The Supreme Court plays a significant role in reflecting upon, shaping and participating in the ongoing development of our identities as members of diverse communities in Canada. One among many guiding influences in our everyday lives, the Court adopts a variety of approaches, found in both pre- and post-Charter jurisprudence, to inter-community relations and issues related to identity. A model of ongoing participation and interplay between community expectations and the Court’s adjudicative responsibilities best describes the Court’s potential within a dynamic and constantly developing framework for how we live together.

La Cour suprême du Canada joue un rôle important dans le développement continu de nos identités en tant que membres de communautés diverses au Canada, et ce à titre de reflet, d’architecte et de participante à ce développement. La multiplicité des approches adoptées par la Cour dans sa jurisprudence touchant aux relations intercommunautaires et aux questions reliées à l’identité, autant avant qu’après la Charte, est certainement un facteur d’influence sur notre quotidien. La description de la contribution potentielle de la Cour à l’échafaudage d’un ordonnancement dynamique et évolutif des relations intercommunautaires doit ainsi insister particulièrement sur l’interaction continue entre les attentes des communautés et la fonction adjudicative de la Cour.

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I. Law’s Roles and Responsibilities — Grappling with Diversity

Many years ago, I was introduced, like so many first year students of law, to the two Ontario cases of *Re Drummond Wren*¹ and *Re Noble and Wolf*.² Decided in the 1940’s, the cases ask whether public policy can block racist restrictions on the transfer of land. In the first case, the Ontario High Court decided that forbidding the sale of land to Jews and other objectionable would-be purchasers was indeed contrary to public policy;³ in the second, the same Court declared that the treacherous terrain of public policy could not override individual freedom to contract.⁴ We were confronted with the most painful, tenacious and exciting problems in the study and practice of law: the relationship between law and social justice, the role and responsibility of judges, and the significance of legal decision-making.⁵ More recently I asked my own students to wrestle with *Drummond Wren* and *Noble and Wolf* and explore the ways in which judges engage with the societies in which they live and work. The cases pre-date the *Charter*;⁶ they are explicitly not anti-discrimination cases; nowhere are the terms multiculturalism, diversity or identity used. And yet, the answers offered by the Courts play a significant part in the landscape, both theoretical and literal, of intercultural relations in mid-twentieth century Ontario. Identity is clearly at stake as the Courts contemplate, albeit implicitly, the diversity of neighbourhoods and the mingling of adults and children who belong to multiple communities.

In such a foundational discussion, the Supreme Court of Canada is remarkable in its absence. Very rarely does anyone bother to read the Supreme Court’s decision in the eventual appeal of *Noble and Wolf*.⁷ Carefully limited in scope, the judgments avoid the question of public policy and thus any explicit entanglement in questions of morality and justice in post-World War II Canada. Instead, they rely on common law property rules incoming to the conclusion that the restriction based on race should be found void.⁸ The importance of the

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³ *Supra* note 1 at 783-84.
⁵ A warm thankyou to Professor Arnold Weinrib at the University of Toronto, whose wonderfully challenging lectures in Property Law in 1986/1987 are still fresh in my mind.
⁸ As Locke J. in his dissent noted, the members of the majority did not consider the questions that were raised before the Ontario Court of Appeal, including the question of the proper scope of public policy (*ibid.* at 78). Instead, they decided the case in light of the rule in *Tulk v. Moxhay*. (1848) 41 E.R. 1143 [hereinafter *Tulk*]. Kerwin J., writing for himself and Taschereau J., held that there was no support for the extension of the rule in *Tulk* to cover a covenant which purported to restrict alienation by excluding members of particular
issue at stake and the impact of the decision on the development of community organization and expectations are never openly acknowledged or addressed. And yet, of course, the pragmatic impact of the decision was highly significant: by law, a perceived outsider could move into a colony of summer cottages owned by people who would have preferred to maintain an exclusionary communal identity.

