Difference, dissent and community identity: Striking the balance in rights theory and jurisprudence

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Everyone carries with them multiple identities, such as their gender, ethnicity, profession, and residence, each of which is more or less relevant to the individual in different circumstances. As one thinks seriously about the multiplicity of ways in which individuals define themselves, the challenge of respecting the diversity that exists both among communities and among the individuals within those communities begins to become apparent. Striking an effective, principled balance between the right of communities to protect their distinctiveness as communities and the right of individuals to protect their distinctiveness as individuals within the community, including their right to dissent from community-imposed norms which are in conflict with their values as individuals, is a challenge to which a perfect resolution within multicultural or multinational democratic societies does not exist. Canada, like many other states, seeks to respect both liberalism and multiculturalism; it is simultaneously committed to liberalism's respect for the individual and to respect for multiculturalism and the place of distinct national minorities within society, albeit imperfectly and inconsistently.

Where to strike this balance is more than merely a theoretical question for political science and philosophy scholars; it is the stuff of democratic politics and law in a multinational state. It is also an issue with significant, practical implications within society, being part of political and legal discourse on such issues as polygamy, coerced participation in the traditional cultural ceremonies of a community, access to education in one's language, the funding of faith-based schools and other services, the accommodation of the traditional dress of religious and cultural minorities in the public sphere, and even rights to membership in the community itself. At heart, the task is to respect individual rights, and in particular the right to individual self-determination, without eliminating the right of minority communities to retain their distinctiveness when they see that distinctiveness as valuable, and the right to collective self-determination in the case of national minorities, through the force of liberal individualism. How, and how carefully, the political and legal institutions of a society secure this difficult balance between the individual and the community will also have a significant effect on the legitimacy of those institutions in the eyes of both minority communities and the members of the majority. Thus, the challenge of managing community diversity, division and dissent cannot be taken lightly.

A principled starting point for any analysis of how to respond to this challenge by reference to the Canadian experience must begin with the recognition that, at some level, the constitutional and political structures of multicultural and multinational states are built on something of a conundrum. As the Supreme Court of Canada stated in the *Reference re. Secession of Quebec*, one of the fundamental principles of the Canadian

constitutional order is the protection of minorities.[1] One must therefore recognize that protecting the right of minority communities to preserve their existence as distinct communities in the face of the weight of majority preferences and promote their distinct identities is fundamental to the Canadian constitutional order. Yet that order also sees respect for individual rights and, especially, equality as fundamental. As the powers of self-government can be used by a minority group to perpetuate the historic disadvantages of some within that group, our constitutional order needs to protect against this result, but the state must do this without going so far as to force cultural homogeneity on our multicultural and multinational reality; hence the description of our constitutional order as being built on a conundrum.

Members of minority communities are as entitled to rights as individuals within Canadian society as other citizens, especially where those rights serve to protect personal security and each individual's capacity to be self-determining as an equal person, worthy of equal concern and respect by the state. The commitment to liberal individualism promotes a view that collective rights should be superseded by individual rights when the collective rights have the potential to harm personal security, equality or freedom from overt coercion by the community in making personal choices about how to live one's life. On the other hand, protection of the right to be distinctive, and to express that distinctiveness within a distinct community that has meaning for its individual members, can make an important contribution to an individual's capacity for self-determination as an equal person within the broader society. For example, since language carries meaning, as the Supreme Court pointed out in *Ford* v. *Quebec (Attorney General)*,[2] the ability of a person to use their language of choice within the public sphere, and more importantly to be understood within the public sphere, makes an important statement about the individual's identity and membership in a linguistic community. To phrase this in liberal terms, respecting minority rights can enlarge the freedom of individuals because freedom is intimately linked with and dependent on culture and respect for the cultural context within which one sees oneself.[3] Thus, the justification for the existence of group rights can be found in the need to protect the well-being of individual members of the minority group. If, however, minority collective rights are exercised in a manner that does not protect and promote the well-being of individual members, a justification for group rights itself becomes questionable.[4]

For immigrant or ethno-cultural minorities, such an approach requires a genuine sensitivity to and respect for cultural difference in approaching individual rights claims. Indeed, respect for cultural difference in the approach to individual rights in Canada has the status of a constitutional commitment, in section 27 of the *Canadian Charter of Rights and Freedoms*. This section declares that, "This Charter shall be interpreted in a

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[1] [1998] 2 S.C.R. 217 [*Quebec Secession Reference*], paras 79-82.

