# HEALTH AND MULTICULTURALISM: AN INQUIRY INTO THE JURIDICAL LIMITS OF MEDICAL PLURALISM IN QUEBEC

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*Unless they are physicians and members in good standing of provincial Colleges of Physicians, practitioners of alternative or parallel medicine are deemed to practice medicine illegally. Consequently, a number of practitioners have posed* Canadian Charter *challenges (s. 2(a), s. 7) to the health laws of various provinces, albeit without success. The issue, however, has yet to reach the Supreme Court of Canada.*

*In this article, the author looks specifically into the practice of traditional Chinese herbalism and naturopathy in Quebec and argues that in the case of a traditional form of medicine, such as Chinese herbalism, it may be appropriate and useful to invoke the multiculturalism clause (s. 27) of the* Canadian Charter *as an adjunct to freedom of conscience arguments. Indeed, Chinese herbalists are renowned within the Chinese community and often possess degrees from East Asian academies of traditional medicine; they may therefore have no wish to acquire degrees in Western medicine in order to have the right to practice their time-honoured healing art. The case of traditional Chinese acupuncture is also discussed as an example of an alternative therapy that has been integrated into the Quebec medical system, although in a hybridized form.*

*À moins qu'ils ne soient médecins et membres en règle d'un ordre provincial des médecins, les praticiens et praticiennes de médecine douce ou parallèle sont réputés exercer illégalement la médecine. Par conséquent, plusieurs praticiens et praticiennes se sont appuyés, sans succès, sur la* Charte canadienne *(par. 2(1) et art. 7) pour contester les lois de diverses provinces portant sur la santé. La question n'a toutefois pas encore été soumise à la Cour suprême du Canada.*

*Dans cet article, l'auteure examine en particulier la pratique de la phytothérapie et de la naturopathie traditionnelles chinoises au Québec. Elle soutient que dans le cas d'un type de médecine traditionnelle comme la phytothérapie chinoise, il pourrait être opportun et utile d'invoquer la disposition de la* Charte canadienne *qui porte sur le multiculturalisme (art. 27) pour appuyer les arguments sur la liberté de conscience. En effet, les phytothérapeutes chinois sont réputés au sein de la communauté chinoise et il arrive souvent qu'ils détiennent des diplômes d'académies de médecine traditionnelle de l'Asie de l'Est. Il se pourrait donc qu'ils n'aient aucun désir d'obtenir un diplôme de médecine occidentale afin d'avoir le droit de pratiquer leur art de guérir séculaire. L'auteure discute également de l'acupuncture chinoise traditionnelle et mentionne que ce type de médecine parallèle a été intégré au système médical québécois, bien que ce soit sous une forme hybride.*

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> It was only when I was more than thirty years old that I began to read Western medical books. I was pleased to find that those books bore many new ideas, some of which had never been dealt with before in our traditional works. It was not until a decade later when I gained more knowledge that I came to realize that many of these new ideas are included within the scope of traditional Chinese medicine. Only they are explained in a vague way which needs further investigations.
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> Zhang Xichun, a physician who practiced traditional Chinese medicine in his homeland at the turn of the century.[1]

> There is a crack in everything. That's how the light gets in.
>
> Leonard Cohen, "Anthem"[2]

## I. INTRODUCTION

There are, in every province of Canada, two categories of medical practice: one is legal and the other is not. To put it simply, a man or woman practicing medicine without a valid license is, of course, practicing medicine illegally. Thus the medical profession is restricted to those who agree to abide by certain legal rules, which rules are said to exist for the protection of the public.

Professor Hogg, in his *Constitutional Law of Canada,* has made the point, that "[l]ike inflation and the environment, health is an 'amorphous topic' which is distributed to the federal Parliament or the provincial Legislatures depending on the purpose and effect of the particular health measure in issue."[3] Legislative authority over the medical profession derives from section 92(13) of the *Constitution Act, 1867*.[4] The provinces, by virtue of their power over property and civil rights, can therefore regulate the practice of medicine, both legal and illegal.

Over the past 15 to 20 years, the illegal practice of medicine has become associated with the practice of "alternative" forms of healing,[5] although the term encompasses a large spectrum of therapies that may include medical practices from other cultures. In fact, it appears that the so-called "alternative medicine" may be practiced in Canada by licensed physicians, although this is subject to controversy. It may not, however, be practiced by persons who are not recognized as physicians by the province in which they practice.

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[1] Quoted in C. Jingfeng, "Integration of Traditional Chinese Medicine with Western Medicine—Right or Wrong?" (1988) 27 Soc. Sci. Med. 521 at 525.

[2] *The Future. Columbia (Sony)* (1992).

[3] P.W. Hogg, *Constitutional Law of Canada*, rev. ed. (Toronto: Carswell, 1997) at 18-11 (footnotes omitted) [hereinafter Hogg, *Constitutional Law*].

[4] Section 92(13) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 provides that: "In each Province the Legislature may exclusively make Laws in relation to...Property and Civil Rights in the Province."

[5] See generally P. Martel, *Médecine douce, médecine illégale: Le cadre juridique régissant la pratique des thérapies alternatives au Québec* Cahier des sciences juridiques No. 6 (Montréal: UQAM, Dépt. des sciences juridiques, 1990) [hereinafter *Médecine douce*]; P. Martel, *Attention santé: La place des thérapies alternatives dans le système de santé* (Boucherville, Qué.: Éditions de Mortagne, 1992) [hereinafter *Attention santé*].

While these legal rules attempt to protect the public from incompetence, they also create a professional monopoly. This, in itself, is neither particularly shocking nor unprecedented. All professions include certain persons to the exclusion of others.[6] In the area of health, however, these legal rules also tend to sanction what may be labelled "Western" explanatory models of illness[7] and methods of treatment.[8] Canada is part of the Western world and it may seem natural for a Western nation to support science as practiced in the West. But at the same time, Canada has entrenched the notion of multiculturalism in its *Charter of Rights and Freedoms*[9] and enacted the *Canadian Multiculturalism Act*.[10]

In this essay, I question the juridical and sociological validity of the legal web that protects a majoritarian vision of health and illness to the detriment of models of health, illness, and treatment rooted in other cultures. Illness is, after all, defined as "the human experience of disease."[11] As such, it is rooted in culture, as much as it is in social and familial circumstances.[12] The word "culture" is used here in its broadest possible meaning. In the words of social scientists Lance Roberts and Rodney Clifton, "[c]ulture...represents a shared symbolic blueprint which guides action on an ideal course and gives life meaning."[13] It follows that methods of treatment are equally dependent on the culture from which they evolve.

Multiculturalism[14] thus becomes the axis around which I centre my inquiry into the juridical

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[6] See, for instance, *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, in which the Law Society attempted to deny membership to non-citizens and was prevented from doing so by the Supreme Court of Canada on the basis of s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Canadian Charter*].