Two observations present themselves. First, the Court's pronouncements are not determinative of the way people interact with each other and organize their identities, affiliations, and relations. Summer cottage colonies of people who resemble each other still exist, whether or not they are officially endorsed or prohibited by private law principles of property. The everyday lives of people and communities are governed by customs and regulation not within the direct ambit of Civil Codes, common law cases, or Charters.9

Second, the Supreme Court does have available a range of interpretive choices as it goes about the task of making decisions in what look like common everyday issues. It can acknowledge and explicitly grapple with its identity-shaping role in such cases such that it openly works through its responsibility towards the communities affected by the outcomes. It can adopt analytical frameworks that implicitly affect identity without openly naming that impact. Or it can mute or try to ignore the social dimension of its decision-making. Irrespective of the approach taken, the Court does speak to identity and, more broadly, to the reality of multiculturalism. And it has done so for its entire history. That is, both before and after the Charter — and both before and after any explicit mention of multiculturalism in our jurisprudence — the Court has exercised an important function in identity-related disputes and their resolution.

These observations give rise to two ideas. The Court's influence is importantly limited in the everyday negotiation of our intersecting identities; at the same time the Court has a heavy responsibility to bear as it chooses and wields concepts that do have an impact on our diversity. In exploring and trying to reconcile these ideas, I will suggest that the Court be cast as a partner in a

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shared project of constructing, defining, and living in a society of multiple and diverse identities.\textsuperscript{10}

II. Law’s Crucial Absence in Everyday Life

First, what does it mean to insist on the limited presence of the Court and, by implication, law, in our lives and communities? Canada is a liberal democracy with a diverse population; the identities of Canadians are multiple in many ways, including those of origin, culture, history, language, faith, race, ethnicity, class, abilities, and sexual orientation. Despite a tendency for students and practitioners of law to presume its paramount importance, the law is but one set of influences that direct our behaviour and relationships.\textsuperscript{11} The accompanying tendency to focus on the Supreme Court and, in particular, the Charter, for answers to crucial questions related to our identities and affiliations is subject to the same critique. That is, the meaning of identity cannot be discovered in judgments or in the notion of multiculturalism embodied in s. 27 of the Charter.\textsuperscript{12} The Court finds its place in a complex web of factors – for example, family relations, workplace organization, education — that direct the shaping of diversity in Canada.

The example of religious identity helps clarify the important “absence” of law in the form of legislation, constitutional guarantees, or judicial decision-making, from our everyday task of recognizing and living with diversity. If we think of the often-heated discussions in 1994 over the wearing of the hijab by young Muslim girls in Montreal public schools,\textsuperscript{13} it is important to note the lack


\textsuperscript{12} Section 27 reads as follows: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

of any official legal adjudication of the issue. Instead, various communities made their voices heard, all of them having a stake in the symbolic and very real outcome of the dispute over whether schools could prohibit the wearing of the veil. The many viewpoints of religious, feminist, education-related, or human rights-based communities presented an interlocking, shifting map of the state of cultural diversity in Quebec. The map never included a Court or Human Rights Commission judgment, but, read carefully, it did provide a normative answer to the question. The classrooms in Quebec do include Muslim female students with their heads covered and their minds open to the possibilities provided by public, mixed, multicultural schools. Without any official legal pronouncement, then, we have a workable and meaningful framework for describing and prescribing contemporary religious identity.

This insistence on law’s absence should not, of course, be overstated. In Canadian society, member of communities can never completely avoid interactions with law and its influence; neither can they dictate unilaterally the terms of their engagement with law. The Quebec Charter of Human Rights and Freedoms did, of course, serve as a guide for responding to the hijab issue. And, if we think back to the situation in Noble and Wolf, today’s legislated anti-discrimination guarantees do affect, to some extent, the content of public policy regarding the transfer of private property and thus the population mix of neighbourhoods. The challenge is one of reconciling the significant silence of law in daily negotiations of who we are in Canada with the responsibility of legal institutions to appreciate their potential impact on our diversity.

