation of the right that emphasizes the freedom of individuals to enjoy their own culture, instead of affirmative action on the part of the state to sustain the effective enjoyment of said right. This statement confirms the view that Article 27 accords special protection to the members of the minority

¹⁸³ General Comment No 23, *supra* note 176 at 6.1.

¹⁸⁴ *Ibid* at 6.2.

¹⁸⁵ *Ibid*.

groups beyond the already existing norms on non-discrimination, which are part of the general human rights regime. There is also a participatory element. The enjoyment of Article 27 rights “may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”¹⁸⁶ What this signifies is that Article 27 should be interpreted to mean there is a State duty to take measures to ensure that minority groups are part of the conversation when it comes to decisions that affect them.

The effect of General Comment 23 is an expansive interpretation of Article 27. The document is a strong statement safeguarding minority cultures. Positive State action is a critical element in the Human Rights Committee’s interpretation. Therefore, while Article 27 has ambiguous wording and read literally would not suggest positive rights, General Comment 23 and the jurisprudence give the provision strong positive content.

Canadian foundations

Justice Tarnopolsky articulated that the overall historical context preceding the entrenchment of section 27 is relevant in the interpretation of section 27.¹⁸⁷ This context includes the provision’s historical foundation in Canada. Examining this foundation reveals how fundamental the concept of multiculturalism was to Canada’s identity.

¹⁸⁶ General Comment No 23, *supra* note 176 at 7.

¹⁸⁷ *Videoflicks*, *supra* note 35.

Beginning in the 1940s, Canadian governments became increasingly aware of the problems experienced by the numerous waves of immigrants to Canadian shores.¹⁸⁸ Canada enacted its first *Citizenship Act*¹⁸⁹ in 1947, setting out a new status: Canadian citizen.¹⁹⁰ The *Citizenship Act* emphasized a Canadian identity over the status of British subject afforded by the *Naturalization Act*. When the *Immigration Act*¹⁹¹ was revised in 1967, discrimination was prohibited on the basis of race, national origin, religion or culture.¹⁹² The previous *Immigration Act* had given the Minister substantial discretion over selecting immigrants. In turn, more non-European immigrants entered Canada, contributing to a more diverse population.¹⁹³ In 2001, The *Immigration Act* was replaced with legislation that recognized multiculturalism explicitly as an objective of Canada's immigration policy: "to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada."¹⁹⁴

In the 1960s, the work of the Royal Commission on Bilingualism and Biculturalism (the Commission)¹⁹⁵ changed the orientation of multiculturalism in Canada. The Commission was established in 1963 to inquire into and report upon the existing state of bilingualism and biculturalism in Canada.¹⁹⁶ It was also tasked with recommending steps to develop Canada taking into account the contribution made by all ethnic groups to the cultural enrichment of

¹⁸⁸ Gerald A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Canada Inc., 2005) [Beaudoin] at 1267.

¹⁸⁹ *Canadian Citizenship Act*, SC 1946, c 15 [*Citizenship Act*].

¹⁹⁰ Beaudoin, *supra* note 188 at 1267.

¹⁹¹ *Immigration Act*, RSC 1952, c 145 [*Immigration Act*].

¹⁹² Beaudoin, *supra* note 188 at 1267.

¹⁹³ *Ethnic Minorities in Canada: A Governance Perspective* (Ottawa: Institute on Governance, 2000) at 21.

¹⁹⁴ *Immigration and Refugee Protection Act* SC 2001, c 27 at 3.

¹⁹⁵ Beaudoin, *supra* note 188 at 1268.

¹⁹⁶ Royal Commission on Bilingualism and Biculturalism, Preliminary Report (Ottawa: Queen's Printer) at 151.

Canada and the measures that should be taken to safeguard that contribution.¹⁹⁷ Canada's ethnocultural communities lobbied the Commission and Canadian government for greater recognition of their contribution to Canada. They wanted to maintain their own linguistic and cultural identity.¹⁹⁸ The response of the Commission was to endorse the preservation of cultural heritage by reinforcing prohibitions on discrimination, promotion of non English-Anglican and French-Roman Catholic cultures and languages specifically through educational institutions and broadcasting, and to fund agencies that promote distinctive identities.¹⁹⁹ The work of the Commission has been noted as forming the "cornerstone of modern multiculturalism policy in Canada"²⁰⁰

The recommendations of the Commission were also implemented in Canada's multiculturalism policy of 1971. Emerging from this 1971 multiculturalism policy were two distinct themes: freedom from discrimination and group survival.²⁰¹ These themes are crucial to understanding section 27 because these developments are part of its essential history. They underscore what should be understood as strong minority identity and resistance towards assimilation.

In 1971, the Federal Government proposed a set of amendments to the *Constitution*: the *Victoria Charter*.²⁰² This precursor to the *Charter* contained no reference to multiculturalism. In 1972, the *Molgat-MacGuigan Report* recommended that the preamble to the *Constitution* should

¹⁹⁷ *Ibid.*

¹⁹⁸ Canada, Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: The Commission, 1969) Book IV at 9-14.

¹⁹⁹ Beaudoin, *supra* note 188 at 1269.

²⁰⁰ *Ibid.*

²⁰¹ House of Common Debates, October 1971, Statement of Prime Minister Pierre Trudeau.

²⁰² https://www.solon.org/Constitutions/Canada/English/Proposals/Victoria_Charter.html. Online accessed March 17, 2022.

recognize Canada as a multicultural country.²⁰³ In June of 1978, the federal government introduced Bill C-60 to encourage public discussion about proposed changes to the *Constitution*.²⁰⁴ Part I of Bill C-60 included a Statement of Aims of the Canadian Federation that included the following objective: “to ensure throughout Canada equal respect for the many origins, creeds and cultures and for the differing regional identities that help shape its society, and for those Canadians who are part of each of them.”²⁰⁵ However, this statement was omitted from the draft *Constitution* of October 1980.²⁰⁶ In fact, the draft text made no reference to the multiculturalism principle.

The federal government appointed a Special Joint Committee of the Senate and of the House of Commons to consult with Canadians about the proposed Constitutional additions. Created in October 1980, this committee was chaired by Senator Harry Hays and MP Serge Joyal. The Hays-Joyal Committee sat through two hundred sixty seven hours of hearings over fifty-six days, all subject to televised scrutiny.²⁰⁷ By February 2, 1981, the Committee had received letters, telegrams and briefs from 914 individuals and 294 groups.²⁰⁸ Numerous representatives of ethno-cultural communities appeared as witnesses before the Hays-Joyal Committee in response to the omission of multiculturalism principles in the draft Constitutional text. The representatives of these groups made moving arguments, stating that they refused to be

²⁰³ Canada, Parliament, *Report of the Joint Committee of the Senate and House of Common on the Constitution of Canada*, Ottawa, 1972, recommendation 27.

²⁰⁴ Beaudoin, *supra* note 188 at 1270.

²⁰⁵ Bill C-60, *An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain other matters*, 3rd Sess, 30th Parl, SC, 1978.

²⁰⁶ Beaudoin, *supra* note 188 at 1270.

²⁰⁷ E. McWhinney, *Canada and the Constitution, 1979-1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982).

²⁰⁸ Bruce P. Elman, “Altering the Judicial Mind and the Process of Constitution–Making in Canada” (1990) *Alta L Rev* 28: 2 [Elman] at 531.

made “second-class citizens”²⁰⁹ and decrying a document that in their view had the potential to become increasingly “irrelevant, not to say racist.”²¹⁰ Some academics have suggested that the *Charter* is a product of all Canadians, elected officials or not, given that the final product “emanated from the people.”²¹¹ This refusal to be assimilated also suggests that the same forces from ethno-cultural communities animating earlier developments around multiculturalism were still at play at the time that the *Charter* was being drafted.

The passionate representations made at these hearings left a deep and lasting impression on those who were present. Svend Robinson, Member of Parliament between 1979 and 2004, was a member of the Special Joint Committee from 1980 to 1981. In an address to the Faculty of Law at the University of Toronto in October 2005, he recounted some of the presentations made to the Hays-Joyal Committee. Mr. Robinson shared that the representative from the National Association of Japanese Canadians, Art Miki, spoke and reminded the Committee of why it was so important to have a check on the absolute, untrammled power of elected representatives given what had happened to Canadians of Japanese origin under the *War Measures Act*.²¹²

Almost a quarter of the more than 100 witnesses who made statements before the Hays-Joyal Committee addressed the issue of multiculturalism: “[t]hey embraced such themes as non-discrimination, equality, cultural autonomy, cultural perpetuation, pluralism, heritage, language rights and educational autonomy.”²¹³ These witnesses proposed including multiculturalism into the *Charter* in one of two forms. The first was as an interpretive provision in the preamble; the

²⁰⁹ Beaudoin, *supra* note 188 at 1270.

²¹⁰ Proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, October 20, 1980, 9:105.

²¹¹ Elman, *supra* note 208 at 532.

²¹² Svend Robinson, University of Toronto Faculty of Law October 2005. Transcript online: <<http://www.thecharterrules.ca/index.php?main=concepts&concept=1&sub=interpretation>>.

²¹³ Beaudoin, *supra* note 188 at 1271.

second was as a substantive provision in the body of the text.²¹⁴ The Government responded by introducing an amendment to the Committee, which is in fact the exact text of the current section 27 of the *Charter*. The Minister of Justice, in introducing this amendment to the Hays-Joyal Committee, referred to the extensive submissions made by the ethno-cultural communities.²¹⁵ The only reasonable conclusion that can be drawn is that section 27 of the *Charter* was a direct response to the testimony of the witnesses and that these witnesses were essential to the framing and inclusion of section 27.