[7] See K.W. Bowman & R.N.F. Lee, "Cultural Issues in Critical Care: A Chinese Case Study" (1995) 28 Annals RCPSC 338 at 339: "All cultures have models of illness that are organized concepts about the nature of illness. Explanatory models explain what disease is, how it occurs, why it exists, what measures can prevent it, and why only some people are affected." See also J. Epstein, *Altered Conditions: Disease, Medicine, and Storytelling* (New York: Routledge, 1995). Throughout this essay, the term "Western medicine" refers to healing as it has been practiced in Europe since the dawn of modern medicine in the 17th century. It was then that a few brave men defied the Church and began dissecting cadavers, thus discovering anatomy and blood circulation. These discoveries changed the face of European medicine and gave rise to new disciplines such as cardiology and neurology. This is not, however, to say that "Western medicine" never borrowed from non-European cultures. It did. Arabic medicine, for instance, is at the source of today's study of infectious diseases and toxicology. Oddly, today, these debts to other cultures are seldom acknowledged by or taught to members of the medical profession. Thus the term "Western medicine" is half historical fact and half state of mind.

[8] See e.g., arts. 2.03.14 and 2.03.17 of the Quebec *Code of Ethics of Physicians*, R.R.Q. 1981, c. M-9, r. 4 [hereinafter *Code of Ethics*], which provide that physicians must practice their profession in accordance with "scientific principles" and act in a way that is respectful of "current medical science."

[9] Section 27 of the *Canadian Charter* provides that: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

[10] *Canadian Multiculturalism Act*, S.C. 1988, c. 31.

[11] J.M. Anderson, "Ethnicity and Illness Experience: Ideological Structures and the Health Care Delivery System" (1986) 22 Soc. Sci. Med. 1277 at 1277.

[12] *Ibid.* See also A. Kleinman, L. Eisenberg & B. Good, "Culture, Illness, and Care: Clinical Lessons from Anthropologic and Cross-cultural Research" (1978) 88 Ann. Intern. Med. 251 at 252: "illness represents personal, interpersonal, and cultural reactions to disease or discomfort."

[13] L.W. Roberts & R.A. Clifton, "Exploring the Ideology of Canadian Multiculturalism" (1982) 8 Can. Pub. Pol. 88 at 88.

[14] As the definition of multiculturalism poses its own set of problems, the reader is referred to Part III of this essay for a discussion of the subject.

limits of medical pluralism in Quebec. I have chosen the province of Quebec, not because it is uniquely interesting or relevant to this inquiry,[15] but because it is the province with which I am most familiar. I ask whether the legal concept of multiculturalism, as it is generally understood in Canada as well as in Quebec, can rescue a minoritarian cultural norm from the illegality to which a majoritarian system has condemned it. To illustrate my analysis, I use the case of traditional Chinese medicine and, more precisely, that of Chinese naturopathy[16] and pharmacology as practiced in the province of Quebec. My reasons for this choice are simple: traditional Chinese healing arts can be described as a discrete and insular form of medicine in Canada and, although illegal outside of a certain framework, Chinese medicine is practiced widely, albeit cautiously, in urban centres such as Montreal. By looking into the case of traditional Chinese medicine, I come to the conclusion that marginal or minoritarian forms of treatment rooted in other cultures have their place in a multicultural society such as ours. The challenge, of course, lies in finding a structure that accommodates these cultural alternatives without undermining the majoritarian system or endangering public health.

I discuss Quebec's health legislation and the case law pertaining to alternative medical practices in Part I of this essay. The judicial treatment of section 7 (the right to life, liberty, and security of the person) and section 2(a) (freedom of conscience and religion) of the *Canadian Charter of Rights and Freedoms* is also reviewed in this part.[17] Part II, in turn, provides a look into the realities of traditional Chinese medicine. In Part III, I examine the content of section 27 of the *Canadian Charter* and the concept of multiculturalism, generally. The relationship between medicine and multiculturalism is analyzed in Part IV. Finally, I conclude with recommendations for the legislative integration of traditional Chinese medicine into the Quebec health system.

## II. THE LEGAL AND ILLEGAL PRACTICE OF MEDICINE IN QUEBEC: THE MAJORITARIAN NORM

### A. *Legislation*

Medical practice in Quebec is regulated by a few sections located in three statutes: the *Professional Code*,[18] which applies to all professions in Quebec, the *Medical Act*,[19] and the *Code of Ethics of Physicians*. Distinctions between what constitutes the legal and illegal practice of medicine within provincial boundaries are to be found therein.[20] A reproduction of the relevant provisions is useful:

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[15] In fact, provincial regulation of the medical profession tends to be very similar from one province to the next. For an Ontario perspective, see J.A. Maciura, "Restrictions on Use of the Title 'Doctor': *College of Physicians and Surgeons v. Cheung*" (1993) 14 Health L. Can. 46.

[16] Naturopathy is defined, for the purposes of this essay, as a method of treatment that makes use of herbal, mineral, or animal substances, food, and exercise to assist the healing processes.

[17] Reference is made in this essay, to the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 [hereinafter *Quebec Charter*]. The focus of this work, however, is on the *Canadian Charter of Rights and Freedoms*, for changes to the interpretation of the *Canadian Charter* are likely to affect *Quebec Charter* jurisprudence in similar ways.

[18] R.S.Q. c. C-26.

[19] R.S.Q. c. M-9.

[20] It would be beyond the scope of this paper to review the history of Quebec health legislation. For a general survey of the area, see *Médecine douce*, *supra* note 5.

1. *The* Professional Code

> 23. The principal function of each order shall be to ensure the protection of the public. For this purpose it must in particular supervise the practice of the profession by its members.
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> 188. Every person who contravenes a provision of this Code or the Act or letters patent constituting an order is guilty of an offence and is liable to a fine of not less than $600 nor more than $6 000.

The above sections of the *Professional Code* constitute penal provisions applicable to all professions. The *Professional Code* was enacted in 1973, following recommendations for the reform of professional associations.[21] Before its enactment, professional orders often played a double role, as they attempted to protect the public, while looking after the social and economic interests of their members. Under the *Professional Code*, however, an order's only goal is to protect the public.[22] It is the role and mission of the "Office des professions du Québec" to ensure that each professional order abides by these rules.[23]

2. *The* Medical Act

There are a dozen professional orders in the health field alone. These comprise, *inter alia*, physicians, dentists, radiologists, nurses, and pharmacists. All physicians in Quebec are represented by the Ordre des médecins du Québec, a professional order created in 1847,[24] whose name has changed a number of times over the past several years.[25] The Quebec *Medical Act* regulates the acts and behaviour of the members of the Order:

> 31. Every act having as its object to diagnose or treat any deficiency in the health of a human being constitutes the practice of medicine.
> The practice of medicine shall comprise, in particular, medical consultation, prescribing of medication or treatment, radiotherapy, attendance at confinements, establishing and controlling diagnosis and treatment of illnesses or diseases.
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> 43. Subject to the rights and privileges expressly granted by law to other professionals, no person may perform any of the acts described in section 31, unless he is a physician.

Section 43 of the *Medical Act* also contains a list of five exceptions, among which are acts performed by medical students (section 43(a)) and persons who, "by reason of their duties or

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[21] *Ibid.* at 3.

[22] *Ibid.* at 4. See also R. Dussault & L. Borgeat, "La réforme des professions au Québec" (1974) 34 R. du B. 140 at 144: "Toute corporation qui, munie de pouvoirs aussi importants, entendrait jouer, à la manière d'un syndicat, un rôle de revendication économique et sociale se placerait dans une situation de conflit d'intérêt." It is worth mentioning, however, that the notion of public protection is not defined in the *Professional Code*. It is therefore implicit that the public is adequately protected, as long as a professional order fulfills its supervisory obligations with respect to its members. See G. Dussault, J. Harvey & H. Bilodeau, *La réglementation professionnelle et le fonctionnement du système socio-sanitaire* (Québec: Publications du Québec, 1987) at 28-29.