[2] [1988] 2 S.C.R. 712 [hereinafter *Ford*], paras. 39-40.

[3] Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), 75.

[4] Thomas Isaac, "Individual Versus Collective Rights: Aboriginal People and the Significance of *Thomas* v. *Norris*" (1991) 21 Man. L.J. 618, 627.

manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." The question remains, however, how to apply this commitment to balancing respect for individual rights and cultural distinctiveness in the real world, where community norms and dissent come into conflict. As Timothy Dickson notes, while the multicultural dilemma will always elude a perfect solution, the importance of the interests involved demands that we formulate sophisticated approaches that encourage, as much as possible, the co-existence of both individual and group rights.[5]

Probably the most prominent Canadian liberal theorist to tackle this question is Will Kymlicka. In attempting to establish a principled basis for approaching this question, he has identified two classes of what one might call "minority exemptions", one of which he sees as a legitimate basis on which to justify the limitation of liberal individualism in the name of minority group protection and the other of which he sees as illegitimate. The first, which he labels "external protections" are those group rights that are designed to protect the group against the external pressures on their distinctiveness that simple majoritarianism would impose.[6] To Kymlicka, the accommodation of difference is the essence of true equality.[7] Because decision-making in liberal democratic states is naturally dominated by the interests of the numerical majority, external protections recognize that it is a fiction to suggest that these states are ethnoculturally neutral and do not privilege a conception of society that reflects the majority's cultural touchstones and interests. Some groups are unfairly disadvantaged in the cultural "marketplace" created by liberal individualism; political recognition and support for minority rights rectify this disadvantage.[8] The external protections for minority groups, then, are designed to level the playing field for such groups and to secure to minorities, and to society as a whole, equal concern and respect among all groups in society, no matter their numerical status.

The second, illegitimate, exercise of collective rights is what Kymlicka refers to as "internal restrictions".[9] These are collective rights claims against a minority's own members, which are designed to reduce or eliminate the destabilizing impact of internal dissent. For Kymlicka, these must be of concern to liberal theorists because of the strength of liberalism's commitment to individual autonomy. Liberals must reject the idea that groups can restrict the basic civil and political rights of their own members in the name of preserving the purity and authenticity of the group's culture and traditions, as stifling the individual's capacity for choice about which attributes of a culture to value and respect is inherently illiberal.[10] One particular understanding of a community's tradition may be dominant at any given time, but this cannot justify the assertion that the

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[5] Timothy Dickson, "Section 25 and Intercultural Judgment" (2003) 61 U.T. Fac. L. Rev. 141, 157.

[6] Kymlicka, *Multicultural Citizenship*, at 109, 152.

[7] Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001), 146.

[8] Kymlicka, *Multicultural Citizenship*, at 109.

[9] *Ibid*, at 37, 152.

[10] *Ibid*, at 152.

traditions are uncontestable or that dissenters from the dominant understanding are heretical.[11] Individuals should have the freedom and capacity to question and possibly revise the traditional practices of their community, should they come to see those practices as no longer worthy of allegiance.[12]

While it is true that Kymlicka's distinction between internal restrictions and external protections provides a good conceptual framework with which to begin a discourse on minority rights within a liberal tradition, it has been subject to some criticism, generally focusing on the difficulty of distinguishing between the two categories. The critics argue that Kymlicka's conceptual framework has not progressed very far in providing guidance on when the commitment to individual equality that underlies the opposition to internal restrictions might justify a limit on self-determination claims characterized as external protections in the real world of specific conflicts between collective and individual rights.[13]

The root of the problem is one of characterization. Inevitably, when a challenge arises, the minority community will characterize its actions as external protections necessary to protect its cultural distinctiveness from being undermined by the dominance of the cultural majority's practices (and thus identify the individual challenging the community's practice as seeking to harm the cultural distinctiveness of a community against the wishes of the community as a whole), while the individual claimant of individual rights will argue with equal force that the community's action is an illegitimate internal restriction, designed to limit their personal autonomy, equality, and right to self-determination in the name of cultural preservation. This is very much how language language politics have played out in Canada, particularly within Quebec, and is reflected in such cases as *Ford* and *Gosselin (Tutor of)* v. *Quebec (Attorney General)*,[14] to be discussed in greater detail below. How, then, do the Canadian courts, which are most frequently tasked with defining this balance, approach their task when minority group interests conflict with majoritarian interests or individual rights. Even more challenging, how do the courts find a legitimate balance when one *Charter* right (such as freedom of religion) conflicts with another (such as equality)?