The value of the Minutes of the Proceedings of the Special Committee has been called into question in some decisions of the Supreme Court;²¹⁶ however, recent decisions of the Court have given closer attention the Committee's work.²¹⁷ A purposive interpretation requires close examination of the historical origins of section 27 in order to pour content into the text of the *Charter*. The Supreme Court has in fact recognized that drafting history can be relevant to constitutional interpretation,²¹⁸ and drawn from the Minutes of the Proceedings of the Special Committee in its decisions.²¹⁹ This historical framework illuminates that including section 27 in the Canadian *Charter* was a thoughtful and intentional decision. The provision emanates from the voices of those waves of immigrants who demanded recognition and protection for their cultural survival. Dismissing section 27 as purely interpretative on the basis of its origins would be a gross misinterpretation of its framers' intentions.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Re BC Motor Vehicle Act* [1985] 2 SCR 486 at 49-52.

²¹⁷ *Reference re Senate Reform* 2014 SCC 32 at 76.

²¹⁸ *R v Desautels* 2021 SCC 17 at 41.

²¹⁹ *R v Prosper* [1994] 3 SCR 236.

Presumption of conformity

The historical record clearly illustrates the Canadian roots of section 27 but, as I discussed above, the record also indicates that international law influenced the text of section 27. Another dimension to examining international sources in relation to domestic law arises from specific international obligations that flow from international law that is binding on Canada. An interpretive onus, known as the presumption of conformity, places an obligation on courts interpreting *Charter* rights to provide protection at least equivalent to that provided by international law.²²⁰ In *R v Videoflicks*, Justice Tarnopolsky, interpreted the relevance of Article 18(1) of the *ICCPR* in relation to *Charter* provision 2(a). He noted that section 2(a) of the *Charter*, then a new and judicially unconsidered feature of Canada's *Constitution*, should be "interpreted in conformity with our international obligations,"²²¹ unless the domestic law is clearly to the contrary. The Supreme Court of Canada has since found that the *Charter* should be presumed to provide at least as great a level of protection as is found in Canada's international human rights obligations.²²² The Supreme Court of Canada recently considered the appropriate use of international (and comparative) law, but affirmed this principle.²²³

The fact that the *ICCPR* is binding on Canada and that Article 27 clearly influenced the drafting of section 27, would trigger the presumption of conformity and place an onus on courts to ensure that section 27 of the *Charter* provides protection at least equivalent to that provided by Article 27 of the *ICCPR*. This presumption will play an important role in my purposive analysis

²²⁰ 9147-0732 *Québec Inc.*, *supra* note 134 at 25.

²²¹ *Videoflicks*, *supra* note 35 at 420.

²²² *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 349.

²²³ 9147-0732 *Québec Inc.*, *supra* note 134 at 31.

of section 27 but, before undertaking my analysis, a review of the academic commentary surrounding section 27 is required.

PART FIVE: LITERATURE REVIEW

A review of the literature pertaining to section 27 of the *Charter* is essential to situating my research in relation to the existing knowledge of the provision as it aids in identifying common themes, areas where my research conflicts, and support for my arguments. This section examines the existing body of research and aims to identify gaps in the existing research and the debates that have arisen thus far. This section also demonstrates where my argument that section 27 is a stand-alone, substantive right fits in relation to what has already been presented.

Limited academic consideration

What stands out upon initial review of the literature pertaining to section 27 is the overall limited consideration it has received. Given that section 27 has been imbedded in the *Charter* for over forty years and has been so politically, socially and historically charged, one might expect significant debate and consideration as to its purpose and use. However, such is not the case. Lawyer and author Vern DaRe speculated that the lack of scholarly research surrounding section 27 could be related to the ambiguity of the definition of the term multiculturalism coupled with the section itself having been relegated as declarative and interpretive as opposed to establishing a substantive right.²²⁴

Furthermore, a significant body of the literature has not been particularly useful in advancing its potential. For example, early academic interpretations of section 27 of the *Charter*

²²⁴ Vern W. DaRe, *Beyond General Pronouncements: A Judicial Approach to Section 27 of the Charter (forthcoming?)* (1995) 3:33 *Alta L Rev* 551.

were not very generous. In 1982, the late Professor Peter Hogg reduced the section to a mere ‘rhetorical flourish.’²²⁵ That same year, Elmer Driedger discounted section 27 as another “meaningless provision.”²²⁶ Driedger further stated that the *Charter* could be broken into five distinct categories, the fifth category being “meaningless provisions” containing only sections 27 and 28.²²⁷ Both Hogg’s and Driedger’s statements were published in 1982, shortly after the *Charter* was introduced. This is troubling as it should have been overwhelmingly evident at that time that section 27 could not mean virtually nothing. This interpretation would suggest that the *Charter* is filled with words empty of meaningful content and would undermine the purpose of the *Charter* as a whole. Section 27 was written into a powerful instrument, the *Charter* being part of Canada’s *Constitution*, and consequently must mean something beyond a ‘rhetorical flourish.’ It is an outrageous statement to suggest that the drafters put meaningless words into the *Constitution*. A purposive and generous interpretation would suggest that section 27 was included in the *Charter* precisely because members of multicultural communities demanded its inclusion for their own protection.

Acknowledging this purpose is consistent with Professor Dale Gibson’s suggestion in 1985 that a growing awareness on the part of Canadians to preserve, propagate, and celebrate their individual cultural heritages produced section 27.²²⁸ This statement is reflective of the idea that determining the purpose of section 27 is a complex, value-laden exercise that draws upon multiple sources. One of these sources should be recognized as the original framers of the

²²⁵ Professor P.W. Hogg stated that section 27 “may prove to be more of a rhetorical flourish than an operative provision,” in *Canada Act 1982: Annotated* (Toronto: Carswell, 1982) at 72.

²²⁶ Elmer Driedger, “The Canadian Charter of Rights and Freedoms” (1982) 14:2 *Ottawa L Rev* 366 at 373.

²²⁷ *Ibid* at 374.

²²⁸ Dale Gibson, “Protection of Minority Rights under the Canadian Charter of Rights and Freedoms: Can Politicians and Judges Sing Harmony (1985) 8:2 *Hamline L Rev* 368.

provision. In the context of analyzing section 28 of the *Charter*, Kerri Froc considers originalist interpretive principles as a critical step towards restoring section 28 as a fully functional constitutional provision and ensuring women have equal access to *Charter* rights.²²⁹ She considers the idea of an “inquiry into how the framers anticipated their words would be understood.”²³⁰ According to Froc, this can be ascertained through writings of the framers, but also any available public documents written at the time that would show common usage of constitutional words and phrases.²³¹ She advocates for courts to “adopt a practical stance about those who are entitled to be considered framers and drafters, beyond the usual, formal political actors.”²³² When it comes to interpreting section 27, the constitutional record with respect to enshrining the section has been described by scholars focused only on government actors as “sparse”²³³ Applying Froc’s approach expands the sources that can be considered by redefining the idea of who a framer is and considering how those framers anticipated their words would be understood.

The work of the Hays-Joyal Committee, which I previously examined, makes clear that section 27 of the *Charter* was a direct response to the testimony of the witnesses that were heard. These witnesses should be considered framers and their intentions should inform our understanding of how the words of section 27 ought to be interpreted. More recent scholarship has, in line with my suggestion regarding who the framers are, suggested a more fulsome understanding of section 27. Professor Dale Gibson noted that by 1990, there had already been

²²⁹ Kerri Froc “Is Originalism Bad for Women? The Curious Case of Canada’s “Equal Rights Amendment” 2015 19:2 *Rev Const Stud* [Froc].

²³⁰ *Ibid* at 263.

²³¹ *Ibid* at 264.

²³² *Ibid* at 273.

²³³ Beaudoin, *supra* note 188 at 1267.

enough judicial use of section 27 to disprove Hogg's assertion.²³⁴ At the forty-year anniversary of the *Charter*, further judicial use of this provision makes clear that it is not purely symbolic. Part two of this paper illustrates many of the ways that the courts have relied on section 27 in creating a body of jurisprudence, albeit a small body, that lays the foundation for a more expansive, and coherent, approach to section 27. In fact, even Hogg himself may have changed his position on section 27, as later editions of his textbook no longer contained the phraseology.²³⁵

Relationship to section 28

Some academics have drawn analogies between section 27 and section 28 of the *Charter*. Both are grouped under the heading of 'general' in the *Charter*, both were placed there after the intense lobbying of focus groups, and both have created some confusion as to their intent and purpose. Beverley Bains has done an extensive examination of section 28, specifically in response to other academics' cautions not to rely on section 28 to reinvigorate a section 15 analysis.²³⁶ In her writing, Bains delves into the issue of the utility of section 28, especially in light of the fact that section 15 and 28 are both sex equality provisions. The methodology she employs to determine the utility of section 28 is highly relevant when considering section 27's value. Bains poses three questions about section 28 in order to determine its utility: why was section 28 added to the *Charter*, what are the features of a section 28 analysis, and what does a

²³⁴ Gibson, Dale, "Section 27 of the *Charter*: More Than a Rhetorical Flourish" (1990) 28:3 *Alta L Rev* 589 at 592.

²³⁵ Later versions of his textbook omitted this description of section 27.

²³⁶ Beverley Bains, "Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation" (2005) 17:1 *Can J Women & L* 45 [Bains].

purposive interpretation of section 28 reveal.²³⁷ Given the similarities between section 27 and section 28, these queries can be usefully applied to the interpretation of section 27. Bains' article contributes to my research by illustrating that provisions in the *Charter* may be dormant due to their treatment. Furthermore, understanding the intention behind the inclusion of section 27 in the *Charter* gives rise to understanding section 27 as the basis for a viable litigation strategy.

Bains' first question regarding why section 28 was added to the *Charter* is fundamental to understanding any provision in the *Charter*. She argues that its feminist framers intended section 28 to be rights bearing.²³⁸ From the perspective of the feminist activists who framed and lobbied for it, section 28 had been added because of a distrust that the wording of section 15 was adequate to the task of persuading the Supreme Court of Canada judges, all fifty-seven of whom had been male appointees, to recognize women's entitlement to sex equality.²³⁹ Acknowledging this dimension is critical to understanding how Bains arrived at the conclusion that section 28 is rights bearing. Its purpose is so powerful, she argues, that it is impossible to view section 28 in any other way: "...it was inevitable that these framers, and the legions of feminists who stood behind them, intended section 28 to be rights bearing."²⁴⁰ Interestingly, she notes that the reason it was never expressly discussed was because the answer was so self-evident.²⁴¹

This theme of distrust was live in the lobbying for section 27 as well. The witnesses to the Hays-Joyal Committee made impassioned statements based on their wariness of being able to maintain their own linguistic and cultural heritage. Mr. Jan Federorowicz of the Canadian Polish

²³⁷ *Ibid* at 45.