[23] *Professional Code*, *supra* note 18, ss. 3, 12, 23.

[24] See *An Act to incorporate the Members of the Medical Profession in Lower Canada, and to regulate the Study and Practice of Physic and Surgery therein*, S.C. 1847 c. 26.

[25] See *Médecine douce*, *supra* note 5 at 3, 9.3. The College of Physicians is one of the province's oldest professional orders.

training, assist the sick gratuitously under special circumstances" (section 43(b)).

In summary, section 31 of the *Medical Act* defines what constitutes medical practice, which, for the purposes of this essay, includes three acts defined as consultation, diagnosis and prescription. Furthermore, the general purpose of these acts must be to identify (diagnose) or treat "any deficiency in the health of a human being." Section 31 can therefore be characterized as an extremely broad provision, since no definition of "health" or health "deficiency" is provided in section 1 of the *Act*. The breadth of section 31 is further expanded by the words "in particular" in that section's second paragraph. Obviously, because of their breadth and vagueness, provisions such as this one exclude very little.[26] Quebec physicians are therefore ensured a wide monopoly on the practice of medicine.

The illegal practice of medicine is delineated in section 43 of the *Act*. Subject to certain exceptions, only a physician can perform the acts mentioned in section 31. A physician is defined, in section 1 of the *Act*, as "any person entered on the roll" of the Ordre des médecins du Québec. Pursuant to section 45 of the *Medical Act*, persons who are not physicians, yet persist in consulting patients, posing diagnoses, or prescribing medication or treatment, contravene section 43 of the *Act* and are therefore liable to the penalties provided in section 188 of the *Professional Code*.

In other words, persons in Quebec who perform basic medical acts, yet do not hold a valid provincial license to practice medicine and do not fall within the exceptions provided within section 43 of the *Medical Act* can be charged with practicing medicine illegally. Although such persons may be practitioners of Western medicine many are, in fact, practitioners of alternative medicine,[27] who choose to stray from the precepts of Western medical science. In the past 20 years, in fact, most actions concerning the illegal practice of medicine were brought against alternative healers. How are such persons discovered, charged and prosecuted; and who institutes the actions against them? Some practitioners are prosecuted by the Attorney-General of Quebec; yet, according to Professor Martel of the Université du Québec à Montréal,

> [l]a quasi-totalité des poursuites pour exercice illégal de la médecine sont intentées par [le Collège des médecins du Québec], sur la base de dénonciations faites par des préposés ou 'agents provocateurs' à sa solde, souvent par des policiers à leur retraite. En 1986, plus de 100 poursuites ont été ainsi intentées et en 1987, pas moins de 511 chefs d'accusation ont été portés contre des thérapeutes alternatifs. En 1988, ce nombre a chuté à environ 200, mais il a remonté à 418 en 1990.[28]

### 3. *The* Code of Ethics of Physicians

It is important to note that the practice of alternative medicine is not, *per se*, illegal. Indeed,

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[26] Professor Martel, in his *Attention santé*, *supra* note 4 at 39 and his *Médecine douce*, *supra* note 4 at 10-11, points out that the 1909 and 1918 versions of the *Medical Act* were somewhat more restrictive than its present incarnation, enacted, like the *Professional Code*, in 1973. In 1909, for instance, medical practice was defined as the act of delivering newborns and treating medical or surgical affections by way of mechanical, physical, chemical, or radiological means.

[27] "Alternative medicine," as it is used in the West, is a rather loose term that encompasses what some have described as quackery, as well as other nations' legitimate, traditional forms of medicine. The term, as such, covers more than 300 methods of healing that include acupressure, aikido, aromatherapy, ayurvedic medicine, Chinese herbalism, Christian meditation, energy balancing, faith healing, hatha yoga, Jungian psychology, moxibustion, naturopathy, petitionary prayer, Rolfing, Sufi healing, and Tibetan medicine. See also Corporation professionnelle des médecins du Québec, *Mémoire sur les thérapies alternatives* (Montréal: Corporation professionnelle des médecins du Québec, 1995) [hereinafter *Mémoire*].

[28] See *Attention Santé*, *supra* note 4 at 41.

physicians who hold a valid provincial licence may resort to alternative therapies, but are limited by sections 2.03.14 and 2.03.17 of the *Code of Ethics*, which provide, respectively, that physicians must adhere to "scientific principles" and refrain from acting in a way that contradicts "current medical science." Thus, Quebec physicians must refuse to administer an alternative form of treatment where recognized therapies exist. Alternative medicine may be resorted to only where no treatment is specifically recognized by current medical science. The physician must then justify his or her choice of therapies and obtain the patient's free and informed consent pursuant to articles 11 to 25 of the *Civil Code of Quebec* and section 2.03.28 of the *Code of Ethics*.[29] Again, "scientific principles" and "current medical science" are not defined in section 1.01 of the *Code of Ethics*.[30]

It is therefore far from certain that physicians may practice alternative medicine freely, although it is obvious from the above provisions that non-physicians may practice neither conventional nor alternative forms of healing.

### B. *Jurisprudence*

The way in which courts have interpreted the legislation has hardly been a source of astonishment, although it has given rise to the indignation of most alternative practitioners.[31] Indeed, Quebec courts have been extremely faithful to the letter of the law, especially where alternative practices are concerned.

The jurisprudence on the subject can be divided, broadly, into pre- and non-*Canadian Charter* cases, and *Canadian Charter* cases. In studying the case law, it is essential to remember that the definition of the non-legality of medical practice is hardly subtle. A medical act is either legal or it is not. There are no nuances here, no shades of gray. Thus, it is immaterial whether the therapist being prosecuted is a practitioner of traditional ayurvedic medicine or a proponent of the diamond approach to inner realization. If that person has performed a medical act, as defined in section 31 of the *Medical Act*, in contravention of section 43 of the *Act*, then he or she has practiced medicine illegally. The acts discussed in the next section were therefore labelled illegal, even though they were carried out by practitioners of distinct alternative methods of healing. It is equally immaterial that the person being prosecuted actually assisted or cured a patient.[32] Illegality must not be confused with malpractice or other forms of medical liability.

#### 1. *Pre- and Non-*Canadian Charter *Cases*

Even before the enactment, in 1973, of the present *Medical Act*, the courts gave a broad meaning to the words "consultation," "diagnosis," and "treatment." A consultation is defined as the examination of a patient, followed by the practitioner's opinion as to that patient's state of health.[33] It matters little whether consultations are carried out by way of conventional Western

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[29] Collège des médecins du Québec, *L'exercice professionnel et les thérapies alternatives* (Montréal: Service des communications, Collège des médecins du Québec, 1994).

[30] The Quebec College of Physicians, in its *Mémoire*, *supra* note 27 at 2, fails to define these terms and merely points out that, "[l]es thérapies alternatives, dans leur majorité, n'ont pas été prouvées scientifiquement ou se disent non vérifiables selon les méthodes scientifiques habituelles."

[31] See generally *Attention santé*, *supra* note 5; and *Médecine douce*, *supra* note 4.

[32] *Médecine douce*, *ibid.* at 24.