As one vital institution of law, the Supreme Court of Canada plays an important role, albeit limited, in how diversity is understood and experienced in Canada. In fulfilling that role, it has various legal instruments at its disposal. In Noble and Wolf, the tool of public policy was available to

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14 A further example related to religious identity illustrates law’s muted role. The contours of self-defined insular religious communities are generally worked out in contexts such as business relations or provision of health services, far removed from courts and official legal pronouncements. Rather than wait to be defined by law in the form of municipal regulations, for example, religious neighbourhoods and family life are actively shaped within communities. Thus, community members may gather to pray or study in a basement apartment, they may construct fictional and literal walls around themselves, and religious leaders may work with member teachers or social workers to develop appropriate mechanisms for ensuring the welfare of the community’s children. Of course, zoning by-laws are relevant to the establishment of houses of worship and study, and provincial child protection rules and practices do reach into all communities, even as they are in turn partially shaped by those communities. See D. Cooper, Governing Out of Order: Space, Law and the Politics of Belonging (London: Rivers Oram Press: 1998); and “Chasidism”, supra note 10.

15 R.S.Q. ch. C-12 (Qué.)

16 These instruments provide the space needed for the ongoing formation of what one legal scholar has called the Canadian “national imaginary” (C.F. Stychin, “A Postmodern Constitutionalism: Equality Rights, Identity Politics and the Canadian National Imagination” (1994) 17 Dal.L.J. 61 at 66).
the judges as they weighed contractual liberty and race relations.\textsuperscript{17} Under the \textit{Charter}, section 1 with its reference point of a free and democratic society has become an obvious forum for working out the right balance of individual freedoms and community interests. Further, as suggested by Chief Justice Dickson,\textsuperscript{18} the values of equality and multiculturalism properly belong in a full section 1 analysis. Importantly, however, the explicit respect for multiculturalism dictated by the \textit{Charter}'s s.27 is not central to an analysis of the Court's response to identity-related claims. It is never crucial that the Court turn to s.27 as it addresses identity and diversity. Indeed, as we will see, the Court can affect identity without having to acknowledge at all the ways in which identity and diversity are implicated in law's processes.

\textbf{III. Varied Voices: The Supreme Court Speaks to Identity}

We now turn to several examples of the way in which the Supreme Court speaks to identity, both before and after the \textit{Charter}. These are litigious clashes that arise over "everyday" issues related to, among other things, business practices, schooling, health care, and family formations. While this everyday nature of the issues reminds us that judicial decision-making cannot govern all aspects of our lives and relationships, that same characteristic means that what the Court says is important. These are issues that constitute who we are and how we treat each other. Individual complaints in these cases contain within them claims grounded in communal affiliations and well-being, and the ways in which the Court wields analytical concepts in individual cases contributes to a broader definitional picture of diversity.

The decisions I have chosen illustrate the following, sometimes overlapping, responses or approaches to identity-related disputes: 1) advocacy, implicit or explicit, of a particular picture of diversity or co-existence; 2) refusal to acknowledge the input of, and impact upon, the affected communities; and 3) partial but problematic acknowledgment of the identity of the individuals

\textsuperscript{17} Indeed, the Ontario Court of Appeal focussed on the scope of public policy (\textit{supra} note 5).

\textsuperscript{18} The Chief Justice in \textit{R. v. Keegstra}, [1990] 3 S.C.R. 697 [hereinafter \textit{Keegstra}] held that \textit{indicia} for determining whether an objective relates to "an objective of pressing and substantial in a free and democratic society" (\textit{ibid.} at 734) can be drawn from ss. 15 and 27 of the Charter. Since "promoting equality is an undertaking essential to any free and democratic society" (\textit{ibid.} at 754) held the Chief Justice, "[t]he principles underlying s. 15 are integral to the s. 1 analysis" (\textit{ibid.}) Included in these principles is a concern for the interests of identifiable groups, and in particular for their members' right to "be given equal standing, concern, respect and consideration" (\textit{ibid.}). Further, the Chief Justice held that s. 27 includes the "recognition that Canada possesses a multicultural society in which diversity and richness of various cultural groups is a value to be protected and enhanced" (\textit{ibid.} at 757), and that this value can be "an element in the s.1 analysis" (\textit{ibid.}).
and groups involved. Whatever the approach or approaches used, the Court says something “constructive”\textsuperscript{19} about the meaning of diversity or pluralism, whether or not it sets out to do so, sees its task as doing so, or does so in an articulate or carefully justified way.