²³⁸ *Ibid* at 47.

²³⁹ *Ibid* at 48.

²⁴⁰ *Ibid* at 51.

²⁴¹ *Ibid*.

Congress was fearful of being made a second-class citizen.²⁴² In its brief, the Canadian Polish Commission expressed concern that any document that singled out the “so-called ‘founding races’ for special mention and special privilege will become increasingly objectionable and irrelevant, not to say racist.”²⁴³ The desire for specific protection was born out of anticipated challenges for the minority groups lobbying for both section 27 and section 28. Based on this history, the argument that both were inserted in the *Charter* to extend protection in a rights bearing manner becomes not only plausible, but also self-evident.

With respect to the features of a section 28 analysis, Bains point out that section 28 has not received “more than a passing glance from the courts.”²⁴⁴ This approach is not unlike the intermittent efforts to invoke section 27 over the past four decades. She also notes that there has been no sustained commentary regarding section 28,²⁴⁵ which as previously discussed is the case with section 27 as well. However, Bains does point to the fact that references to section 28 treat the provision as if it were interpretive.²⁴⁶ This is a thread that has also been woven into the commentary respecting section 27.²⁴⁷ Bains points to scholars such as William Pentney who argues that sections 25 to 29 are interpretive guides that can be resorted to as aids in the construction of substantive guarantees.²⁴⁸ Pentney reasons that based on the structure of the *Charter*, these provisions are grouped under a single heading (General), separate from the substantive guarantees and they apply with reference to other rights. He relies on this distinction

²⁴² Proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, October 20, 1980, 9:105.

²⁴³ Canadian Polish Congress, Brief on Constitutional Reform (1980).

²⁴⁴ Bains, *supra* note 236 at 52.

²⁴⁵ *Ibid* at 52.

²⁴⁶ *Ibid*.

²⁴⁷ See for example, *R v Kapp*, [2008] 2 SCR 483 and *Church of Atheism of Central Canada v Canada (Minister of National Revenue-MNR)*, 2019 FCA 296.

²⁴⁸ Bains, *supra* note 236 at 52.

to restrict sections 25 to 29. Bains reframes the argument by examining what section 28 has the power to perform in terms of constructional analysis.²⁴⁹ She focuses less on the distinction between interpretive and rights-bearing rights, and more on how section 28 operates as a prism, altering the scope and content of *Charter* limits.²⁵⁰ Bains' ability to refocus the argument to underscore the work that section 28 is able to accomplish is a strategy that should be applied to section 27 analysis.

Shifting the conversation from examining where a provision exists in the *Charter* to how it should be used dovetails into Bains final question asking what a purposive interpretation of section 28 reveals. Her overall conclusion is that scope remains for construing section 28 as an independent rights-bearing provision. Bains notes that the elements essential to purposive interpretation includes *Charter* objects, rights language, conceptual analysis, and associated provisions.²⁵¹ These are factors that should also be reviewed in understanding section 27 of the *Charter*. Finally, Bains asks if purposively interpreted section 28 is consistent with intersectionality.²⁵² She answers this question in the affirmative, focussing on the idea of viewing section 15 and section 28 as complementary as opposed to redundant in spite of the other's existence.²⁵³ This idea can be applied to the relationship between section 27 and section 28 given the potential tension between sex equality and religion. However, it is not an argument that courts have been prepared to endorse.

²⁴⁹ *Ibid* at 61.

²⁵⁰ *Ibid* at 62.

²⁵¹ *Ibid* at 62-63.

²⁵² *Ibid* at 66-68.

²⁵³ *Ibid*.

In *Hak v Attorney General of Quebec*²⁵⁴, a trial court decision which is subject to appellate review, the Superior Court of Quebec recognized that section 28 is an independent rights-bearing provision, despite its inclusion under the heading “General.” However, differences in the language between section 27 and section 28 led the Court to differentiate between the purposes of section 27 and section 28.²⁵⁵ However, I argue that drawing this distinction was not required by the text of the *Constitution* and that Bains’ work on section 28 can usefully inform my approach to section 27.

A purposive approach to interpretation, grounded in the text of the two provisions, would require recognition that the two sections share similar historical origins in that they both can be understood as direct responses to concerns about inadequate rights protection.²⁵⁶ In addition, both provisions appear on their face to be interpretative based on specific phrases such as “shall be interpreted” in section 27 and “rights and freedoms...will be implemented” in section 28. While the language is not identical, both phrases appear to give the provisions interpretive force only. As well, both provisions are located in the same “General” section of the *Charter*. Examination of where a provision resides in the *Charter*, the headings, and subheadings it falls under, and the margin notes along the text are all important considerations in understanding its purpose.²⁵⁷ Justice Arbour has stated that limiting the kinds of interests protected by a provision because of its placement in the *Charter* would be contrary to a generous and purposive approach.²⁵⁸ The similarities in the provisions reinforced by long-standing principles of

²⁵⁴ *Hak c. Procureur général du Québec*, 2021 QCCS 1466 (CanLII) [*Hak*].

²⁵⁵ *Ibid* at 850-852.

²⁵⁶ See my earlier examination of the history of section 27 and *Froc*, *supra* note 229 at 263-273.

²⁵⁷ *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357.

²⁵⁸ *Gosselin*, *supra* note 21 at 316.

constitutional interpretation suggest that Bains' purposive approach to section 28 should be applied to section 27, revealing section 27 to be a substantive provision as well.

Bains is not the only scholar who has examined the interplay between section 27 and section 28. Ayelet Shachar has also examined the relationship between the two provisions, but from a different perspective.²⁵⁹ She examines how unique Canada is to have these two provisions operating at the same time and considers how their interplay in society creates a living experiment. She highlights that the Canadian constitutional system searches for legal and institutional pathways to address the seemingly intractable demands, obligations, rights, and protections endowed by sections 27 and 28.²⁶⁰ She considers the legal response of the courts and other policy makers to claims by religious minorities for fair inclusion and concludes that there are no predefined or easy formulas for how to best fulfill the requirements of diversity and equality.²⁶¹ This analysis is relevant to an understanding of section 27 as it illustrates the complex paradigm that these provisions are operating within, especially given disputes involving issues such as the rights of religious women. This article also furthers the need for considering these multifaceted problems from an intersectional approach.

The intersectional potential

A final article to consider in this discussion of section 27 is written by Professor Natasha Bakht.²⁶² Bakht contemplates how equality can be understood and reinvigorated in the *Charter*,

²⁵⁹ Ayelet Shachar, "Squaring the Circle of Multiculturalism? Religious Freedom and Gender Equality in Canada" (2016) 10:1 Law & Ethics of Human Rights 31.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² Natasha Bakht "Reinvigorating Section 27: An Intersectional Approach" (2009) 6:2 JL & Equality 135.

beyond employing section 15.²⁶³ To that end, she considers the potential of section 27 and suggests that section 27 ought to be used more regularly as an interpretive section that gives additional meaning to other *Charter* rights. Bakht argues that the protection of minority rights as described in section 27 of the *Charter* is not opposed to the protection of equality, but rather section 27 should be seen to inform all *Charter* rights.²⁶⁴ Further, she argues that this interpretation should bring an intersectional lens to any analysis. The potential of section 27, according to Bakht, is that “it may assist in mediating a middle ground when interconnected and mutually enforcing oppressions are in the balance.”²⁶⁵

Bakht’s argument is premised on the idea that an intersectional analysis would capture the actual reality of individuals, but of women in particular. As I earlier examined, women of colour can experience racism and sexism in the same course of events. Some discrimination only occurs because the affected individual has multiple protected characteristics. As noted above, intersectional theory suggests that political movements and institutions, including the law, fail to consider these intersectional dynamics. For instance, a truly multicultural interpretation of section 27 would require the *Charter* analysis to take into account women’s understanding of their culture as a woman may construe her culture differently from a man. This theory adds another dimension to my research as it raises the question of how an intersectional interpretation of section 27 could function in actual litigation. It suggests an approach that can be used when there are multiple grounds of discrimination or oppression in the context of section 27 litigation.

Bakht also makes a number of powerful observations about the scope of section 27. In her article, she expressly opts not to challenge the prevailing perspective that section 27’s nature

²⁶³ *Ibid* at 136.

²⁶⁴ *Ibid*.

²⁶⁵ *Ibid* at 136.

is interpretive, meaning section 27 serves to modify or add meaning to other rights set out throughout the *Charter*.²⁶⁶ However, she does seek another way in which the provision can be interpretive, namely by reinvigorating the multiple dimensions of such rights. She notes that preservation and enhancement suggest a dual capacity: “[t]he reference to “preservation” could refer to the protection of old constitutional settlements from the impact of the *Charter*, while the mention of “enhancement” invokes a forward-looking requirement of positive action as it pertains to cultural minorities.”²⁶⁷ She suggests that lack of agreement as to the content of multiculturalism and its preservation and enhancement might explain some of the reason the judicial approach has been haphazard or peripheral.²⁶⁸ Interestingly, she views this absence as an opportunity. The ambiguity that she identifies might serve to provide the latitude to employ section 27 in new and imaginative ways. In undertaking my own purposive analysis, that is precisely what I hope to achieve.

²⁶⁶ *Ibid* at 143.

²⁶⁷ *Ibid* at 143.

²⁶⁸ *Ibid* at 145.

PART SIX: ANALYSIS

In this section, I will weave together the existing section 27 jurisprudence, the provision's foundation, and the literature pertaining to the provision to propose a more fulsome understanding of section 27 and to suggest a coherent approach to its application. My starting point will be to summarize how the Supreme Court of Canada understands culture (and by extension multiculturalism) as evidenced in its case law. From there, I return to the actual text of section 27 and give a purposive interpretation to the words that are used in that provision.