[33] *Collège des médecins et chirurgiens de la province du Québec* v. *Desjardins*, [1970] R.L. 147 at 152. See also *Collège des médecins et chirurgiens de la province du Québec* v. *O'Neil*, [1950] C.S. 58, in which having a patient fill out a questionnaire as to his or her health, as well as auscultating another person, are defined as consultative acts. See *Médecine douce*, *supra* note 5 at 27.1. Theoretically, then, the mere act of

auscultation or by taking the patient's pulse in accordance with traditional Chinese medicine.[34]

"Treatment" includes the prescription of drugs. Again, the term has been interpreted by the courts in a broad manner, and includes any means used to combat disease or alleviate its symptoms.[35] Whether this task is accomplished by prescribing penicillin or by praying for the patient is irrelevant. Furthermore, an act that is normally legal may become illegal if its object is to alleviate suffering. Thus, a person who sells chamomile tea may arguably be charged with practicing medicine illegally, if he or she kindly suggests to a distressed client that the herbal tea would be helpful to soothe frazzled nerves.[36] Indeed, section 31 of the *Medical Act* does not require that there be a consultation necessarily followed by prescription or treatment. The words of the provision are that there must be, "...*in particular*, medical consultation, prescribing of medication or treatment [emphasis added]."

As Professor Martel has suggested, most alternative therapies would, under this interpretation of the law, be deemed illegal. The legislation, however, does not cover preventive medicine, although prevention forms an integral part of nursing practice, which also happens to be defined and protected by legislation.[37] Alternative medicine is therefore marginalized by legislation and case law alike, despite the fact that Taschereau J., in *Pauzé* v. *Gauvin* warned that:

> [l]es statuts créant ces monopoles professionnels sanctionnés par la loi, dont l'accès est contrôlé, et qui protègent leurs membres agréés qui remplissent des conditions déterminées, contre toute concurrence, doivent cependant être strictement appliqués. Tout ce qui n'est pas clairement défendu peut être fait impunément par tous ceux qui ne font pas partie de ces associations fermées.[38]

Traditional defenses have proven unhelpful. The illegal practice of medicine has been deemed an absolute liability offence. Thus, guilt flows from proof of the *actus reus* alone, which, in this case, consists of the mere performance of a prohibited act. Proof of negligence or of *mens rea* is not required.[39]

Other means of defense have also been rejected. In *Corporation professionnelle des médecins du Québec* v. *Van Zsidy*,[40] the accused, an iridologist and a nutritionist, challenged the charges brought against him on the grounds that he was set up by an investigator posing as a patient. Hamelin J., after briefly considering the Supreme Court of Canada case of *Collins* v. *R.*,[41] came to

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talking to a person and then concluding the conversation by stating that this person is in good health would be considered a "consultation" for the purposes of s. 31 of the *Medical Act*.

[34] *Médecine douce*, *ibid.*

[35] *Ibid.* at 28.

[36] See *Collège des médecins et chirurgiens de la province de Québec* v. *Tapp* (1936), 74 C.S. 218; *Collège des médecins et chirurgiens de la province de Québec* v. *Saucier*, [1946] C.S. 30. In both cases, the accused had sold medication to individuals who had complained of different ailments.

[37] *Médecine douce*, *supra* note 5 at 33-34; *Nurses Act*, R.S.Q. c. I-8, s. 36.

[38] *Pauzé* v. *Gauvin* (1953), [1954] S.C.R. 15 at 18 [hereinafter *Pauzé*]. Compare the above quotation with the following, by L'Heureux-Dubé J.A., as she then was, in *Corporation professionnelle des médecins du Québec* v. *Larivière* (12 July 1984), Montreal 500-10-000257-814 at 3 (C.A.) [hereinafter *Larivière*]: "Le législateur prohibe...'tout acte qui a pour objet de traiter toute déficience.' Les termes sont clairs et ne souffrent aucune équivoque. Le législateur ne distingue pas entre l'acte ou modèle médical ou non, déficience physique ou mentale. Il n'y a pas lieu de distinguer là où le législateur lui-même ne l'a pas fait."

[39] In *Larivière*, *ibid.* at 6, Chouinard J.A., in *obiter*, disagrees and writes that the offense is one of strict liability. But Mr. Justice Chouinard stands alone in this belief. See *contra*, *Médecine douce*, *supra* note 5 at 34.1-35.

[40] (20 April 1988), Montreal 500-27-006966-875 (C.S.P.) [hereinafter *Van Zsidy*].

[41] [1987] 1 S.C.R. 265 [hereinafter *Collins*].

the conclusion that the means used by the investigator would not "shock" a reasonable person and bring the administration of justice into disrepute.[42]

Decades before the advent of the *Canadian Charter*, constitutional challenges to sections 31 and 43 of the *Medical Act* were brought before the courts, alleging that these provisions were *ultra vires,* since they curtailed individual freedom and intervened in commercial matters that were of federal competence.[43] The Quebec Superior Court decided, in all cases, that these sections were of public order and therefore *intra vires* pursuant to section 92(13) of the *Constitution Act, 1867*. Allegations that section 31 of the *Medical Act* is vague and uncertain, on the ground that it defines several offenses at once were also systematically rejected.[44]

The vast majority of these non-*Canadian Charter* cases have never made it to the Court of Appeal. Consequently, as discussed below, alternative practitioners today tend to invoke *Canadian Charter* provisions, rather than these unavailing means of defence.

2. *Jurisprudence Under the* Canadian Charter

Since 1989, two cases in particular have challenged the legislation on the basis of section 7 (security of the person)[45] and section 2(a) (freedom of conscience)[46] of the *Canadian Charter*. In the first case,[47] Henri-Paul Raîche described himself as a naturo-therapist and a healer. When charged with practicing medicine illegally, Raîche relied on *Morgentaler* v. *R.*[48] to argue that the expression "security of the person" must include a right to the medical treatment of a life- or health-threatening condition. Biron J. of the Superior Court of Quebec recognized the authority of the *Morgentaler* decision, but distinguished the case at bar on the facts, since patients who are barred from consulting Raîche may always receive treatment from a recognized physician.[49]

In 1994, Lucinda Lamontagne, a homeopath, challenged section 31 of the *Medical Act* and invoked both section 7 of the *Canadian Charter* and section 1 of the *Quebec Charter*,[50] while relying on *Rodriguez* v. *British Columbia (A.G.)*[51] to support her argument that security of the

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[42] *Van Zsidy*, *supra* note 40 at 20.

[43] See *Collège des médecins et chirurgiens de la province de Québec* v. *Boily* (1936), 74 C.S. 107; *Collège des médecins et chirurgiens de la province de Québec* v. *Fortin* (1936), 74 C.S. 111.

[44] See *Médecine douce*, *supra* note 5 at 35.

[45] S. 7 of the *Canadian Charter*, *supra* note 6, provides that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[46] S. 2(a) of the *Canadian Charter* reads as follows: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion...."

[47] *Raîche* v. *Corp. professionnelle des médecins du Québec*, [1989] R.J.Q. 1495 (C.S.)[hereinafter *Raîche*].

[48] [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler* cited to S.C.R.]. In this decision, a majority of the Supreme Court of Canada held that *Criminal Code* restrictions on abortion were unconstitutional. The *Criminal Code* required that abortions be approved by a hospital's therapeutic abortion committee. But some hospitals refused or were reluctant to set up such committees for a variety of reasons. A majority of the Court found nonetheless that women's health was put at risk by the refusals and delays, which, in fairness to those establishments, included the onerous qualifications hospitals needed to meet in order to set up committees, and the lack of adequate standards by which those committees would operate.