A. Advocacy

The first approach—that of advocacy—is taken when the Court presents particular visions of pluralist co-existence in Canada. Sometimes, multiculturalism is explicitly valued by the Court; alternatively, other values are seen to outweigh the fostering by law of inter-community respect. In \textit{Adler v. Ontario},\textsuperscript{20} for example, in which the funding of non-Catholic religious schools in Ontario was at issue, both Justices McLachlin and L’Heureux-Dubé explicitly articulated a vision of Canadian society in which diversity, in education in particular, is not only important but should be actively sought.\textsuperscript{21} For Justice McLachlin, denial of funding to parochial schools would lead to greater diversity within the public school system, and thus to the creation of schools as multicultural fora where “children of all races and religions learn to play together.”\textsuperscript{22} For Justice L’Heureux-Dubé, at least partial funding to parochial schools would be necessary for the recognition of the faith-related needs of the child and adult members of minority religious groups, and thus to foster the “values of pluralist democratic society, including the values of cohesion, religious tolerance, and understanding.”\textsuperscript{23} As evidenced by the disagreement between these judges over the resolution of the issue, positive advocacy of multiculturalism does not necessarily dictate the outcome in a particular case. But it does situate the Court as an active speaker in the discussion of diversity and education for Canadian children.

In a very different context, the Supreme Court in the 1940 case of \textit{Christie v. York Corp.},\textsuperscript{24} also spoke loudly to the issue of inter-community interaction. There, the Court responded to the question of whether a tavern could deny service to “coloured persons”. In deciding that the tavern’s policy did not contravene public order, the Court conveyed the message that freedom in contractual relations trumped principles of equal treatment and anti-

\textsuperscript{19} I mean this in the sense that the Court’s pronouncements contribute to the building of a model for understanding multiculturalism.

\textsuperscript{20} [1996] 3 S.C.R. 609. See “Education”, \textit{supra} note 10, especially at 1361-70, for a fuller discussion of the case.

\textsuperscript{21} The majority judgment, written by Iacobucci J., finds that the arrangement whereby Catholic schools would receive public funds is not subject to Charter scrutiny, and therefore does not explicitly discuss diversity and equality as do the minority judgments.

\textsuperscript{22} \textit{Supra} note 20 at para. 212.

\textsuperscript{23} \textit{Ibid.} at para. 97.

\textsuperscript{24} [1939] S.C.R. 139 [hereinafter \textit{Christie}].
discrimination. The law’s answer to the issue at hand both reflected and promoted a model of race relations whereby one community could exclude another.

It is tempting to think that the Charter, introduced long after Christie, dictates a particular priority ranking of values such that diversity is always favoured. But that is not the case. Whether within or without a Charter framework, the Court has open to it the possibility of advocating, in a given context, a picture of society where support for diversity as a value is subordinated to some other value or values. In Egan v. Canada, for example, where the issue was the availability of spousal benefits to same-sex partners, the judgments give different weights to the idea of promoting diversity in spousal and family arrangements.

On one hand, the Court, as reflected in Justice La Forest’s reasons, could read the legislation in question as support for the institution of marriage and for procreation as a central component of that institution. Same-sex couples could thus be excluded from the legislation’s definition of “spouse” and from the attached benefits. On the other hand, the Court, as exemplified by Justice L’Heureux Dubé’s approach, could give greater weight to the group’s claim for recognition than to the legislature’s objectives, thereby expanding eligibility for spousal benefits so as to include same-sex couples. Without offering an analysis of the issue and of anti-discrimination law, we can see the way in which judicial decision-making can indeed advocate the contours of diversity or pluralism in Canadian society.

25 The issue before the Court was whether, on the facts, there was a specific law that restricted the general principle of freedom of contract, or in the carrying out of the general principle, there was “the adoption of a rule contrary to public order” (ibid. at 142). The majority held that because the appellant was not a traveller asking to be furnished with food in a restaurant, he did not fall within the scope of the specific, restrictive law found in the Québec License Act (ibid. at 145-46), and that there was no contravention of public order (ibid. at 143-44).