Using the existing case law to limit our understanding of section 27 leads to a flawed application of the provision. The courts have treated section 27 as if it were a fleeting thought, not the powerhouse instrument it has the potential to be. The courts have for the most part painted a picture of section 27 as a purely interpretive provision, capable of providing little more than rhetoric. Examining the purpose and history of the provision is revealing in that it spotlights what the courts have failed to recognize. Stepping back from the case law and defining the provision, as academics have done with other similarly situated provisions, illuminates the extent to which the courts have underestimated section 27. Beverley Bain's approach to defining section 28 is especially revealing when considering the integral elements of section 27.²⁶⁹

Defining section 27 requires an analysis of the *Charter* provision through the lens of constitutional interpretation. This process is accomplished by relying on broad interpretive principles. While there are a multitude of individual principles that have been identified by academics and the courts, focusing on a purposive analysis of section 27, rooted in its text, is

²⁶⁹ Bains, *supra* note 236 at 62-63.

highly revealing. An analysis of context is also essential to this purposive approach. A purposive analysis reveals that section 27 should properly be understood as directing courts toward applying the provision as an independent, substantive right.

The existing jurisprudence

My argument that section 27 of the *Charter* is an affirmation of a substantive right to which the laws of Canada must conform begins with summarizing the current state of the law. As I have comprehensively reviewed the law earlier, this summary will be brief. This summary forms part of the foundation for my argument that section 27 has been misunderstood and misapplied and that a different approach is required. Early engagement with section 27 by the Supreme Court of Canada laid the foundation for a robust approach to the provision. An important aspect of this foundation is that these early decisions provide an interpretation, although implicit, of what culture, and by extension multiculturalism, means. Later cases evidenced a more dismissive attitude towards section 27, with only a few exceptions signalling a renewed openness to recognizing a role for the provision. Unfortunately, at no time has the Court provided a road map that can be used consistently and with any degree of certainty.

We know from *Big M Drug Mart* and *R v Edwards Books and Art Ltd.* that culture is linked to religion. *Keegstra* also affirms that religion is connected to culture. Even though the Court was split in *Keegstra* and there were three dissenting Justices, the minority agreed with the majority that section 27 could be employed to strengthen and legitimize the government's objective of prohibiting activity that promotes hate towards identifiable groups (in that case a

group defined by religion).²⁷⁰ The case law deals not only with the content of communication, but also with the method of communication revealing a further dimension of culture as evidenced by *R v Tran*. Language was a pivotal factor in employing section 27 when the Supreme Court of Canada considered the constitutional right to an interpreter as protected under section 14 of the *Charter*. In considering section 14 of the *Charter*, the Court relied partially on Canada's claim to be a multicultural society as noted in section 27. The Court stated that multiculturalism recognizes multilingualism. Therefore, the Supreme Court decisions suggest at the least that the Court understands culture as connected to religion and language. This basis allows other aspects of religion and language to be drawn into the analysis. For example, aspects of language would include stories, histories, and songs and aspects of religion would include holidays, holy days, rituals or even food. These are all aspects of language and religion that may represent an expression of an individual's culture in a society as diverse as Canada's.

The case law is less helpful however, in that its approach to section 27 has been inconsistent in terms of recognizing how the social and political environment should affect its use. For example, the early decisions appear to embrace the idea that the provision should be used to champion multiculturalism ideals.²⁷¹ In *R v S (RD)*, the Court appeared to back away from this approach and instead used the provision to caution that all Canadians matter, with no emphasis on marginalized groups. This application of section 27 does nothing for its interpretation and in fact treats it as a redundancy by not recognizing the distinct challenges faced by the particular members of Canada, specifically people of colour, aboriginal people, and immigrants.

²⁷⁰ *Keegstra*, *supra* note 50 at 759.

²⁷¹ For example, *Big M Drug Mart*, *supra* note 33 and *R v Edwards Books and Art Ltd*, *supra* note 29.

Very little after *R v S (RD)* has contributed to a comprehensive application of section 27, with the Court opting for a dismissive, generic approach, primarily reciting earlier broad statements.²⁷² The lower courts have been left to grapple with this void and have even gone so far as to suggest that litigants need to tell the courts how they should be employing section 27 if they want to have it applied.²⁷³ This approach essentially shifts the burden to the litigant to develop the framework that the Supreme Court of Canada has failed to create. A purposive approach shows how courts and litigants should understand and employ section 27.

Purposive approach

The foundation of *Charter* interpretation is that a purposive approach should be taken and accordingly, the Supreme Court of Canada has adopted a purposive approach as its dominant method of interpretation.²⁷⁴ A purposive approach means that the *Charter* right in question should be given a generous and liberal interpretation aimed at fulfilling the purpose of the right in question and of the *Charter* as a whole.²⁷⁵ This approach aims to establish the purpose of the right and then interpret the right to include activities that come within the purpose and exclude activities that do not.²⁷⁶ In *R v. Big M Drug Mart Ltd.*,²⁷⁷ the Supreme Court of Canada elaborated that this meant that the right must be understood in light of the interests it was intended to

²⁷² See for example *R v Church of Scientology of Toronto*, [1997] OJ No 1548 CA where section 27 is mentioned only in passing and *R v TLK*, [2001] SJ No 184 where section 27 was raised, but not addressed.

²⁷³ See for example *R v Fehr*, 2004 ABQB 859.

²⁷⁴ Gerard J. Kennedy, *Charter of Rights in Litigation: Direction from The Supreme Court of Canada* (Toronto: Thomson Reuters, 2020) (loose-leaf updated 2021, release 2), ch 5, s 5:05 (1) (Kennedy).

²⁷⁵ *Ibid.*

²⁷⁶ Peter W. Hogg, *Constitutional Law of Canada, 5th ed* (Toronto: Thomson Reuters, 2019) (loose-leaf updated 2019, release 1), ch 36, s 36.8 (c).

²⁷⁷ *Big M Drug Mart*, *supra* note 33.

protect.²⁷⁸ In *Big M Drug Mart*, the Court continued that it must consider the relevant linguistic, philosophic and historical contexts when employing a purposive approach.²⁷⁹ Given this interpretation, employing a purposive approach includes some consideration for the language employed, other *Charter* rights associated with the right, the need for *Charter* rights to be capable of development over time, and the historical origins of the provision.²⁸⁰

The Supreme Court of Canada has generally regarded a ‘purposive’ and ‘generous’ approach as being consistent and has used them together. For example, the word generous can be used to expand on the concept of purposive;²⁸¹ however, the terms generous and purposive are not to be conflated.²⁸² The Court has clarified that “the principle that a provision bearing more than one plausible meaning must be read in a manner that favours the accused is not a principle of *Charter* interpretation.”²⁸³ This is an example of the Court identifying the differences between the result a purposive interpretation requires and the requirements of a generous interpretation. Further, “*Charter* rights do not automatically receive the most generous interpretation that their language can bear.”²⁸⁴ In the case of some rights, section 8 for example, a purposive interpretation will yield a broad scope.²⁸⁵ Finally, *Charter* rights should be read broadly, putting the burden of justifying limitations on the state.²⁸⁶

²⁷⁸ *Ibid* at 116.

²⁷⁹ *Ibid* at 117.

²⁸⁰ *Ibid* at 117.

²⁸¹ *Ibid* at 117.

²⁸² *R v Poulin*, 2019 SCC 47 at 55.

²⁸³ *Ibid*.

²⁸⁴ *Ibid* at 55.

²⁸⁵ *R v Duarte*, [1990] 1 SCR 30.

²⁸⁶ *Ross v New Brunswick District No 15*, [1996] 1 SCR 825.

Consider the context

Situating section 27 in the appropriate context is integral to a purposive interpretation. A contextual analysis is important in a diverse society as it allows the *Charter* to be interpreted correctly regardless of the particular issue that puts the interpretation in question. In *Edmonton Journal v Alberta (Attorney General)*,²⁸⁷ the Supreme Court of Canada's view was that a contextual method brings into sharp relief the aspect of the right or freedom that is truly at stake in the case as well as the relevant aspects of any values in competition with it. Professor Kennedy points out that a right may have more value in a political context than in the context of disclosure of the details of a matrimonial dispute.²⁸⁸ The contextual approach may be especially useful in the case of rights in tension where competing values are at stake, which was the case in *Edmonton Journal* where protection of privacy was pitted against the public right to an open court process.

In *Chiarelli v Canada*,²⁸⁹ which involved an immigration law issue, the Supreme Court of Canada stated that a contextual analysis will often involve a consideration of the principles and policies underlying the law or area of law that is in question. This means that a contextual approach can play a role in determining how to balance individual rights and societal interests. The contextual approach has been incorporated into the purposive approach since they are used together with context informing purpose.

A contextual analysis also includes examining the title above each section in the *Charter*. This exercise can be a useful aid for interpreting the provisions found below the heading.

²⁸⁷ *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 [*Edmonton Journal*].

²⁸⁸ Kennedy, *supra* note 274 at ch 5, s 5:05 (4).

²⁸⁹ *Canada Minister of Employment and Immigration v Chiarelli*, [1992] 1 SCR 711.

Embedded in the *Charter* is a bloc of provisions under the heading ‘General.’ Examination of where the provision resides in the *Charter*, the headings, and subheadings it falls under, and the margin notes along the text are all important considerations in understanding a section’s purpose.²⁹⁰ It may also be necessary to consider the provisions that it is grouped with in the *Charter*. For example, section 28 of the *Charter*, which logically follows section 27, has been labelled as meaningless by some academics.²⁹¹ However, section 28 has found renewed import and influence based on deeper understanding of its purpose.²⁹² Furthermore, Justice Arbour has stated that limiting the kinds of interests protected by a provision on the basis of its placement in the *Charter* would be contrary to a generous and purposive approach.²⁹³ This sort of restrictive reading of the *Charter* should not be used to control the scope of provisions and “freeze constitutional interpretation in a manner that is inconsistent with the vision of the Constitution as a “living tree” which has always been part of the Canadian constitutional landscape.”²⁹⁴

The primacy of the text

Most importantly, the interpretation of any section of the *Charter* must be rooted in the specific text of the provision. A plain reading of the *Charter* text is critical to its understanding as “[t]he text of the *Charter* provisions will always govern their interpretation.”²⁹⁵ Accordingly, with respect to section 27, it is essential to consider what linguistic choices were made. It is also instructive to examine how section 27 relates to other provisions in the *Charter* based on the

²⁹⁰ *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357.