[49] *Raîche*, *supra* note 47 at 1501-02.

[50] S. 1 provides that: "Every human being has a right to life, and to personal security, inviolability and freedom."

[51] [1993] 3 S.C.R. 519, 107 D.L.R. (4th) 342.

person includes personal autonomy and physical inviolability.[52] According to Sirois J. of the Quebec Court, section 31 of the *Medical Act* protects the public against incompetence. As such, it does not apply to the practice of homeopathy, since it neither condones nor condemns it. Only article 2.03.17 of the *Code of Ethics of Physicians* poses certain restrictions to the practice of homeopathy, yet it does not entirely prohibit the alternative method of healing. It merely requires that physicians who practice homeopathy conform to the precepts of medical science. Greenberg J. of the Superior Court affirmed the decision, without bringing much that is novel to the interpretation of section 7.

Section 2(a) of the *Canadian Charter* has proven equally unproductive. In *Raîche*, Biron J. dealt, in a rather laconic manner, with the argument that sections 31, 43, and 45 of the *Medical Act* violate the freedom of conscience of the accused: the Court simply failed to see how freedom of conscience and religion could be violated by these provisions.[53] Lucinda Lamontagne was also unsuccessful in her argument concerning freedom of conscience. Sirois J. was content to quote Biron J.'s conclusion in *Raîche*.[54] Greenberg J., in *obiter*, respected the first judge's decision. The matter of section 2(a) had not been brought before the Superior Court.[55]

In short, the courts have merely deferred to the Legislature, without looking beyond the letter of the law. It is obvious that the result of sections 31 and 43 of the *Medical Act* is that only physicians can practice iridology or homeopathy. Under the circumstances, it is difficult to disagree with the courts that sections 7 and 2(a) of the *Canadian Charter* are inapplicable to these provisions. From that perspective, the *Medical Act* seems unassailable. The problem, however, is that an increasingly large number of Quebeckers have used some form of alternative therapy at least once in their lives.[56] *Lamontagne* also shows clearly that a background in conventional medicine is not essential to the practice of homeopathy, although it tends to give homeopaths more confidence in their diagnosis.[57] In other words, while society has changed and there is a demand for various alternative forms of healing, the courts are unwilling to open the gates to such methods by even suggesting that the law needs to be amended. This is understandable, of course. The courts must not be mistaken for legislatures. Extra-juridical factors may also explain the courts' reluctance to look at societal choices. Alternative therapies such as iridology and homeopathy constitute direct threats to conventional medicine, because they were developed in opposition to Western scientific dogma.[58] Furthermore, judges, like physicians, view their profession from a

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[52] *Corp. professionnelle des médecins du Québec* v. *Lamontagne* (26 January 1994), Montreal 500-27-016575-914 (C.Q.), aff'd (*sub nom. Lamontagne* v. *Corp. professionelle des médecins du Québec*)(28 March 1995), Montreal 500-36-000042-948, J.E. 95-1015 (C.S.), aff'd (9 March 1998), Montreal 500-10-000133-957 (C.A.), [1998] A.Q. No. 692 (QL) [hereinafter *Lamontagne*, C.Q. or C.S.].

[53] *Raîche*, *supra* note 47 at 1503.

[54] *Lamontagne* (C.Q.), *supra* note 52 at 39.

[55] *Lamontagne* (C.S.), *supra* note 52 at 20. In Greenberg J.'s words: "La preuve devant le premier juge en l'espèce n'a démontré aucune relation entre un précepte de conscience, de religion, de croyance, de pensée, d'opinion, d'expression, de moralité, de respect à la vie privée, de dignité, d'honneur ou de réputation avec la décision d'une personne de consulter un homéopathe."

[56] A recent survey conducted by the Quebec Ministry of Health and Social Services provides that up to 45 percent of Quebeckers have had a brush, however brief, with at least one form of alternative medicine. This survey is quoted in *Mémoire*, *supra* note 27 at 7. The Quebec College of Physicians disagrees with this figure and prefers to rely on a 1991 Léger & Léger survey, which provides a more conservative figure of 11.2 percent. See also P. Chisholm, "Healers or Quacks?" *Maclean's* (25 September 1995) 34 at 34, who estimates that "about 20 percent of Canadians opt for some type of alternative treatment."

[57] *Lamontagne* (C.Q.), *supra* note 52 at 8 ff.

[58] See *Mémoire*, *supra* note 27 at 2: "Ces 'thérapies alternatives' sont rarement confrontées les unes aux autres; on préfère davantage les mettre en opposition à la médecine conventionnelle."

protective, insider's standpoint.

The effect of the above decisions is that all forms of alternative healing appear to be similar, if not equal, in their marginalization from what constitutes legal, conventional, scientific medical practice. But in fact, certain therapies have gained more respect than others. Homeopathy, for instance, is widely practiced throughout Europe.[59] An interesting problem arises as well with the traditional medicine of other nations and cultures. It would be inaccurate to compare, say, traditional Chinese medicine and the alternative, Western-based anti-gymnastics movement. In the next part of this essay, therefore, I examine the case of traditional Chinese medicine and the questions it raises in light of the conclusions reached above.

## III. TRADITIONAL CHINESE MEDICINE AND THE *CANADIAN CHARTER*: A CASE OF THE SHOE THAT FITS

### A. *Introduction*

Sections 31 and 43 of the *Medical Act* require that medical procedures, as defined in section 31, be practiced exclusively by recognized physicians. In *Lamontagne*, Sirois J. of the Quebec Court ruled that this requirement does not prevent patients from receiving homeopathic treatment from a licensed physician.[60] Sirois J. agreed that homeopathy is a popular method of treatment that can be effective, even if it is scientifically unproven, and that consenting patients therefore have a constitutional right to resort to such treatment.[61] He also noted that, in 1994, over 200 Quebec physicians practiced homeopathy. At the Superior Court level, Greenberg J. affirmed Sirois J.'s ruling that sections 31 and 43 of the *Medical Act* allow the practice of homeopathy by a qualified physician. Both judges, in *obiter*, dismissed the argument that article 2.03.17 of the *Code of Ethics* strictly prohibits even qualified physicians from practicing a method of treatment that has not been scientifically tested.[62] The argument was rejected, in part, because the *Code of Ethics* applies only to members of the College of Physicians, whereas the accused was a trained homeopath, but not a physician.

It would be interesting to read the response of a member of the judiciary to the argument that certain alternative healing arts will only rarely be practiced by a provincially recognized physician. Traditional Chinese medicine provides a sound basis for this kind of discussion. Unfortunately, neither the Quebec College of Physicians nor Quebec case reporters carry decisions with respect to this issue. The reason for this lacuna seems to be that practitioners of Chinese medicine tend to plead guilty to charges of illegal practice and pay the required fine.[63] But such practitioners

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[59] See Chisholm, *supra* note 56 at 35-36.

[60] *Lamontagne* (C.Q.), *supra* note 52.