27 The issue before the Court was whether a provision in Ontario’s old age security legislation, which limited the provision of spousal allowance to persons of the opposite sex, contravened s. 15 (1) of the Charter by discriminating on the basis of sexual orientation. La Forest J., writing on behalf of Lamer C.J., Gonthier and Major JJ. held that there was no contravention of s. 15(1). Sopinka J. held that s. 15(1) was infringed for the reasons given by Cory J., but was saved under s. 1. Cory J. in dissent, with Iacobucci J. concurring, held that the legislation was an instance of direct discrimination under s. 15(1), and that it could not be saved under s. 1..L’Heureux-Dubé J., in a separate dissenting opinion, held that there was discrimination under s. 15(1), which could not be saved under s. 1, and focussed extensively on the effect of the impugned distinction on the adversely affected, vulnerable group.

28 Supra note 26 at para. 25.

29 Ibid. at paras. 90, 91.
B. *Refusal*

The second approach is that of refusal. Rather than offering a perspective on diversity through the adjudication of disputes, the Court sometimes refuses to grapple with the community-related aspects of those disputes. As with the first approach, we can find examples both in the Court’s distant past and in a more current context. *R. v. Quong-Wing*,[^30] decided in 1914, is an “old” case whose very issue — the constitutional validity of legislation prohibiting Chinese merchants from employing white women — may tempt us to dismiss it as a relic of a less enlightened era. Yet Quong-Wing deserves analysis because the reasons of the Court illustrate a strand of judicial interpretation still seen in the present-day.[^31] The framing of the issue in Quong-Wing as one of the division of powers allowed the Court to submerge consideration or accommodation of the concerns of the Chinese community in Canada.[^32] By finding the legislation to be *intra vires*, the Court upheld restrictions on that community, but remained silent as to their impact.

That silence with respect to the judgment’s impact on the community was not inevitable.[^33] Neither was it inevitable in the case of *B.R. v. C.A.S. of Metropolitan Toronto*,[^34] decided in a contemporary *Charter* context. There, the Court faced a challenge to the constitutional validity of provincial child protection legislation that was brought by parents whose religious beliefs led them to refuse a blood transfusion for their sick child. In focusing on the parents’


[^31]: Within this strand of interpretation, a court will frame an issue, which implicates the vital interests of particular communities, such that those interests do not appear explicitly in the reasons of the court. Various reasons for doing this exist; I simply want to raise the question of whether, by doing so, courts can affect identity in a negative way without clear justification.

[^32]: Fitzpatrick C.J. held that the present legislation was indistinguishable from other acts passed by the provincial legislature to regulate factories. Further, he held that since its aim was the protection of women it could not be distinguished from other disciplinary and police regulations, which were in the purview of the provincial legislature (*supra* note 32 at 444). Davies J., with Anglin J. concurring, held that the present legislation in pith and substance dealt with subject matter of property and civil rights (*ibid.* at 449). Duff J. held that the legislation dealt with local matters (*ibid.* at 461), that it could not be interpreted as dealing exclusively with naturalized citizens (*ibid.* at 463), and that, it could be distinguished from the legislation in *The Union Colliery Co. v. Bryden* [*1899*] A.C. 580., insofar as it did not prevent “Orientals”, who were naturalized citizens from gaining a livelihood (*ibid.* at 465). Idington J. in dissent held that if the legislation were interpreted as affecting rights that are guaranteed to naturalized citizens under federal powers, it would be *ultra vires* the provincial legislature (*ibid.* at 453). However, he held that the legislature could not intend such an interpretation, and that since the appellant was a naturalized citizen, the legislation could not have been intended to apply to him (*ibid.* at 456).