²⁹¹ Elmer Driedger, “The Canadian Charter of Rights and Freedoms” (1982) 14:2 *Ottawa L Rev* 373-374.

²⁹² *Froc*, *supra* note 229.

²⁹³ *Gosselin*, *supra* note 21 at 316.

²⁹⁴ *Gosselin*, *supra* note 21 at 317.

²⁹⁵ *Kennedy*, *supra* note 274 at ch 5, s 5:05 (3).

language that the provision employs. Some provisions are inclusive in nature and capture “everyone” or “all”. For example, section 7 of the *Charter* states that “everyone” has the right to life, liberty and security of the person. Other rights are more restrictive in their application. Section 23 guarantees minority language educational rights only to French speaking communities outside Quebec, and to English speaking minorities in Quebec. The language in which the right is expressed may make the right defensive in nature or offensive in nature, requiring some kind of positive action. The words of a provision may suggest a dynamic approach to interpretation in terms of being a call to action on the part of the government. A provision may detail that nothing in certain *Charter* sections “abrogates or derogates” from other rights; that other *Charter* rights “shall not be construed” to prejudice other rights;” and that the *Charter* does not “extend” the legislative powers of any authority.²⁹⁶ On their face, these provisions can all be viewed as protective or defensive in nature in that they can be used to protect from unintended impact of the *Charter*.

However, relying strictly on wording should not have the effect of freezing the intention of the text in time. The Supreme Court of Canada has been clear on the point that the *Charter* does not simply set out rights as they existed at the time that it was drafted. In *Hunter v Southam*,²⁹⁷ the Court underscored the idea that *Charter* rights must be capable of evolving to meet unimagined circumstances. Again, this view is consistent with the perspective espoused in *Edwards v. Attorney General for Canada*²⁹⁸ that the Canadian *Constitution* should be viewed as “a living tree capable of growth and expansion within its natural limits.”²⁹⁹ Therefore, while the

²⁹⁶ *Charter*, *supra* note 1 at ss 21, 22, 29, 25, 26, and 37.1(4).

²⁹⁷ *Hunter v Southam*, 1984 [SCR] 145 at 155.

²⁹⁸ *Edwards v. Attorney General for Canada*, [1930] AC 124.

²⁹⁹ *Ibid* at 136.

Supreme Court has emphasized the primacy of the *Constitutional* text, it remains the case that each provision should be given a purposive interpretation to give effect to the text.

Academic treatment

The academic treatment of section 27 further informs my purposive interpretation. As earlier stated, Bains suggests that elements essential to a purposive interpretation include *Charter* objects, rights language, conceptual analysis, and associated provisions.³⁰⁰ These are all factors that should be considered in forming an understanding of section 27 of the *Charter*. Moreover, these factors would further an intersectional understanding of section 27 as they would allow a more nuanced approach to understanding complex multiculturalism paradigms.

Applying a purposive analysis to define section 27

Textual analysis

Recognizing that the Supreme Court of Canada has recently underscored the primacy of the language of a given constitutional provision,³⁰¹ it is important to start with the actual text of section 27 as the basis for a purposive interpretation. Section 27 states that the “*Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural

³⁰⁰ Bains, *supra* note 236 at 62-63.

³⁰¹ 9147-0732 *Québec Inc.*, *supra* note 134 at 8 and *Toronto (City) v Ontario (Attorney General)* 2021 SCC 34 [*Toronto v Ontario*] at 14.

heritage of Canadians.”³⁰² Even examining just the text of section 27 clearly supports directing courts towards a more robust interpretation than they are employing.

To begin with, nothing in the wording of section 27 limits those whose multicultural heritage can benefit from the provision. The provision’s protection of culture is therefore expansive and applies to all Canadians rather than any specific minority groups. There is no need to identify the beneficiaries of section 27 because of this application. Section 27 is defensive in terms of the way it is written. It calls for the *Charter* specifically to be interpreted to preserve and enhance the multicultural heritage of Canadians. The language of the provision is helpful in that it underscores how the *Charter* should be interpreted; however, there is nothing explicit in its wording that disentitles its application as a substantive, operative right.

In fact, the words ‘preservation’ and ‘enhancement’ support some form of positive obligation to act. What does it mean to preserve and enhance something? The Oxford dictionary defines the word preserve as meaning to protect, to keep safe from injury or harm, to save or spare, and to keep alive.³⁰³ Enhance is defined as to lift, to raise, to elevate, and to set up.³⁰⁴ The fact that both these words are verbs is in and of itself telling—they require some sort of action. Further, both verbs are defined in highly dynamic ways. They require action beyond the ordinary, asking the reader to enrich, to augment, to conserve—all behaviours that require one to extend themselves. That is what section 27 requires: that compelling action is taken to ensure culture is treated with deference.

³⁰² *Charter*, *supra* note 1 at s 27.

³⁰³ [preserve, v. : Oxford English Dictionary \(oed.com\)](#)

³⁰⁴ [enhance, v. : Oxford English Dictionary \(oed.com\)](#)

The fact that the provision begins by stating that the *Charter* “shall be interpreted in a manner” may appear to be problematic for my argument, but is in fact not a limitation on its substantive application. As I have adverted to above, close examination of the phrasing of the provision suggests it is both the affirmation of a constitutional principle and an interpretive direction. Section 27 is an affirmation that a substantive principle exists, the principle being the “preservation and enhancement of the multicultural heritage of Canadians.” There must be a substantive principle that exists in the first place that requires the consistent interpretation of the other *Charter* rights. Further, case law suggests this substantive principle has been recognized. In *Reference re Secession of Quebec*, the Supreme Court affirmed that the protection of minority rights was an unwritten constitutional principle. It is not, however, an unwritten principle. Section 27 was not raised in *Reference re Secession of Quebec* but, it enshrines the constitutional principle identified in that case. In *Reference re Secession of Quebec*, the protection of minority rights was acknowledged as a factor in the development of our constitutional structure, existing even at the time of Confederation, and that it is a principle, which continues to influence the application and interpretation of the Constitution.³⁰⁵ The protection of minority rights has been accepted as a constitutional principle, but the principle recognized in section 27 is not an unwritten one: section 27 expressly affirms its existence.

In *Toronto (City) v Ontario (Attorney General)*,³⁰⁶ a majority of the Supreme Court of Canada narrowed the function of unwritten constitutional principles. The majority decision establishes that these principles can serve only two functions: on the one hand, they can be used as aids in interpreting constitutional text; on the other, they can fill textual gaps.³⁰⁷ The

³⁰⁵ *Reference re Secession of Quebec* [1998] 2 SCR 217 [*Reference re Secession*].

³⁰⁶ *Toronto v Ontario*, *supra* note 301.

³⁰⁷ *Ibid* at 55-56.

jurisprudence until *Toronto (City) v Ontario (Attorney General)* supported the position that unwritten principles could be used to invalidate legislation in certain circumstances.³⁰⁸ For the purposes of my argument, however, this pivot in treatment of unwritten constitutional principles is inconsequential. The principle recognized in section 27 is enshrined in the *Constitution* and its purposive interpretation, rooted in the text of the provision, is what leads to my conclusion that section 27 is a substantive right. As I have argued, even consideration solely of the text of section 27 does not clearly indicate that the provision is simply an interpretive direction for understanding the other rights provisions in the *Charter*. Other aspects of the purposive analysis confirm the argument that section 27 is not simply an interpretive provision.

Contextual analysis

Understanding section 27 in its context gives further support to the view that section 27 is both an interpretive direction and an affirmation and expression of a substantive right. Section 27 of the *Charter* can on its face be interpreted as a powerful and direct call to action that can be relied on by all Canadians, despite being grouped with mostly interpretive provisions under the heading ‘General’. Justice Arbour has underscored that the placement of a right in the *Charter* should not be used to limit the right.³⁰⁹ It is also telling that the heading is “general” rather than “interpretive” provisions, as I have averted to above. If the drafters had wanted to label the provisions as interpretive, they could have done so, but clearly did not. Further, the drafters made

³⁰⁸ *Reference re Secession*, *supra* note 305 at 50.

³⁰⁹ *Gosselin*, *supra* note 21 at 316.

a deliberate choice to include protection of multiculturalism as a provision, rather than as part of the preamble, which is more clearly interpretive in nature.

The idea of placing multiculturalism wording in the preamble was rejected in favour of making it a stand-alone general provision.³¹⁰ It is, however, unique from the other provisions under the ‘General’ heading. It requires “preservation,” but it is not defined or limited by its protection component. There is an element of action required by the provision. It is action-oriented and dynamic requiring the “enhancement” of Canadian multiculturalism. Moreover, as a general provision, it can be understood as fluid and accommodating, not strictly available for a singular purpose.

Interpreting section 27 as capable of being flexible, but requiring action would be consistent with the idea that *Charter* rights must be capable of growing to meet unimagined circumstances including the ever evolving and complex cultural diversity that defines Canadian society. Given how politically charged issues of equity, diversity and systemic discrimination have become, close attention to the contextual analysis should have significant influence in section 27 being read as having substantive force. Further, this interpretation would also be consistent with the manner in which scholars have interpreted section 28 of the *Charter*.³¹¹ Since these provisions are in the same part of the *Charter*, understanding section 27 as rights bearing would not be unprecedented.

³¹⁰ Beaudoin, *supra* note 188 at 1271.

³¹¹ Bains, *supra* note 236 at 62-63.