[61] *Ibid.* at 24: "Il suffit de constater que même si selon certains témoins, aucune preuve scientifique de l'homéopathie n'a encore été faite, il n'est pas déraisonnable que des citoyens désirent y recourir....Même si la démonstration scientifique n'est pas faite, l'homéopathie s'est avérée efficace pour le traitement de certaines maladies....L'important est de constater qu'on ne peut associer les homéopathes qualifiés à des charlatans ou des guérisseurs de tout acabit à qui il serait difficile de garantir aux patients le droit constitutionnel d'y avoir accès."

[62] Sirois J., *ibid.* at 32, wrote that, "[c]haque cas est un cas d'espèce et tout médecin accusé peut toujours se défendre en présentant une preuve de la valeur scientifique de son traitement."

[63] One explanation for this practice may be that Chinese law has, over the centuries, tended to favour mediation over litigation. Traditional distrust of litigation is illustrated by the Chinese proverb: "Win your lawsuit, lose your money." Indeed, both Confucianism and Socialism reject our culture of individual rights and provide instead for solutions meant to strengthen and bring harmony to the community. See e.g., D.E.

could, if they so chose, argue that the very nature of traditional Chinese medicine discourages Western physicians from practicing the ancient healing arts as they might a more accessible form of alternative medicine, like homeopathy, which constitutes a Western pocket of resistance against scientific dogma.[64] As seen in *Lamontagne*, the right of patients[65] to be treated by a Chinese healer or non-physician would then, arguably, be constitutionally protected, since patients' health may be put at risk by a lack of licensed physicians practicing the therapy of the patients' choice.

B. *General Principles of Traditional Chinese Medicine*

An understanding of traditional Chinese medicine, however cursory, makes it clear that this is not a form of healing that can be practiced at will by any physician. According to P.Y. Ho and F.P. Lisowski,[66]

> [t]he traditional Chinese healing arts form an integral part of Chinese culture. One cannot appreciate Chinese culture fully without taking into account the basic concepts of Chinese thought which were employed to explain not only all phenomena in nature, but also all human activities.[67]

The origins of traditional Chinese medicine are attributed to three mythical emperors, Fu Hsi, She Nuy, and Huang Ti, who gathered herbs for medicinal purposes around the 30th century B.C.[68] Since then, Chinese medicine has been practiced throughout Eastern Asia and has traditionally included various methods of treatment, such as acupuncture, herbalism, and naturopathy.

Acupuncture has been used in China as a means of analgesia and anesthesia since 220-280 A.D.[69] It consists, essentially, of the insertion and manipulation of needles at more than 360 points along the body, in order to block pain and stimulate energetic pathways. To this day, schools of traditional Chinese medicine in Beijing and Shanghai teach acupuncture from texts written by the old masters of the tradition.[70] However, when discussing traditional Chinese medicine in this essay, I refer, in a more limited way, to Chinese herbalism and naturopathy alone. The reason is that acupuncture is now practiced legally in Quebec. Acupuncturists even have their own

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Christensen, "Breaking the Deadlock: Toward a Socialist-Confucianist Concept of Human Rights for China" (1992) 13 Mich. J. Int'l. L. 469; R.P. Peerenboom, "What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics" (1993) Harvard H.R.J. 29. The local Chinese community may therefore be acting in accordance with its own customs and institutions, rather than reacting against a majoritarian system. This, of course, presents an added problem to the exclusion of medical pluralism. Given our own Western-based political and judicial systems, democratic change may only come about following repeated confrontation and litigation.

[64] See *Lamontagne* (C.Q.), *supra* note 52 at 9-10.

[65] Cases concerning the illegal practice of medicine have so far been argued by practitioners, in the name of what patients may require, for the obvious reason that the practitioners are the ones prosecuted. Professor Martel, in his *Médecine douce*, *supra* note 4 at 76.6, makes the following point: "Il est probable qu'un recours pris non par un thérapeute poursuivi mais par un consommateur de soins réclamant la reconnaissance de ses droits fondamentaux serait plus efficace."

[66] P.Y. Ho & F.P. Lisowski, *Concepts of Chinese Science and Traditional Healing Arts* (Singapore: World Scientific, 1993) at 7.

[67] *Ibid.* at 7.

[68] E.L.P. Chan *et al.*, "History of Medicine and Nephrology in Asia" (1994) 14 Am. J. Nephrol. 295 at 295-297.

[69] *Ibid.* at 297.

[70] C. Larre, J. Schatz & E. Rochat de la Vallée, *Survey of Traditional Chinese Medicine*, trans. S.E. Stang (Columbia, Maryland: Traditional Acupuncture Institute, 1986) at 19.

corporation, the recently created Order of Acupuncturists of Quebec. But since many acupuncturists are of Asian extraction, they tend also to prescribe herbs and naturopathic remedies at the closing of a consultation. Since the Order of Acupuncturists has not yet ruled on herbalism or naturopathy, these practices remain illegal when carried on by someone other than a physician. These points will be discussed further in Part IV of this essay, as well as in the Conclusion.

Traditional Chinese treatment, whether by acupuncture, herbalism, nutrition, or a combination of all three, depends upon diagnostic methods that vary from those practiced by Western physicians.[71] To this day, the main diagnostic method of Chinese medicine is the taking of the pulse. In one writer's words,

> This means of diagnosis is so intricate that it required several chapters in *The Yellow Emperor's Classic*, which were elaborated and expanded by Wang Shu-ho (about 280 A.D.) into a separate treatise of 10 volumes, entirely given over to the study of the pulse....The instructions concerning the pulse contained in *The Yellow Emperor's Classic* are briefly summarized here. The pulse, it was said, consisted of 6 pulses on each wrist, each connected with a particular organ of the body, and each able to record even the minutest pathological changes taking place within the body....By means of the pulse the physician was supposed to be able to judge the site and the state of the disease, its cause and duration, whether it was chronic or acute, and whether it would result in recovery or death. When we realize that the seasons, the time of day, weather conditions, and the age of the patient were held to cause differences in the sounds of the pulse beats, we become aware of the immense difficulties confronting the Chinese physician.[72]

Treatment, which follows diagnosis, is based upon a complex and ancient way of thinking about nature and the universe. Traditional Chinese medicine is therefore rooted in philosophy and religion.[73]

The three features of Chinese Universalism are the *Tao* (the Way), the distinction between *Yin* and *Yang*, and the five elements.[74] The *Tao* was said to cause the original state of chaos to divide the world into *Yin* and *Yang*, "the female and the male, the negative and the positive elements."[75] *Yin* and *Yang*, in turn, brought forth five elements (water, fire, wood, metal, and earth), which co-exist in perfect harmony, because of the moral force of the *Tao*. And so, "Man, who was created with the universe and in its image, owed his health and hence his life to the harmony of natural forces; if this harmony was upset, the result was disease and death."[76] The cure, therefore, consists in bringing harmony back into the body and spirit of the patient, by way of herbal infusions, acupuncture and other means, such as nutrition, body temperature changes, and so on. As such, Chinese medicine may be defined as a holistic approach to health.

Traditional Chinese medicine is infinitely more complex than it might appear from my review. For the purposes of this essay, however, the above synopsis should suffice to explain that this type of medicine is an ancient form of healing firmly established in Chinese culture. Although current

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[71] Western physicians establish their diagnoses in three steps. The patient must first recount his or her symptoms. The physician then confirms these symptoms by way of a physical examination that includes an auscultation, the taking of the patient's blood pressure, an assessment of tissue health, and an evaluation of body temperature. A variety of tests are then ordered to establish or refine the diagnosis.