In such cases, the courts have generally trod carefully. There are several cases that provide examples of the courts' treatment of these issues. In the case of conflicts between the rights claims of individual members of minority groups to express their cultural difference and majoritarian interests, the courts generally come down on the side of minority rights. One of the earliest *Charter* cases was a religious freedom case, in which non-Christian store owners defended themselves against charges of violating a

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[11] Jean Leclair, "Federalism Constitutionalism and Aboriginal Difference" (2006) 31 Queen's L.J. 521, 525.

[12] Kymlicka, *Multicultural Citizenship*, at 152.

[13] See, for example, Richard Spaulding, "Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective" (1997), 47 U. Toronto L.J. 35, 72.

[14] 2005 SCC 15, [2005] 1 S.C.R. 238 [hereinafter *Gosselin*].

legal requirement that all stores close on Sundays by claiming that the law violated the *Charter* protection of freedom of religion. In this case, *R.* v. *Big M Drug Mart*, the Supreme Court of Canada decided that the law did violate freedom of religion, as its avowed purpose was to enforce Sunday religious observance.[15] In the course of his decision, Dickson J. also noted that the power to compel the universal observance of one religion's preferred day of rest was inconsistent with the preservation of the multicultural heritage of Canada protected by s. 27 of the *Charter*.[16]

The Supreme Court of Canada also decided, in *Syndicat Northcrest* v. *Amselem*, that condominium by-laws which prevented orthodox Jews from setting up succahs on their balconies violated the guarantee of freedom of religion under s. 3 of Quebec's *Charter of Human Rights and Freedoms* (which is a similar provision to that in s. 2(a) of the *Canadian Charter of Rights and Freedoms*).[17] Iacobucci, J., for the majority, also concluded that the alleged negative effects on the interests of the other occupants of the condominium by having succahs on some balconies for the nine-day Succat holiday were, at best, minimal and could not validly limit the exercise of the appellants' religious freedom.[18] In this context, he commented that,

> In a multiethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities — and is in many ways an example thereof for other societies —, the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants' religious freedom is unacceptable. Indeed, mutual tolerance is one of the cornerstones of all democratic societies. Living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others. In this regard, I must point out, with respect, that labelling an individual's steadfast adherence to his or her religious beliefs "intransigence"… does not further an enlightened resolution of the dispute before us.[19]

The Supreme Court of Canada has also ruled, in *Multani* v. *Commission scolaire Marguerite-Bourgeoys* that the banning of the Sikh kirpan (a ceremonial dagger that all Sikhs are required to wear on their person) in public schools violated the freedom of religion of Sikh students.[20] The Court also concluded that there were alternative ways to ensure the safety of students and staff in schools that would have impaired the Sikh students' religious freedom less than a complete ban on the wearing of kirpans, for

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[15] [1985] 1 S.C.R. 295, paras. 150, 78-81.

[16] *Ibid*. at para. 99.

[17] 2004 SCC 47, [2004] 2 S.C.R. 551 para. 103

[18] *Ibid*. at para. 84.

[19] *Ibid*. at para 87.

[20] 2006 SCC 6, [2006] 1 S.C.R. 256, para. 41.

example if there were rules requiring the kirpan to be worn under one's clothes and sewn into a cloth envelope and that it be kept on one's person at all times.[21] Charron J. commented that,

> Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is… at the very foundation of our democracy.[22]

On the other hand, the courts are much more circumspect about protecting freedom of religion when vulnerable persons, such as children, are involved. Thus, in the case of *B(R)* v. *Children's Aid Society of Metropolitan Toronto*, which involved questions of freedom of religion and parental rights to make decisions about their children's medical treatment, the Supreme Court recognized that state intervention violates the freedom of religion of parents but justified such interventions in order to protect the child.[23]

When different rights come into conflict, the balancing that the courts must undertake is a more difficult task. For example, in *Trinity Western University* v. *British Columbia College of Teachers*, the majority of the Supreme Court of Canada held that neither freedom of religion nor equality is an absolute and that they must, instead, be balanced against one another.[24] For the majority, this balancing allowed members of a religious group to hold whatever beliefs they chose, though they could not act on the basis of those beliefs in a way that undermined equality.[25] There was no evidence in this case that the university's teacher education program fostered discrimination in British Columbia schools, so there was no action undermining equality.[26] Thus, the Supreme Court of Canada decided against the College of Teachers, concluding that the freedom of members of the university to hold their religious beliefs should be respected.[27] The Supreme Court has also concluded that, while same-sex marriage itself did not violate freedom of religion, that compelling religious officials to perform such marriages against their religious beliefs would.[28] There is, thus, still room for freedom of religion, even in the face of a challenge based on equality.