[^33]: See W. Tarnopolsky and W.F. Pentney, who convincingly argue that the Court "could have come down on the side of egalitarianism" (*Discrimination and the Law*, looseleaf (Toronto: Carswell, 1994) at 1-16).

rights,\footnote{35} or, alternatively, on the child’s rights,\footnote{36} judgments of the Court muted any discussion of the input of, and impact on, religious communities. This is not to say that the Court did not speak to religious communities; indeed it did.\footnote{37} The identities of religious individuals, both adults and children, and of families are significantly shaped by membership in religious communities, and communities are therefore important and interested players in a situation such as that in B.R. The Court’s message might have been even more convincingly and meaningfully conveyed if the judgments had consciously acknowledged that reality and its implications.

C. Partial Engagement

A third approach — that of partial engagement — is one whereby the Court is actively involved with the very formation of the identities of individuals or communities. Two examples illustrate the pitfalls and potential of the Court’s participation in people’s lives.

In Racine v. Woods,\footnote{38} a case involving the adoption of an aboriginal child, the Court weighed the importance of aboriginal cultural influence on the child against the significance of a psychological bond between the child and her foster parents. Justice Wilson held that the importance of cultural considerations would lessen over time, while the psychological bond would only grow stronger, and ordered the adoption in the best interests of the child. The Court’s consideration of the importance of culture in the formation of identity, is significant, but problematic in its overlooking of the social imbalances that underlie the situation. Aboriginal children, for a variety of reasons, are disproportionately represented in care situations like the one in Racine.\footnote{39} As a result, when courts give primary importance to “psychological” bonds, they likely decide against the perceived interests of the First Nations communities to which the child and her parents belong. Although express engagement with this wider context may not have led to a different outcome in Racine, it may have reflected, and contributed to, a better understanding of the complex interests at play.

A fuller understanding of the complexities involved when the Court reflects upon and engages in the formation of identity can be glimpsed in the Court’s

\footnote{35} Justice La Forest and Chief Justice Lamer focus on parental s. 7 rights; Justice La Forest also focuses on s. 2(a).
\footnote{36} See the minority judgment of Justices Iacobucci and Major.
\footnote{37} See “Faith”, supra note 10.
\footnote{38} [1983] 2 S.C.R. 173 [hereinafter Racine].
reasons in *Eaton v. Brant Board of Education*. In considering the placement of a disabled child in a special education class, the Court offered a subtle and compelling understanding of identity and its formation. Without offering an analysis of the outcome of the appeal, or the issue of integration in the education context, it is significant that Justice Sopinka held up a two-part model of discrimination that requires both an understanding of someone’s real needs and limits and the elimination of any unreasonable imposition of standardized requirements on disabled persons.

This two-part model suggests that identity involves, and is defined by, a process of interaction. The identity of cultural or religious groups, for example, is shaped simultaneously by their self-defining activities (in the language of Eaton, the “real limits”) and by the influence of external forces on the community (in Eaton’s terms, the “imposition” of external standards). This constant, fluid exchange, in which the lines between “external” and “internal” are constantly blurred and rewritten may present the Court’s most helpful portrait of identity in our diverse, multicultural society.

D. *The Impact of Speaking*

In none of the examples presented above do we find any explicit analysis of s. 27, the Charter’s reference to multiculturalism. Indeed, each approach can be identified in both pre-and post-Charter jurisprudence. In contemplating the three sometimes overlapping possibilities of advocacy, avoidance, and participation, we can distill a model of participation for understanding the law’s role and responsibility in the arena of identity. That is, in response to the advocacy approach, we have to be careful not to overestimate the significance of the Court by asking or expecting it to impose a particular definition of identity and inter-community relations. At the same time, in response to the refusal approach, the Court does have some obligation to accept and work through its involvement in the shaping of identity development and community affiliation.