[72] I. Veith, "Traditional Chinese Medicine: Historical Review" in G.B. Risse, ed., *Modern China and Traditional Chinese Medicine: A Symposium Held at the University of Wisconsin, Madison* (Springfield, Ill.: Charles C. Thomas, 1973) 13 at 23.

[73] *Ibid.* at 16.

[74] *Ibid.*

[75] *Ibid.* at 17.

[76] *Ibid.*

Chinese medical textbooks may occasionally be translated into English, renditions of the old masters' works are extremely rare.[77] Besides, even in Canada, the herbs prescribed by its practitioners are native to and imported from various countries in Eastern Asia. In Montreal, they are sold at a handful of Chinese pharmacies, both within and outside Chinatown. With a few exceptions, Chinese pharmacists will not, as a rule, sell herbs without a prescription, which is usually written in Chinese.[78]

### C. *A Re-examination of* Canadian Charter *Arguments*

Polarizing cultures or methods of healing serves no constructive or cohesive purpose. It is therefore important to avoid generalizations, especially if they risk being misleading. The fact is that Western medicine and traditional Chinese medicine are not entirely distinct; in fact, they share similar empirical roots.[79] Also, certain Western treatments were inspired by Chinese medicinal herbalism.[80] It remains, however, that the philosophy underlying Chinese medicine is fundamentally distinct from what we call modern, or Western, science.

As a result, the Quebec physicians likely to practice traditional Chinese medicine are also likely to be persons of East Asian extraction, who have studied the precepts of traditional Chinese medicine abroad, or with a parent or mentor trained abroad.[81] Otherwise—in all likelihood—they would not be able to read the relevant textbooks, understand the philosophy or the culture underlying the healing arts, be familiar with Chinese pharmacology, or converse with some of the Chinese community's older members, who may be not fluent in either English or French. More importantly, they would otherwise be unable to grasp the often crucial semantic subtleties that arise from the differences between Western and Chinese practice.[82] Clearly, in light of these facts, only a handful of Quebec physicians are likely to be able to practice traditional Chinese medicine.

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[77] See P.U. Unschuld, "Traditional Chinese Medicine: Some Historical and Epistemological Reflections" (1987) 24 Soc. Sci. Med. 1023 at 1028.

[78] Packaged preparations manufactured by pharmaceutical companies in both China and the rest of Eastern Asia are sold on the shelves of such pharmacies. Magistral remedies, however, are prepared by hand at the pharmacy and require a prescription.

[79] See Unschuld, *supra* note 77.

[80] In Western emergency wards, for instance, asthma is treated with an injection of epinephrine, a hormone produced by the adrenal glands, which causes a rise in blood pressure. The Chinese have long alleviated symptoms of asthma by administering *Ma Huang*, or ephedra, an herb that stimulates the adrenal glands. Ironically, Ma Huang, which is now sold in the West as a "food supplement"—and at times as an ingredient in dietary supplements advertised as "safe" alternatives to the street drug Ecstasy, has been implicated in hundreds of reports of adverse reactions, including eight deaths in Texas in 1996 (see A.A. Skolnick, "China Is Eager to Export Its Traditional Medicine, But Some Chinese Scientists Urge More Skepticism" (1996) 276:21 Journal of the American Medical Association (J.A.M.A.) 1707 at 1708; S.L. Nightingale, "Warning Issued About Street Drugs Containing Botanical Sources of Ephedrine" (1996) 275:20 J.A.M.A. 1534). This last point illustrates the dangers of administering Chinese herbal remedies outside the knowledgeable supervision of a healer trained in traditional Chinese medicine. I discuss this further in Part V. See text accompanying notes 151-153 below.

[81] There are presently, in China alone, 25 colleges and academies of traditional Chinese medicine. See Jingfeng, *supra* note 1 at 526.

[82] See Chan, *supra* note 68 at 299: "It should be recognized...that the points of reference are very different between modern Western medicine and medical terms based on ancient Chinese medicine. 'Kidney weakness' describes somatized depression, not the Western concept of chronic renal insufficiency. Western-trained physicians in their interactions with Asian patients need to become aware of such nuances of cultural difference. [footnote omitted]"

Sirois and Greenberg JJ. held, in *Lamontagne*, that sections 31 and 43 of the *Medical Act* did not put patients' health at risk, since some 200 licensed physicians practiced homeopathy in the province.[83] By following this logic, it would be possible to argue that the absence—or even the insufficiency—of Quebec physicians practicing traditional Chinese medicine puts the patients who wish to be thus treated at risk and endangers their security, as provided for in section 7 of the *Canadian Charter*. This argument, especially when supported by the *Morgentaler* decision,[84] may be all that is needed to legalize traditional forms of medicine and ensure that their practitioners are not harassed and set up by investigators. As pointed out by Professor Martel, the argument might be even more successful if made by a patient.[85] Indeed, *Lamontagne* and the other *Canadian Charter* decisions on the subject do not reject the right of patients to the therapy of their choice, but rather the right of therapists to practice medicine without a license. At the end of the day, *Lamontagne* suggests that both Sirois and Greenberg, JJ. might have ruled differently, had there been two instead of 200 physicians practicing homeopathy in the province of Quebec. Although it is possible that these judges may have seen, in the above figure, a convenient motivation for their decisions, it provides practitioners of traditional medicine, and their patients, with a logical argument. After all, judicial rulings should not be rendered or interpreted lightly.

Freedom of conscience was given little consideration by the courts. In *Morgentaler*, Wilson J. wrote that what a person conscientiously believes, independently of any religious motivation, is also protected under the freedom of conscience section.[86] A similar point was made by the Supreme Court of Canada in *R.* v. *Big M Drug Mart Ltd.*[87] In the areas of health and alternative therapies, American case law has determined that a patient's belief in faith healing, and her refusal to undergo surgery, were matters of conscience protected by the First Amendment.[88] It is therefore difficult to understand Biron J.'s comment in *Raîche* that the Court did not see how freedom of conscience could be violated by the *Medical Act*.[89] One is equally hard-pressed to find a motivation for Sirois J.'s statement in *Lamontagne*, that the Court did not *believe* that the right to a therapist of one's choice was protected by freedom of conscience.[90] In neither of these cases did the court substantiate its ruling.

It seems rather obvious that a firmly held belief in one form of therapy over another is a matter of conscience, even when the patient does not go so far as to favour faith healing. I may, for instance, be opposed to surgery or synthetic drugs, because these methods of healing contradict my view that nature must, in all cases, run its course. I do not have to be a Jehovah's Witness to be opposed to blood transfusions. Canadian courts have traditionally required only that the plaintiff's beliefs be sincere.[91]

This last detail may provide a clue to decisions such as *Raîche* and *Lamontagne*. In the latter case, Greenberg J., of the Superior Court, noted that the evidence presented before the Quebec Court did not demonstrate a relationship between conscience, or belief, and a person's decision to

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[83] *Supra* note 52.

[84] *Supra* note 48.

[85] See *Médecine douce* , *supra* note 5.

[86] *Supra* note 48 at 178.

[87] [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 32. See also I. Cotler, "Freedom of Conscience and Religion" in Hon. G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) 165 at 172-76.