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[21] *Ibid*. at paras 77, 58.

[22] *Ibid*. at para. 76.

[23] [1995] 1 S.C.R. 315.

[24] 2001 SCC 31, [2001] 1 S.C.R. 772, paras. 29-31. This was a case in which the British Columbia College of Teachers denied the appellant university full responsibility for the conduct of its teacher education program because of concerns that it was discriminating against homosexuals.

[25] *Ibid*. at paras. 36-7.

[26] *Ibid*. at para. 36.

[27] *Ibid*.

[28] *Reference re. Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.

Where national minorities are involved, the challenge is even more significant than simply applying the liberal rights paradigm of the *Charter* sensitively and in a way that respects section 27. National minorities are those groups that exercised sovereignty prior to the establishment of our current governance arrangements and secured a measure of continuing sovereignty within the state despite being numerical minorities. For Canada's two generally-recognized national minorities, Quebec and Aboriginal peoples, the very legitimacy of the application of the *Charter* to their communities becomes a live question. For these communities, the conflict between collective rights and individual rights runs deeper, as it requires the state to address the extent of the right to self-government for national minorities within a Canadian constitutional system that is committed to the reconciliation of competing sovereignties through federalism and *sui generis* Aboriginal rights.

Within Quebec, this debate has centred around language policy, particularly limitations on the use of the English language and access to English-language education. In *Ford*, a key freedom of expression case about Quebec's ban on the use of English in outdoor commercial signs, the Supreme Court of Canada decided the French-only rule for outdoor signs interfered with the freedom of expression guaranteed by s. 3 of Quebec's *Charter of Human Rights and Freedoms* and s. 2(b) of the *Canadian Charter of Rights and Freedoms* and could not be justified as a reasonable limit on the freedom.[29] In coming to this conclusion on the justification analysis under s. 9.1 of the Quebec *Charter* and s. 1 of the Canadian *Charter*, however, the Supreme Court stated that:

> The aim of such provisions as ss. 58 and 69 of the *Charter of the French Language* was, in the words of its preamble, "to see the quality and influence of the French language assured". The threat to the French language demonstrated to the government that it should, in particular, take steps to assure that the "*visage linguistique*" of Quebec would reflect the predominance of the French language.
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> The section 1 [of the Canadian *Charter*] and s. 9.1 [of the Quebec *Charter*] materials establish that the aim of the language policy underlying the *Charter of the French Language* was a serious and legitimate one. They indicate the concern about the survival of the French language and the perceived need for an adequate legislative response to the problem. Moreover, they indicate a rational connection between protecting the French language and assuring that the reality of Quebec society is communicated through the "*visage linguistique*".[30]

These comments suggest an awareness of and sensitivity to the concerns of national minorities about protecting their collective identity on the part of the Supreme Court of Canada. When it came to questions of access to English-language education in Quebec, in *Gosselin*, the Supreme Court of Canada upheld Quebec's laws limiting access to English-language education to those whose parents were educated in English in Canada against an equality rights challenge, on the basis that s. 23 of the *Charter*, which provides constitutional rules for access to minority-language education in Canada, cannot be

[29] *Ford*, at para. 83.

[30] *Ibid*. at paras. 72-3.

invalidated by an equality claim.[31] Here, showing a sensitivity to Quebec's cultural context similar to that shown in *Ford*, the Court stated that,

> In rejecting "free access" as the governing principle in s. 23, the framers of the Canadian *Charter* were concerned about the consequences of permitting members of the majority language community to send their children to minority language schools. The concern at the time (which the intervener, the Commissioner of Official Languages for Canada, submitted is a continuing concern today) was that at least outside Quebec minority language schools would themselves become centres of assimilation if members of the majority language community swamped students from the minority language community. Within Quebec, the problem has the added dimension that what are intended as schools for the minority language community should not operate to undermine the desire of the majority to protect and enhance French as the majority language in Quebec, knowing that it will remain the minority language in the broader context of Canada as a whole. [emphasis in original][32]