It is evident based on a definitional perspective that the courts have missed the mark when approaching section 27. It clearly has been an underestimated tool at their disposal, one which has untapped potential to address systemic discrimination.

Historical foundation

As has been illustrated by the above argument, ensuring the protection of the multicultural heritage of Canadians is a complex, value-laden exercise that draws upon multiple sources. Another element that requires careful consideration is the history of the section. The Supreme Court has largely ignored the foundations of section 27—both domestic and international. Neither of these sources is meaningfully addressed in any jurisprudential discussions.

If, as I argue, the framers of section 27 are the witnesses from the ethno-cultural communities who appeared before the Committee, then their intentions are critical to understanding the text of the provision. These origins provide invaluable context that allows the text of the provision to be properly interpreted.³¹² The framers clearly intended section 27 to be a substantive right, and not simply an interpretive principle. These witnesses were undoubtedly concerned about discrimination and the protection of multiculturalism. They also wanted to ensure the continued ability to enjoy and disseminate their cultures.³¹³ These issues were presented to the Committee from a multitude of sources and perspectives, despite an equality provision already having been proposed. Section 27 was carefully crafted to meet these pressing concerns. The challenges faced by these groups at the time that the *Charter* was introduced are

³¹² 9147-0732 *Québec Inc.*, *supra* note 134 at 13 and *Toronto v Ontario*, *supra* note 301 at 14.

³¹³ Proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, October 20, 1980, 9:105.

ongoing concerns as evidenced by the governments' increasing efforts to embrace diversity and inclusion and combat systemic racism.³¹⁴ To read section 27 as anything less than a continuing responsibility of the government would diminish the lived experience of minority groups from the time of the *Charter's* introduction to the present. Interpreted properly, section 27 must be understood as having a substantive dimension that operates to protect multiculturalism and prevent discrimination. This interpretation is confirmed by section 27's international pedigree.

As previously examined, section 27 has its international foundation in Article 27 of the *ICCPR*. The fact that the *ICCPR* is binding on Canada triggers the presumption of conformity and places an onus on courts to ensure that section 27 of the *Charter* provides protection at least equivalent to that provided by Article 27 of the *ICCPR*.³¹⁵ Article 27 has been interpreted as far broader than section 27 in terms of those to whom it applies and what it encompasses, as discussed in my earlier examination of Article 27 and section 27 in relation to each other. Article 27 enshrines a substantive "right" and a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party. Given that the presumption of conformity places an obligation on Canadian courts to provide protection at least equivalent to that provided by international law, there is an expectation that section 27, being similar to Article 27,³¹⁶ should also be recognized as requiring Canada to take active measures in relation to minorities exercising their section 27 right.

³¹⁴ See for example *supra* note 10.

³¹⁵ *9147-0732 Québec Inc.*, *supra* note 134 at 25.

³¹⁶ *Reference Re Public Service Employees Act (Alta.)* [1987] 1 SCR at 59.

As I have previously discussed, the wording of the section 27 and Article 27 are similar, but not identical. However, this fact is not an obstacle to interpreting section 27 consistently with Article 27. Article 27 was the model for section 27 and accordingly examination of the language of Article 27, while not determinative, is helpful and persuasive in interpreting section 27.³¹⁷ At the very least, the interpretation of Article 27 reminds us that section 27 can, like other human rights protections, be given an evolving interpretation, consistent with its terms, in order to provide increasingly comprehensive protections. Further, the courts and commentators have explained that “the international human right obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself.”³¹⁸ Differences in wording, should not translate into different interpretations for the two provisions. This argument is particularly true since, as I have discussed, a textual interpretation of section 27 does not preclude reading it as a substantive right.

Based on the forgoing, section 27 should be understood as a substantive right that requires that government actors not only preserve Canada’s multicultural nature, by not undermining it, but also dynamically enhance multiculturalism when they act to ensure the protection of the multicultural heritage of Canadians. Some Canadian courts appear to have recognized that section 27 is more than an interpretive provision, as illustrated by lower court decisions that recognize that the language of section 27 invites more than the Supreme Court has previously allowed. These decisions reflect a more comprehensive interpretation, which respects the text of the *Constitution* while being consistent with *Charter* values. Section 27 has already been employed by the courts to act on external legislation.³¹⁹ Despite the flaws in the reasoning

³¹⁷ *Beaudoin, supra* note 188 at 1271.

³¹⁸ *Keegstra, supra* note 50 at 66.

³¹⁹ *Prus-Czarnecka v Alberta, supra* note 120.

of that decision, the proper interpretation of section 27 leads to the same result: section 27 applies to all statutes and the common law as well.³²⁰ Any law that deviates from the norm established by section 27 should be read as a *Charter* violation. This use of section 27 would unlock its potential for many equity-seeking minorities.

From impoverished to enhanced engagement

The question remains as to how to take what has been an impoverished understanding of section 27 and compel the courts to engage more comprehensively with its potential. The answer involves a nuanced approach to using the provision. The jurisprudence has made it clear that it is necessary to be intentional and express when arguing that the provision applies to a given set of facts. The opportunity needs to be identified and then the court needs to be overtly told that section 27 needs to be addressed in the litigation. Litigants need to set out how, in the context of their case, their multicultural rights are engaged. This can be done by connecting the impact of legislation back to what the courts have already identified culture relates to including religion, language, and identity. This process might also require a rethinking of how one understands their culture and how it is expressed in order to align aspects of culture that have not been addressed by the courts with section 27.

If the courts determine that multiculturalism is implicated in the context of the facts of the specific case, then the legislation in question needs to be analyzed to determine if it is consistent

³²⁰ Section 27 applies to the common law when a government actor is relying on the common law. This is consistent with the way the Supreme Court has interpreted the application of the *Charter* in cases like *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573.

with the objective to preserve and enhance multiculturalism. Since the terms preserve and enhance have different meanings, this step involves two separate queries. The first question should be whether a government action (or potentially inaction) undermines or fails to preserve multiculturalism? A separate question is whether the government action (or potentially inaction) fails to enhance multiculturalism? The scope of this action is potentially broad. Parties may take action to attack aspects of legislation inconsistent with section 27. Alternatively, parties may bring arguments to ensure that legislation that serves section 27 norms is not repealed. Either way, section 27 should be treated as a tool to compel the government to behave in a manner that supports multiculturalism.

Not subject to section 33

There is another aspect of section 27 that could see the provision recognized as a potential powerhouse. Section 27 may have some overlap with section 2 (a) or 15 of the *Charter*. However, section 27 is clearly broader than those sections because it deals with culture as such and not specific elements that together make up culture. This feature would align section 27 with an intersectional approach because it would potentially require examination of all aspects of a culture, not discrete elements, and ensure more robust protection which better recognizes the intersecting elements of culture and how they can be undermined. The nature of the rights protected in section 27 is also broader. While freedom of religion has been recognized as having a communal aspect, both s 2(a) and s 15(1) are really conceived of as rights that are more

individual. Section 27 seems to protect the rights of groups as such. Further, section 27 is also not subject to what is commonly referred to as the notwithstanding clause.³²¹

Section 33 of the *Charter* allows Parliament or the provincial legislatures to override certain provisions of the *Charter*, specifically section 2 and sections 7 through 15. Section 33 functions to prevent a person from bringing an action in court claiming that a law violates their fundamental freedoms, legal rights, or equality rights and is consequently invalid. Provincial or federal governments can use section 33 when they want to pre-emptively protect a law. The clause acknowledges that there can be situations where a government will want to pass a law, or maintain an existing law that disregards *Charter* rights or freedoms.³²²

If legislation is non-compliant with section 27, and section 27 is recognized as a substantive right, section 33 cannot be invoked by governments to insulate legislation from review. The implications of this interpretation are powerful and could have bearing on cases currently before the courts. There is currently an ongoing court challenge related to the language legislation that was recently assented to in Québec.³²³ The applicants argued that section 27 should apply, but unfortunately, the provision was dismissed as interpretive.³²⁴ If it was established in subsequent appeals of this decision that section 27 enshrines a substantive, *Charter* protected right, it would aid in the applicant's argument that language rights, as a component of cultural rights, cannot be overridden. Without the assistance of section 27, language rights would fall under the group of rights that governments could otherwise override in the interests of public policy. Recognition of section 27 as a substantive right would alter the outcome of a decision that has potential to

³²¹ *Charter*, *supra* note 1 at s 33.

³²² *Ibid.*

³²³ *Hak*, *supra* note 254. The legislation is *An Act respecting French, the official and common language of Québec*.

³²⁴ *Ibid* at 638.

preserve multiculturalism in Québec. I will now apply my framework to show how section 27 can alter outcomes.

Practical applications

People of colour, newcomers to Canada, and Indigenous people have long faced barriers created by discrimination in the justice system that begins with the factors that cause them to enter the system and continues once they are in the system. Canada has recently experienced a series of galvanizing events rooted in racism and systemic discrimination such as the emergence of the Black Lives Matter and the Idle No More movements.³²⁵ In response, Canada has been seized by an urgent need to accelerate actions to address systemic racism and discrimination. Recognizing section 27 as a substantive right would help to achieve this goal at a systemic level. The legal framework I proposed above to standardize the application of section 27 would support this goal.

Acknowledging that section 27 should be used to operate on statutes as an external force is a step in that direction. The decision in *Prus-Czarnecka v Alberta* (discussed above) is a practical illustration of how the provision should operate to support multiculturalism in Canada from a practical perspective. The Court in *Prus-Czarnecka v Alberta* clearly recognized that a child's name as an extension of the parent's culture and tradition was a multicultural right in need of preservation. In that case, a mother attempted to register the birth of her daughter in accordance with her Polish culture and tradition.³²⁶ In that culture, names have gender specific

³²⁵ "Idle No More" calls on all people to join in a revolution, which honours and fulfills Indigenous sovereignty online: <idlenomore.ca – Indigenous Revolution>.