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41 Justice Sopinka held: “It is recognition of actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability” (ibid. at para. 67). In Eaton, the parents of a child with cerebral palsy, who was unable to communicate through any communication system, and who was also visually and mobility-impaired, requested that she be placed in her neighbourhood school on a trial basis. After three years, her teachers and assistants concluded that the placement was not in the child’s best interests, and may even harm her. A review committee decided that she should be placed in a special education class. Her parents appealed, and asked for a judicial review of a Tribunal decision confirming the committee’s decision. On the s. 15(1) issue, the Supreme Court found that after having balanced the child’s various educational interests, the Tribunal decided that her best interests would be served in a special class, and mentioned that there would be an ongoing assessment to determine whether any changes in her condition should result in a change in placement. The Court held that neither the outcome, nor the approach taken by the Tribunal could be considered to have violated s. 15 (1).
Finally, the engagement approach that the Court does sometimes adopt requires a more sophisticated and effective appreciation of its impact on the individuals, groups and institutions who also participate in the complex solutions to the problems at stake.

A model of participation casts the Court as significant speaker but it also cares about the dynamic framework in which judgments are situated. The examples I have canvassed do not tell, on their own, a complete story about race restrictions in commerce, same-sex partnerships, public schools, or caring for children. If we truly want to understand pluralism in family formations, business practices, and educational settings, the meaning of the Court's pronouncements is found by analysing their impact and by asking how those affected hear and respond to the Court's voice. What, then, is heard when the Court speaks? A spectrum of possibilities presents itself. A judgment might be experienced as a violent attack on community values, norms, or even existence. For example, child placement decisions resulting in the adoption of First Nations children in non-aboriginal families, when looked at in the aggregate, might be felt as a real and ongoing assault by members of First Nations communities. Alternatively, a judgment might be read as a strong signal to individuals and groups as to their value; gay and lesbian couples perceive legal pronouncements as official assessments of their life experiences. A third possibility is a perception of paternalistic protection offered by the Court when it prohibits, for example, certain kinds of relationships, as in Quong Wing, or certain kinds of treatment or care, as in B.R. The Court's words can represent a balancing of temporal interests, fixed in and reflective of a particular time and place; supporters of publicly funded Jewish schools in Ontario might hear a decision of the Court to uphold the constitutionality of the province's denial of funding in this way. A further interpretation of the Court's voice focuses on its symbolic support for or against harmonious community relations; as an example, would-be patrons after Christie felt a real refusal by the Court to pave the way for interracial transactions. Finally, the Court's decision-making might be perceived as self-conscious encouragement of meaningful involvement by members of particular groups in Canadian society, and Eaton appears to be a


43 For a discussion of this kind of response, in the child custody context, see "Religion", supra note 10 at 336 ff.

44 See e.g., D. Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994).

45 This perception may also be found in the context of First Nations claims, at least until the recognition of aboriginal rights, first analysed by the Court in *R. v. Sparrow* [1990] 1 S.C.R. 1075.

46 A spectrum of possibilities with respect to religious identity and education exists in Canada, each with particular contextual justification. They include secular, mixed schools, nominally religious mixed schools, separate funded religious schools, and separate non-funded religious schools. See "Education", supra note 10.

47 See e.g. *Keegstra*, supra note 18.
case in which this hearing of the Court’s voice is at least a possibility for Canadians with widely varying abilities.  

In pushing ourselves to think of the ways in which Court decisions are experienced, in addition to how they are drafted, we shift our attention to the ongoing negotiation of boundaries in which the Court, and law more generally, are not the only players. The reaction to the Court’s words by communities, groups, families, and their members may reveal more about diversity than does an analysis of the language itself — of rights and interests, policies and guarantees — used by the Court. The impact of the Court as speaker is fully appreciated only if we situate it appropriately as one participant.

As a participant, the Court is never solely determinative of our relations and interactions, but its presence is significant in our collective existence and our shared experience of living our pluralist lives. When it offers a judgment, it not only adjudicates the particular dispute before it, but it traces the contours of our liberal, diverse society. When the Court assesses race-based restrictions on commercial relations, when it considers spousal benefits for same-sex couples, when it declares that parental choices regarding medical care justify intervention by Children’s Aid, when it finalizes the adoption arrangements for an aboriginal child, or when it directs appropriate educational resources for students with disabilities, it participates in ongoing discussion of identity in Canadian society. The Court’s role, then, is one of partner and participant in a shared framework of identities; its responsibilities include self-aware encouragement of the potential for flourishing offered by diversity.