Even in the accompanying case of *Solski (Tutor of)* v. *Quebec (Attorney General)*, in which the Supreme Court ruled that the claimants have a right to an English-language education in Quebec, the Court did not decide that the Quebec law was invalid; rather, it upheld the minority language education rules of the *Charter of the French Language*, deciding that the law was being interpreted too narrowly in its application and that it could be interpreted in a way that would be consistent with the minority language education rights in the *Charter*.[33] The Court commented, in the course of its decision, that

> The application of s. 23 is contextual. It must take into account the very real differences between the situations of the minority language community in Quebec and the minority language communitie of the territories and the other provinces. The latitude given to the provincial government in drafting legislation regarding education must be broad enough to ensure the protection of the French language while satisfying the purposes of s. 23.[34]

This decision, too, suggests that the Supreme Court of Canada exercises care when deciding cases that involve the balancing of individual rights and the protection of core elements of the identity of national minorities.

The courts have also dealt with these conflicts between individual rights and right of minority communities to autonomy in cases involving Aboriginal groups but with somewhat different outcomes. In *Thomas* v. *Norris*, for example, the Supreme Court of British Columbia concluded that the Aboriginal rights of Coast Salish First Nations did

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[31] *Gosselin*, at para. 34.

[32] *Ibid*. at para. 31.

[33] 2005 SCC 14, [2005] 1 S.C.R. 201, paras. 27-28, 46.

[34] *Ibid*. at para. 34.

not extend to a right to seize and force an individual to participate in a "spirit dance".[35] There have also been several cases involving the right of First Nations to control who votes and runs for position on First Nation band councils under First Nation election laws and the right of First Nations to determine who is a member, or citizen, of the First Nation under First Nation membership rules. For example, *Francis* v. *Mohawk Council of Kanesatake* was a voting rights case which involved a challenge to the Mohawk Council of Kanesatake's custom election code.[36] While the Federal Court, Trial Division, decided that it was not necessary to determine whether the exclusion of off-reserve Band members from voting under Band custom election codes violated section 15 of the *Charter*, the Court did note that,

> Recent indications in the jurisprudence of the Federal Court of Canada show a certain inclination towards the applicability of the Supreme Court's decision in *Corbiere, supra*, to custom band elections [citations deleted]. However, in none of these decisions did the Court engage in any kind of extensive analysis of the "complex" legal issues involved in determining whether *Corbiere, supra*, also applied to custom band elections. I think this question is still open to debate and the indications already given by the Court are by no means definite.[37]

This question was resolved, at least at the level of the Federal Court, Trial Division, two years later, in the case of *Clifton* v. *Hartley Bay (Electoral Officer)*.[38] In deciding this challenge to a band custom election code, the Federal Court, Trial Division, quickly found that there was a distinction in the election code, that the distinction was based on the analogous ground of Aboriginality-residence and that this distinction was discriminatory. Thus, the Federal Court, at least at the level of the Trial Division, has taken the view that the complete exclusion of off-reserve status Indians from voting is a violation of section 15 of the *Charter* and cannot be justified even in the case in which the exclusion is part of a Band custom election code.

In *Scrimbitt* v. *Sakimay Indian Band Council*, Scrimbitt, a member of the Sakimay First Nation who married a non-Indian in 1971 and lost her status, but who regained her status under Bill C-31, was struck from the Band list and not allowed to vote in Band elections due to the operation of the Band's membership code, which was designed to disenfranchise potential band members who had received status by the operation of Bill C-31.[39] She challenged this exclusion as incompatible with section 15 of the *Charter* and won. The Federal Court, Trial Division, decided that the refusal of the right to vote discriminated against Ms. Scrimbitt and was based on sex and marital status, which are

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[35] [1992] 2 C.N.L.R. 139 (B.C.S.C.).

[36] 2003 FCT 115, [2003] 4 F.C. 1133 (F.C.T.D.).

[37] *Ibid.* at para. 77.

[38] 2005 FC 1030, [2006] 2 F.C.R. 24, [2005] 4 C.N.L.R. 161 (F.C.T.D.).

[39] [2000] 1 F.C. 513, [2000] 1 C.N.L.R. 205 (F.C.T.D.).

immutable characteristics.[40] It also determined that refusing Ms. Scrimbitt the right to vote was an affront to her dignity.[41] Thus, the refusal contravened section 15 of the *Charter*.