³²⁶ *Prus-Czarnecka v Alberta*, supra note 120 at 1.

endings.³²⁷ To someone in her culture, it would be inappropriate that a female child would have a male surname. The Director of Vital Statistics for the Province of Alberta refused the registration on the basis that the name could only be one of the father's surname, mother's surname, or a combination of both names, hyphenated or non-hyphenated.³²⁸ The director relied on the interpretation of the *Vital Statistics Act* as limiting authority to register a child with her father's name to the exact name used by the father. In granting an order requiring the Director to accept the registration of birth under the female version of the father's surname, the Court disagreed with the Director and, in doing so, applied section 27 of the *Charter* directly to interpret the provincial legislation.³²⁹ While I discussed the analytical weakness of the Court's treatment of section 27 above, it is clear that the Court implicitly (and as I have argued properly) recognized that section 27 enshrines a substantive right which can be applied to legislation and protect multiculturalism.

The *Prus-Czarnecka v Alberta* decision is not based on isolated events. Issues around naming have in fact have arisen numerous times in the context of Indigenous culture as well. Recently in both Manitoba and Alberta, parents have faced challenges registering their baby's traditional name under their province's vital statistics legislation.³³⁰ In February 2022, the Manitoba parents attempted to register their daughter with the traditional spelling of an Indigenous name.³³¹ Interestingly, the Manitoba parents were noted as saying they were expressly trying to preserve their customs.³³² The name was ineligible because of a colon, which

³²⁷ *Ibid* at 2.

³²⁸ *Ibid* at 1.

³²⁹ *Ibid* at 7.

³³⁰ *The Vital Statistics Act* CCSM c V60 and *Vital Statistics Act*, SA 2007 c V 4.1.

³³¹ Online date accessed May 30, 2022 <https://www.cbc.ca/news/indigenous/first-nations-baby-name-manitoba-1.6356017>.

³³² *Ibid*.

is commonly used in their culture and necessary to pronounce the name properly.³³³ Wab Kinew, leader of Manitoba's Opposition NDP, explained that "[t]he naming of children in the Indigenous community with Indigenous names is a key part of cultural survival and resurgence, particularly set against the history of Indigenous children having their Indigenous names erased when they were taken from their families during the residential school era."³³⁴

In the case of the Indigenous families, governments should recognize that naming a baby is an important way to honour one's heritage and to continue the work of reclaiming and revitalizing Indigenous languages. As noted by the Truth and Reconciliation Commission, "the objectives of the schools were to strip away Aboriginal children's identities and assimilate them into Western Christian society."³³⁵ Residential schools assigned numbers to students. The Truth and Reconciliation Commission's Call to Action 17 directs all levels of government to enable residential school survivors and their families to reclaim and use the name that is part of their heritage and culture on various identity documents.³³⁶

This situation is not unique as in the last few months two additional cases of Indigenous families being unable to register their child's name have emerged.³³⁷ These families should be able to rely on section 27 in arguing that their *Charter* right under section 27 has been violated. Relying on the decision in *Prus-Czarnecka v Alberta*, the application of section 27 seen in that

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ Summary of the final report of the Truth and Reconciliation of Canada: *Honouring the Truth, Reconciling for the Future* at 145.

³³⁶ 17. We call upon all levels of government to enable residential school Survivors and their families to reclaim names changed by the residential school system by waiving administrative costs for a period of five years for the name-change process and the revision of official identity documents, such as birth certificates, passports, driver's licenses, health cards, status cards, and social insurance numbers.

³³⁷ <https://bc.ctvnews.ca/it-feels-like-it-s-losing-dignity-b-c-parents-unable-to-register-baby-with-indigenous-name-1.5843686> and <https://globalnews.ca/news/8767798/bc-parents-cant-register-babys-indigenous-name/> accessed on May 31, 2022.

case should also benefit these families. A purposive interpretation of section 27 of the *Charter* would require the provision to be applied in relation to a fundamental matter such as an individual's name, as the name of an individual has been found to be a vital component of that individual's identity.

Recognizing that a name not only identifies you, as an individual, but your family, your culture and where you come from, resonates with me on a personal level given my own distinctly ethnic name. I have given my three children traditional West Indian names as well even though they are of mixed ethnicity.

Speculative fiction

Justice Cory's decision in *R v S (RD)* might have been different had he been equipped with a purposive interpretation of section 27. Justice Cory shied away from using section 27 as a prism that reflects the social context in which the decision was heard. Had he understood the provision correctly he might instead have viewed Judge Sparks' comments as timely and necessary. In contrast to Justice Cory's decision is the 2018 decision in *R v Morris*.³³⁸ Justice Nakatsuru of the Ontario Superior Court of Justice did not hesitate to apply the social context in a case involving a Black accused and took into consideration anti-Black racism. During sentencing, Justice Nakatsuru made specific comments concerning the impact of overt and institutional anti-Black racism in Canada. On appeal, in 2021, the Ontario Court of Appeal also acknowledged the existence and negative effects of anti-Black racism in society and the criminal

³³⁸ *R v Morris*, 2018 ONSC 5186 (CanLII).

justice system.³³⁹ While section 27 was not raised in either level of Court, it would have fit into the argument for recognition of the distinct challenges faced by specific Canadians. Based on Justice Nakatsuru's decision, it is unlikely he would have interpreted section 27 in a manner that required particular attention not to say anything that would upset white Canadians. Applying the section 27 analysis I have suggested, he would have recognized multiculturalism as implicated in the context of the facts of this case relying on the Supreme Court decision in *R v S (RD)* where ethnicity was found to be related to culture. Then he would have to consider whether the legislation related to sentencing is consistent with the objective to preserve and enhance multiculturalism. In this case, he would have found that over policing and over incarceration of Black citizens and residents creates a situation in which these individuals are simply erased from Canadian society. This reality is clearly a failure to preserve or enhance multiculturalism.

Application to criminal law

In the criminal law context, there are other examples of legislation that may operate in violation of the norm enshrined in section 27. For example, section 27 of the *Charter* could be used to challenge the *Jury Act* on the basis that it does not achieve the goals of promoting and enhancing the multicultural heritage of Canadians. This argument could be based on the fact that certain defences or responses to situations (like being stopped by police) may only be put into proper context if the members of the jury are able to understand the cultural situation of the accused. This treatment of section 27 is highly aligned with a purposive and contextual interpretation of the provision, directly addressing the growing diversity within Canada. Drawing

³³⁹ The ultimate sentence was replaced, but for different reasons.

on this treatment, the application of section 27 can be expanded to require modification of the jury system.

The jury system is a vital institution that has been described as the conscience of the community.³⁴⁰ However, defining a community through the composition of a jury can be an elusive task. Throughout modern history, the composition of a jury has been questioned for its ability to be truly representative of a community. In 1970, the Mangrove Nine, a group of British Caribbean activists unsuccessfully requested that their trial be heard by an all-Black jury in a trial that was significant for being the first judicial acknowledgement of racial prejudice in the Metropolitan police.³⁴¹ In 2021, the prosecution of the men charged with murdering Ahmaud Arbery, a Black man, took place in Georgia's Glynn County. Race played a central role in the case: the three defendants in the case were white, as were the 11 of the 12 jurors, and yet Glynn County's population is over 25% Black.³⁴² In Canada, jury trials have raised similar concerns with respect to representation.³⁴³ The representativeness of a jury can be viewed as problematic from two perspectives: the first lies in the empanelling process and the second relates to the group of individuals who ultimately make up a given jury.

³⁴⁰ *R v Sherratt* [1991] 1 SCR 509, 1991 CanLII 86 (SCC) at 523-525 and Canada, Law Reform Commission, *Report on the Jury*, (Ottawa: Supply and Services Canada, 1982) at 5.

³⁴¹ Nicholas Langen, "Mangrove Nine: When Black Power Took on the British Establishment" *The Justice Gap*, November 29 2019. Online.

³⁴² Erik Ortiz, *Why only one defendant in the Ahmaud Arbery killing was guilty of malice murder*. NBC News November 24, 2021. Online.

³⁴³ *R v Parkes* (1993), 15 OR (3d) 324, 1993 CanLII 3383 (Ont CA) [*Parkes*].

Empanelling a jury

*The Jury Act*³⁴⁴ and its regulations³⁴⁵ set out the process for selecting and composing juries in Manitoba. Section 6(1) of the *Jury Act* states that a list of potential jurors is prepared by random selection from appropriate lists creating what is known as the jurors' roll.³⁴⁶ In Manitoba, the jurors' roll is created from the list of residents registered with the Minister of Health and Seniors Care under the *Health Services Insurance Act*.³⁴⁷ The sheriff for each of Manitoba's six judicial centers then creates a jury panel by sending out summonses by mail to those named on the jurors' roll.³⁴⁸ The summonses contain material in French and English explaining the jury process and the recipient's obligations. Those who respond to the sheriff and attend at court comprise the jury panel. When the trial is held, the names of all those on the jury panel are placed in a box and drawn at random. The individuals whose names are pulled are called forward in the courtroom and subjected to further questioning from the judge about any reasons that they would be an ineffective fact-finder.³⁴⁹

On its face, the empanelling of a jury appears to be a neutral exercise, underpinned by randomness. For a specific subset of the population, however, the process is still fraught with systemic barriers. Indigenous people and new Canadians may be negatively impacted by the summoning procedure. Non-Indigenous communities are likely to have better mail service and better telephone service than Indigenous communities are.³⁵⁰ In remote areas, mail service may

³⁴⁴ *The Jury Act*, CCSM c J30 [*The Jury Act*].

³⁴⁵ *Jury Regulation*, Man Reg 320/87 R, s 6 [*Jury Regulation*].

³⁴⁶ *The Jury Act*, *supra* note 344 at s 6.

³⁴⁷ *Jury Regulation*, *supra* note 345.

³⁴⁸ *Ibid* at s 22.

³⁴⁹ Peremptory challenges no longer exist, but the trial judge has residual discretion to question the suitability of a juror.