IV. Forging Relationships: Reflections of Law in a Shared Project

This analysis reminds us that the challenge of asking and answering identity-related questions is shared by many individuals, groups and institutions. Families, religious communities, people who identify with each other on the basis of sexual orientation, visible minority groups, schools, employers and employees, First Nations leaders, and providers of healthcare all provide pieces in a large puzzle of Canadian diversity. So too, do lawyers, legal clinics, judges, and the Supreme Court. Truly appreciating what the law-related participants contribute to the picture requires humility, confidence and vision. I have insisted here that the Court alone does not prescribe or proscribe multiculturalism or diversity. It does not play the role of engineer and cannot impose structures of individual and community interaction. Neither can the Court try to retreat into the role of simple mirror or reflector of societal norms and expectations; instead,

48 It is stressed that Eaton raises the potential for such a perception, although those affected by the outcome of the case may not have felt its impact in this way. This possibility has also, arguably, been realized when the Court has considered the issue of workplace discrimination and bona fide occupational requirements. See e.g. British Columbia (Public Service Employee Relations Commission) v. British Columbia and Service Employee’s Union [1999] 3 S.C.R. 3.
it always recasts those norms and invites their further development. It is expected to consciously work within a dynamic and constantly developing framework for how we live together in Canada.

The Court, then, is an active participant and an indisputably important participant. But it is always a partner in an ongoing dance. It dances with public schools and private religious schools; it dances with doctors and Jehovah’s Witness parents; it dances with First Nations children and members of visible minority groups; and it dances with all of us in our highly varied family formations, individual physical and intellectual abilities, and affiliations. The dance partners experience constant changes in rhythm, direction and coordination. They move together and apart, from cheek-to-cheek waltzes to occasional glances at each other from opposite sides of the dance floor. Sometimes the Court trips its partners; sometimes it takes the lead and offers interesting possibilities; sometimes it finds itself trying to follow new and complicated steps. In recognizing the everyday lives and contributions of its multiple partners, the Court enters into meaningful relationships that in turn can be analysed for what they say about a diverse society. Textual analysis of judgments cannot capture the intricacies of the dance. Neither can the Charter, and s. 27’s multiculturalism reference, in particular, provide clear-cut resolution of the necessary grappling by the Court with the identity-related aspects of litigation.

Legal scholars are often called upon to offer models for judicial decision-making with which it is possible to predict particular outcomes to difficult issues. The model of participation sketched here does not work that way. The actual results of the appeals I have referred to might not change at all if the Court were more conscious of itself as participant in the many sets of norms and expectations, and in the many communities, at play in people’s lives. But the shape of the interactions would change. Instead of a discourse that assumed a unidirectional impact by the Court on identity and diversity, or, alternatively, deference on the part of the Court to community claims, we would discuss the ways in which the Court’s contributions are effectively incorporated into a shifting and exciting picture. We would move beyond a debate over whether we find in the Court’s judgments passive reflections of society’s diversity or active, even daring, reflections by the judges on society’s diversity. Indeed we might find an enriched understanding of the Court and law’s boundaries reflected in the way in which multiculturalism develops and builds. Rather than looking to law to find out what diversity means, then, we might look to diversity to better grasp what law means.

In conclusion, our identities and affiliations and relations do feel the impact of the Court. Regardless of whether identity and diversity and multiculturalism are explicitly put before the Court, they are affected by judgments in all legal arenas. If we want to know who the “we” are in Canada, the Supreme Court is an important place to look. At the same time, the meanings of identity and diversity are worked out through a multi-faceted interaction of understandings and beliefs and commitments, and the Court is but one, admittedly significant
and unique, partner in the formulation of those understandings. Unlike the case with the appeal of Noble and Wolf, we do read Supreme Court of Canada judgments today explicitly in order to examine, analyse, and critique the way in which the Court speaks to identity. But we do so not because we have to believe that law defines or dictates diversity but because, as lawyers and perpetual students of law, we care very much about this particular participant. We care about the ways in which the Supreme Court of Canada encourages or discourages, and always contributes to, meaningful participation of individuals and communities in a shared project.