A similar challenge was brought in the case of *Grismer* v. *Squamish First Nation*.[42] In this case, the adult adopted children of a Squamish First Nation member were denied membership because of the rules of the First Nation's membership code. This code established three categories of members: 1) descendant members, 2) lineal members, and 3) acquired members.[43] Lineal members, the class under which the claimants sought to become members, require that applicants have a biological parent who is a Squamish First Nation member.[44] Acquired members are primarily minor children with Indian status who have been adopted by two Squamish parents.[45] Because the parent of the claimants who was a member of the First Nation was only their adoptive parent, the claimants were denied the status of lineal members and because the claimants were over 18 in this case, they were also denied acquired membership.[46]

In deciding this case, the Federal Court, Trial Division, decided that an infant cannot change their status as an adopted child, making it an immutable characteristic, while the adoption status of an adult child is constructively immutable.[47] As a consequence, the status of adopted child qualifies as an analogous ground.[48] The Court then went on to decide that, while the Squamish First Nation had the right to develop its own membership code, its provisions discriminated between adopted and biological children, as well as among adopted children themselves.[49] Thus, the Court found that paragraph 7(b)(i) of the Squamish First Nation membership code was contrary to section 15 of the *Charter*.

The Court, however, went on to find the code to be justified under section 1 of the *Charter*, due to the existence of the acquired membership provisions. The First Nation described this provision as a "compromise" arrangement to make provision for adopted children and felt that to go further and include a provision for the adopted child of only one

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[40] *Ibid.* at para 52.

[41] *Ibid.*

[42] 2006 FC 1088, [2007] 1 C.N.L.R. 146 (F.C.T.D.).

[43] *Ibid.* at para. 8.

[44] *Ibid.* at para. 11.

[45] *Ibid.*

[46] *Ibid.*

[47] *Ibid.* at para. 46.

[48] *Ibid.*

[49] *Ibid.* at para. 57.

Squamish parent would unduly stretch Squamish laws and traditions.[50] The Court concluded that,

> Considerable deference should be accorded to the Squamish in making this policy decision, particularly since it concerns questions of citizenship, Band custom and lineage...
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> In my opinion, in the case at bar, the "compromise" arrangement provided for in the Membership Code minimally impairs any rights that may exist for non-Squamish adoptees, while still achieving the objective of protecting Squamish culture and identity through traditional means.[51]

The Court did, however, note that, "in another case, based on a differently constituted evidentiary record, another judge may have come to a different conclusion"[52] on the issue of whether an infringement is justified.

One of the most prominent of these cases, largely because of the length and procedural complexity of the litigation and intensity and notoriety of the conflict, was *Sawridge Band* v. *Canada*. In this case, some Alberta First Nations argued that the requirements in 1985 amendments to the *Indian Act* that band membership codes had to provide membership to those who acquired "Indian" status under the 1985 amendments abridged their Aboriginal and treaty rights. After the Federal Court of Appeal ordered a new trial because it accepted the band members' claim that there was a "reasonable apprehension of bias" on the part of the original trial judge in 1997,[53] the subsequent trial eventually collapsed, in 2009, after the trial judge excluded witnesses on procedural grounds and the band members chose to close their case and seek dismissal of the challenge.[54] When they appealed the trial judge's decision to exclude witnesses, the Federal Court of Appeal upheld his decision so the challenge was dismissed.[55] This being the outcome, the Sawridge band must now include those who gained "Indian" status under the *Indian Act* amendments of 1985 and 2010, though the courts did not ever have the chance to make an authoritative determination on the conflict between the assertion of Aboriginal rights and the *Indian Act*'s rules on band membership codes.

One can see in the cases that involve a conflict between individual rights and self-determination claims by First Nations something more of a hierarchy of claims, reflective of Kymlicka's concern about internal restrictions, than one sees in the cases of rights interpretation in the Quebec context. The courts seem to have established security of the

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[50] *Ibid.* at para. 72.

[51] *Ibid.* at paras. 73-74.

[52] *Ibid.* at para. 83.

[53] [1997] 3 F.C. 580.

[54] 2008 FC 322.