³⁵⁰ Report of the Aboriginal Justice Inquiry of Manitoba: Aboriginal Justice Implementation Commission (1999) Volume 1 Chapter 9.

not be easily accessible or checked every day.³⁵¹ Indigenous people are more likely to be renters and change address more often than the rest of the population.³⁵² Newcomers receive little information about the jury system, its role in society, and the importance of participating in the process.³⁵³ Language can also play a role in preventing individuals from participation, as section 4 of the *Jury Act* requires that the individual be able to understand, speak or read in the language in which the trial is conducted.³⁵⁴ This creates an additional barrier for some Indigenous people and immigrants to Canada. Physical location can also influence the process of jury composition in that there are limited locations to hold jury trials, and therefore the conscience of the appropriate community is not necessarily being exercised.³⁵⁵

Section 27 of the *Charter* could be used to challenge the *Jury Act* on the basis that it does not achieve the goals of promoting and enhancing the multicultural heritage of Canadians. Arguably, the legislation does not go far enough to achieve its purpose, particularly with respect to addressing systemic racism. In *Ayangma v Prince Edward Island*,³⁵⁶ the Prince Edward Island Supreme Court made the striking statement that “[S]ection 27 of the *Charter* supports the prohibition of indirect or systemic discrimination, as well as cultural discrimination.”³⁵⁷ Although this case was litigated in the context of section 15(1), the Court recognized that to permit cultural discrimination would be the antithesis of “preservation and enhancement” of Canada’s multicultural heritage.³⁵⁸ The potential of section 27 to play a more substantial role in

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ Nathan Afilalo, “The Jury: “What is a Fair and Just Cross-Section of the Community? Report of the Canadian Institute for the Administration of Justice (2019) at 7.

³⁵⁴ *The Jury Act*, *supra* note 344 at s 4.

³⁵⁵ *R v West* [1992] BCJ No 2958 (QL).

³⁵⁶ *Ayangma v Government of Prince Edward Island* 2000 PESCTD 74 (CanLII) (*Ayangma v Prince Edward Island*).

³⁵⁷ *Ibid* at 34.

³⁵⁸ *Ibid.*

combatting discrimination could be realized by challenging the *Jury Act* to ensure that in cases where a jury with particular cultural awareness is required, that can be ensured for a party. This is especially true given the current social and political climate we are currently living in and the urgent calls for action.

An appropriate use of section 27 would be for the government to review the *Jury Act* given its potential role in combatting discrimination by enhancing multiculturalism. Potential exclusion from jury duty can affect an individual's right to their culture where a case involves multiculturalism and requires a diverse jury. There may be words, ideas, or gesture that are understood a particular way in a particular culture that would vindicate the rights of the party. The concept of taking pre-emptive measures to ensure legislation is consistent with not only existing laws, but also Canadian values is not novel. This course of action reflects the fact that over time, the law evolves. While the *Charter* itself was adopted in 1982, it was not until 1985 that section 15 came into effect³⁵⁹. This delay was intended to give the federal and provincial governments an opportunity to review pre-existing statutes and strike potential unconstitutional inequalities.³⁶⁰

More recently, in 2016, the Government of Canada endorsed the *United Nations Declaration on the Rights of Indigenous Peoples*³⁶¹ (*UNDRIP*) and in 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* received Royal Assent.³⁶² This *Act* stipulates that Canada's federal government "must, in consultation and cooperation with Indigenous peoples and with other federal ministers, take all measures necessary to ensure that

³⁵⁹ Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 3rd ed (Toronto: Irwin Law, 2005) at 280.

³⁶⁰ *Ibid.*

³⁶¹ *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.

³⁶² *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14

the laws of Canada are consistent with the Declaration” and “prepare and implement an action plan to achieve the objectives of the Declaration.”³⁶³ Furthermore, individual provinces have enacted legislation to ensure their laws are consistent with the 46 articles of the *UNDRIP*. British Columbia has enacted legislation that obligates the province to take all necessary measures to ensure laws are consistent with the *UNDRIP*.³⁶⁴

Reviewing the *Jury Act* in light of section 27 would accelerate actions to address systemic racism and discrimination by enhancing the participation of members of multicultural communities in cases where such participation matters. A failure to engage in this review would undermine the multicultural heritage of Canadians that section 27 is meant to protect, which in turn would violate section 27 by excluding Canadians from meaningful participation in Canada’s justice system.

Composition of a given jury

Even if the above issues with the empanelling process could be remedied, there remains the question of whether the specific individuals serving on a given jury are representative. The process of forming a jury could still result in a group of individuals not representative of the community from which a party identifies themselves. The representativeness of the people on a jury matters if its goal is to reflect the conscience of the community. However, despite being raised in a number of cases,³⁶⁵ no accused has successfully argued in favour of jury diversity

³⁶³ *Ibid* at 5-6.

³⁶⁴ *Declaration on the Rights on the Rights of Indigenous Peoples Act*, SBC 2019, c44.

³⁶⁵ See for example *R v Kent* [1986] MJ No.239 (Man CA) [*R v Kent*] and *R v Teerhuis-Moar*, [2007] MJ No 257 [*R v Teerhuis-Moar*].

based on their multicultural heritage as reviewed above. In these cases, the Courts should have recognized that, when an accused is Indigenous or a member of another historically marginalized group and can show that multiculturalism is engaged, section 27 should apply to ensure the appropriate interpretation and application of the *Jury Act*.

Section 27 applied using my framework would result in different outcomes in these decisions. This can be illustrated by re-examining *R v Redhead*,³⁶⁶ a decision of the Manitoba Court of Queen's Bench, wherein the accused asked for a change in venue to increase the likelihood that jurors would represent cultural features similar to those of his own community. Section 27 was raised by the accused, but the argument was rejected. The accused cited as a reason for wanting a diverse jury the fact that his first language was Cree. He was concerned about the way his language would influence his evidence, specifically the potential that jurors would misunderstand his evidence based on his ability to communicate precisely what he meant.³⁶⁷

This set of facts would engage the multiculturalism protections because of the potential language barrier. Multiculturalism would also be implicated due to the history of colonialism (attempts to erase Indigenous cultures including languages), over representation in the criminal justice system, and the way Indigenous experience and culture inform responses to the justice system. Each of these factors would impact his potential testimony and how jurors might interpret it. They would affect his demeanor and jurors' potential perceptions of his honesty. Once multiculturalism is engaged, section 27 applies. The questions then are (1) whether the failure to try to ensure a diverse jury would preserve or (2) enhance Canada's multicultural

³⁶⁶ *R v Redhead*, [1995] MJ No.243.

³⁶⁷ *Ibid* at 563.

heritage. In this case, the government inaction both undermines multiculturalism and fails to enhance multiculturalism. The failure to have a diverse jury would continue to undermine the preservation and use of the Cree language by forcing an individual to testify in a language in which he is less comfortable. It would undermine the ability of a party to express how their culture impacted their case, and to have that understood. This framework would allow the accused to attack aspects of the *Jury Act* inconsistent with section 27.

Section 27 should be applied, as it consistently has been, to aid in the interpretation of section 11(f) and (d) of the *Charter* to help inform what it means to be tried by an impartial and independent jury when an accused is Indigenous or a member of another historically marginalized group. Section 27 should also be recognized to operate directly on the *Jury Act* to require that, at the very least, the initial panel is sufficiently diverse that it at least increases the likelihood of the parties being able to seat a diverse jury.

The Supreme Court of Canada has already stated the right to be tried by one's peers is a cornerstone of Canada's legal system, and that representativeness is a necessary component of the right to a jury trial as it legitimizes the jury.³⁶⁸ Further, in the recent Supreme Court of Canada decision *R v Chouhan*,³⁶⁹ Justice Abella in her dissent underscored that representativeness is an important guarantor of impartiality. Given these statements, section 27 should be applied as a positive obligation to give an accused real and substantive access to a fair trial. This treatment of section 27 would be highly aligned with a purposive and contextual interpretation of the provision, directly addressing the growing need to accelerate actions to address systemic racism and discrimination.

³⁶⁸ *R v Kokopence* [2015] 2 SCR 398 at 1 and 55.

³⁶⁹ *R v Chouhan* 2021 SCC 26.

The positive dimension to section 27 of the *Charter* imposes an obligation on the state to ensure that a jury is representative of the community. Ensuring jury representativeness supports my interpretation of section 27 because it increases the chance that culturally specific elements of a case will be addressed appropriately. A representative jury would also reduce bias in cases where different cultures have different ways of reasoning and debating. This perspective on section 27 would recognize the right within its natural limits, one that includes a right to representativeness. Although judicial inclination has been a factor behind the courts reluctance to impose positive remedies, there is no legal bar to enforcing one. Based on the jurisprudence, courts appear to regard it as less intrusive to tell governments that they may not pass a particular law or pursue a specific line of action than to state what law should be enacted or line of action be taken. To get around this issue, courts could issue a declaration of unconstitutionality and leave addressing the unconstitutionality to the government. In the case of representativeness, it may be enough to acknowledge that the *Jury Act* does not go far enough to ensure representation, both at the empanelling stage and with respect to the specific individuals who make up the jury.

When it comes to juries, some progress has already been made towards greater fairness. In the 1993 *R v Parkes*³⁷⁰ decision of the Ontario Court of Appeal, the Court ruled that it was an error to deny racialized accused people the ability to ask potential jurors if they were racist. More recently, in Manitoba, the *Jury Act* was amended to provide for people with disabilities to be reasonably accommodated on juries. There is clearly precedent for reimagining section 27 in a manner that would more appropriately align with its purpose in relation to juries. The examples

³⁷⁰ *Parkes*, *supra* note 343.

discussed above illustrate the potential application and effectiveness of section 27 to protect Canada's multicultural heritage and root out systemic discrimination.

PART SEVEN: CONCLUSION

Properly interpreted section 27 of the *Charter* is an independent, substantive right that requires government actors to preserve Canada's multicultural nature and take action to enhance multiculturalism as well. This argument is supported by a purposive approach that considers the related jurisprudence, the specific text of the provision, and its historical foundation.

There is already precedent for using section 27 as an operative force in a manner that promotes multiculturalism in Canada. This use is highly significant in the face of growing diversity and greater awareness of systemic discrimination, particularly towards people of colour, newcomers to Canada, and Indigenous people.