[55] 2009 FCA 123.

person and equality as higher-order values than Aboriginal self-determination when these claims come into conflict. Yet in its recent decision in *Alberta (Aboriginal Affairs and Northern Development)* v. *Cunningham*, the Supreme Court of Canada upheld the provision of the *Métis Settlements Act* that automatically excluded individuals who sought registration as an "Indian" from membership in the Métis settlements in Alberta in the face of an equality rights challenge.[56] The Supreme Court decided that the *Métis Settlements Act* was designed to ameliorate the disadvantage of Métis, a disadvantaged group, and, as such, was protected from equality rights challenges by subs. 15(2) of the *Charter*.[57] This suggests that equality will not always trump the right of Aboriginal communities to some forms of self-determination; this may more frequently be the case if the courts increasingly use subs. 15(2) of the *Charter* to insulate government laws and programs that provide benefits to some Aboriginal peoples from equality rights scrutiny.

Given that section 25 of the *Charter* itself states that the guarantee of rights and freedoms within it shall not be construed so as to abrogate or derogate from Aboriginal or treaty rights (which presumably includes the inherent right of self-government), however, one cannot assume that the *Charter* will simply apply to Aboriginal governments if those governments are exercising their continuing sovereignty.[58] The application of the *Charter* must be the subject of democratic debate within Aboriginal communities and negotiation between Aboriginal and non-Aboriginal governments. This adds a whole new twist to the challenge of balancing collective self-determination and individual rights to equality, freedom and self-determination.

This is not to suggest that all Aboriginal people are fundamentally opposed to the application of the *Charter* to Aboriginal peoples. In fact, many Aboriginal people would insist that their governments demonstrate a commitment to the protection of minorities and others, such as women, who have been systematically disempowered by the effects of colonialism on Aboriginal peoples. This insistence led to an amendment to the Constitution in 1983 to add a provision, in subsection 35(4), that stated that, "Notwithstanding any other provision of the Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."[59]

Similarly, when the recognition and implementation of an inherent Aboriginal right to self-government seemed most likely to be realized, with the negotiation of the Charlottetown Accord in 1992, many Aboriginal women, represented by the Native Women's Association of Canada, expressed deep concerns about how Aboriginal governments might treat women and insisted that the *Charter* apply to inherent-right Aboriginal governments, to ensure the equality of men and women. Some Aboriginal

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[56] 2011 SCC 37, para. 96.

[57] *Ibid*. paras 83-88.

[58] For an excellent exposition of this argument, see Kerry Wilkins, "…But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999) 49 U.T.L.J. 53.

[59] Subsection 35(4) was added to section 35 of the *Constitution Act, 1982* by the *Constitution Amendment Proclamation, 1983*, S1/84-102.

women who support self-government see the *Charter* as a way to ensure their involvement in the creation, implementation, and ongoing operation of Indigenous governments.[60] The Native Women's Association articulated its position by stating that,

> What we want to get across to Canadians is our right as women to have a voice in deciding upon the definition of Aboriginal government powers. … Governments simply cannot choose to recognize the patriarchal forms of government which now exist in our communities. … We are telling you we have a right, as women, to be part of that decision. Recognizing the inherent right to self-government does not mean recognizing or blessing the patriarchy created by a foreign government.[61]

The counter-argument, that the individual-rights focus of the *Charter* is inappropriate as it is fundamentally inconsistent with Aboriginal culture was certainly argued at the time, including by such prominent Aboriginal women as Mary Ellen Turpel,[62] but this argument was unconvincing for those who the Native Women's Association represented. They had experienced the disempowerment of women that went with *Indian Act* governance and they were not prepared to have their capacity for individual self-determination limited by potentially male-dominated Aboriginal governments exercising a constitutionally-recognized inherent right to self-government in a manner that discriminated on the basis of gender.

While both the *Charter* and subsection 35(4) of the *Constitution Act, 1982* articulate a commitment to gender equality in the strongest possible terms, such that the equality of men and women within national minorities must be assumed to be embedded within our constitutional order, the question nonetheless remains whether the full application of the *Canadian Charter of Rights and Freedoms* is really the best approach to balancing the collective rights of national minorities, particularly Aboriginal peoples, with individual rights. The language of the *Charter* is not the only way to articulate a commitment to the constitutional protection of individual rights. As Webber notes, even given a shared commitment to individual rights, the specific expression of those rights in a concrete legal order is always marked by cultural features that have little or nothing to do with respect for the individual. [63] Statements of law that work perfectly well in one culture may have to be adjusted for another, not because the other culture is less committed to the individual but simply because the presumptions underlying the particular expression

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[60] Jennifer Koshan, "Aboriginal Women, Justice and the *Charter*: Bridging the Divide?" (1998) 32 U.B.C. L. Rev. 23, at 27.

[61] Quoted in John Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nation Politics" (1994) 43 U.N.B.L.J. 19, at 41.

[62] Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in Richard F. Devlin, ed., *First Nations Issues* (Toronto: Emond Montgomery, 1991); Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking, 1993).

[63] Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Kingston & Montreal: McGill-Queen's University Press, 1994) at 237.

of that commitment in the law are wrong for that culture.[64] If that were not so, there would have been no need for Canada to draft its own *Charter*; instead it could simply have adopted the American *Bill of Rights*.[65]

The question of the appropriateness of applying the *Charter* to Aboriginal governments also, of necessity, raises the question of whether the existing courts, which one has to admit currently have a limited understanding of Aboriginal cultural contexts, can legitimately undertake the task of interpreting the application of individual rights in Aboriginal societies. Our current courts have made it clear that *Charter* analysis, and particularly the analysis of whether the limitation of rights by a government is reasonable and demonstrably justified, must take account of the specific cultural context of the society within which the conflict between claims of individual rights and collective action takes place. While one may disagree with their outcomes, in cases involving language rights in Quebec, such as *Ford* and *Gosselin*, the Supreme Court of Canada has shown a great deal of respect for the particular linguistic and cultural context of Quebec. It seems unlikely that it is mere coincidence that the *Ford* and *Gosselin* decisions come from a Supreme Court of Canada on which one-third of the Justices are drawn from those called to the Bar of Quebec.[66] Of course, the lower courts, being composed of judges appointed from the Quebec bar, have also shown a great deal of care and respect for Quebec's linguistic and cultural context.

The sensitivity that these courts have shown simply serves to reinforce the relevance of the cultural backgrounds of those who decide cases in which the interests of the individual and the collective must be balanced in effectively judging such cases. One must therefore also ask whether, in the case of Aboriginal peoples, our existing courts can claim sufficient knowledge and legitimacy to judge individual rights claims in an Aboriginal cultural context effectively, given the distinctiveness of that cultural context and the limited understanding of it on the part of the existing courts.

The lesson in this for democratic politics is that the political and legal debate over balancing the right to preserve a collective identity as a minority community against the right of individuals to exercise their individual self-determination, even to the point of dissenting from community norms, is a difficult, imperfect, and multifaceted one. For immigrant or ethno-cultural minorities, it raises difficult issues about the legitimacy of concern for collective rights and interests within liberalism and what the right balance is between respect for cultural distinctiveness and respect for individual autonomy within a society. Both of these are clearly questions of significance in democratic discourse. For

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[64] *Ibid*.

[65] *Ibid*. at 247.

[66] *Supreme Court Act*, R.S., c S-19, s. 6. I recognize, of course, that there have long been arguments within Quebec that this is insufficient when the Justices of the Supreme Court of Canada are appointed by the Prime Minister and that provinces should, therefore have a role in the appointment of the Justices. While this critique is certainly relevant to any debate about the Supreme Court's role as the final court of appeal for Canada, the fact that three of its Justices inevitably come from Quebec does have a substantive effect on its decisions, even when those three are appointed by the Prime Minister.

national minorities, however, even bigger questions, ones that go to the heart of our constitutional order, arise. The application of an individual rights regime that arises out of the cultural context of the majority and is interpreted and applied by the institutions of the majority society to national minorities of necessity raises the question of the extent of the continuing sovereignty of those national minorities within what is meant to be a shared constitutional order.

While certainly not perfect, we have done relatively well in Canada to strike a balance between the individual and the collective in a way that preserves the legitimacy of our political and legal institutions in the eyes of both the majority culture and minority communities. The most significant exception to this generally positive track record is our treatment of Aboriginal peoples and their sovereignty. If we are to secure the legitimacy of this most systematically excluded of Canada's minority communities, we have much to learn from the approach taken in the context of Quebec, as difficult as it has sometimes been to secure respect for, and an appropriate accommodation of, Quebec's distinctiveness within the Canadian state. Our commitment to liberalism must not prevent us from thinking hard thoughts about cultural, political and legal pluralism so that we can effectively use what the Quebec example can teach us about respect for minorities, and particularly national minorities, in continuing to build a genuinely multicultural and multinational state build on mutual concern, respect, and reconciliation.