[88] *Lewis* v. *Califano*, 616 F.2d 73 (3d Cir. 1980). See also P. Macklem, "Freedom of Conscience and Religion in Canada" (1984) 42 U.T. Fac. L. Rev. 50 at 72.

[89] See *supra* note 47 at 1503.

[90] *Lamontagne* (C.Q.), *supra* note 52 at 39.

[91] See Cotler, *supra* note 87 at 175.

consult a homeopath.[92] The fact is that, where freedom of conscience is concerned, the sincerity of a person's beliefs is evaluated on a case-by-case basis.[93] Thus, it may be preferable to have a patient challenge the constitutionality of sections 31 and 43 of the *Medical Act* on the grounds that these provisions restrict his or her access to the traditional Chinese practitioners. The problem, of course, is that many alternative practitioners function underground, so that patients may resort to them despite the illegality of their practice. However, the patient of a practitioner who was set up by an investigator, charged and fined, served with an order to cease practicing medicine, or even jailed for persisting in his or her illegal practice,[94] may wish to launch an action declaring that access to the physician of his or her choice has been restricted or denied by such measures. The patient who is reluctant to do so because of the cost of litigation, may change his or her mind if the practitioner is willing to subsidize the action. There are many hypotheticals here, of course, yet past cases have shown that lawsuits are often stranger than fiction. In the case of traditional Chinese medicine, specifically, strong arguments can be put forth to the effect that the realities of Chinese medicine, outlined above, prevent a reasonable number of licensed physicians from being versed in the ancient healing arts, thus depriving sincerely needful patients of the therapies of their choice.

Arguments concerning freedom of conscience are especially appropriate when the needed therapies are rooted in the tradition of other cultures. Indeed, section 27 of the *Canadian Charter* provides that the *Canadian Charter* "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." This provision has been a source of scholarly frustration, mostly because of its interpretive nature;[95] yet, it has proven useful when appended to section 2 of the *Canadian Charter*. In the next part of this essay, I discuss the content and possible uses of section 27. I also look more generally into the concept of multiculturalism. My discussion of these issues will end with an inquiry into the reasons why medical pluralism, when rooted in culture, might be opposed.

## IV. THE USES OF CANADIAN MULTICULTURALISM

### A. *The Content of Section 27 of the* Canadian Charter

In 1982, Professor Hogg dismissed section 27 of the *Canadian Charter* as a "rhetorical flourish."[96] Rhetoric, however, plays a large part in human rights advocacy, and section 27 of the *Canadian Charter* was modelled after article 27 of the *International Covenant on Civil and*

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[92] *Lamontagne* (C.S.), *supra* note 52 at 20.

[93] Cotler, *supra* note 87 at 175.

[94] Besides the fine provided in s. 188 of the *Professional Code*, practitioners acting illegally may be subject to an injunction or to imprisonment. See *Médecine douce*, *supra* note 5 at 14.

[95] See G.L. Gall, "Multiculturalism and the Fundamental Freedoms: Section 27 and Section 2" in Canadian Human Rights Foundation, ed., *Multiculturalism and the Charter: A Legal Perspective* (Toronto: Carswell, 1987) 29; D. Bottos, "Multiculturalism: Section 27's Application in Charter Cases Thus Far" (1988) 26 Alta. L. Rev. 621; J.E. Magnet, "Multiculturalism and Collective Rights: Approaches to Section 27" in Hon. G.-A. Beaudoin & E. Ratushny, eds., *supra* note 87 at 739; D. Gibson, "Section 27 of the Charter: More Than a 'Rhetorical Flourish'" (1990) 28 Alta L. Rev. 589.

[96] P.W. Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at 72. Professor Hogg's opinion does not seem to have changed, since in his *Constitutional Law*, *supra* note 3 at 40-11, only a passing mention of s. 27 is made, in the larger framework of a discussion of s. 2(b) of the *Canadian Charter*.

*Political Rights*,[97] an instrument ratified by Canada in 1976, which embodies the world community's commitment to human rights.[98] Professor Hogg is not entirely alone in his skepticism; one author has described section 27 as a mere "declaratory provision."[99] As well, the legislative history of this section suggests that it may have been something of an afterthought. [100] Generally, however, despite the fact that section 27 has been named an "adjectival section"[101] and an interpretive addition to the *Canadian Charter*,[102] the academic community has found this provision to show substantive promise.[103]

The Courts and counsel have not hesitated to put this provision to use in support of substantive sections of the *Canadian Charter*. More precisely, the Supreme Court of Canada, in *R.* v. *Big M Drug Mart Ltd.*,[104] invoked section 27 to bolster its ruling that the religiously motivated Sunday closing requirements of a federal statute contravened the freedom of religion of those whose creed required an alternative day of rest. Section 27 was applied, because the persons affected would most likely not belong to a Christian denomination and would therefore be in a minority in Canada. In *Edwards Books and Art Ltd.* v. *R.*,[105] however, the Supreme Court reversed an Ontario Court of Appeal decision in which similar arguments had been made. In this case, the impugned provincial statute was enacted for social rather than religious reasons. The effect of the statute was still to inflict hardship on minorities. The Court's decision was motivated, *inter alia*, by the fact that it

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[97] 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171 (entered into force 23 March 1976) [hereinafter *ICCPR*]: "In 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."

[98] See Magnet, *supra* note 96 at 745-751 for a discussion of the genesis of art. 27 of the *ICCPR*. The first case to be decided under art. 27 was, interestingly enough, the Canadian case of *Lovelace* v. *Canada*, [1983] Can Hum. Rts. Y.B. 305 (U.N. Hum. Rts. Ctee.), in which the Human Rights Committee upheld the claim of a native woman who, by reason of her marriage to a non-native, had lost her right to live on a reservation.

[99] Bottos, *supra* note 95 at 633.

[100] See Magnet, *supra* note 95 at 742-745. As early (or as late) as the 1960s, representatives of Canada's ethnic communities lobbied the government, including the Royal Commission on Bilingualism and Biculturalism, for increased recognition. As a result, the Commission, in its 1969 *Report*, recommended a confederation based on the equal partnership of the two founding races, taking into account the contributions of other ethnic groups (Canada, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: 1969) Vol. IV). This recommendation was implemented in the Canadian Government's multiculturalism policy of 1971, which embraced a wide spectrum of ideals, ranging from the promotion of cultural autonomy to the facilitation of assimilation. The Draft Constitution of October 1980, however, contained no reference to ethnic communities or to multicultural ideals. Ethnic community representatives applied renewed pressure on the government for inclusion. In the words of J.E. Magnet, *ibid.* at 745: "Almost one quarter of the more than 100 witnesses before the Hayes-Joyal Committee made submissions on the multicultural issue embracing such themes as non-discrimination, equality, cultural autonomy, cultural perpetuation, pluralism, heritage language rights and educational autonomy." Consequently, in 1981, the Minister of Justice suggested to the Hayes-Joyal Committee an amendment to the Draft Constitution. The proposed amendment was identical to the current formulation of s. 27.

[101] Gall, *supra* note 95 at 35-38.

[102] Gibson, *supra* note 95 at 592.

[103] Professor Gall argues, for instance, that s. 27 may acquire substantive content whenever Parliament or a provincial Legislature uses s. 33 of the *Canadian Charter* to opt out of s. 2 or ss. 7-15: *supra* note 95 at 37-38. Thus, cultural rights would always be protected.

[104] *Supra* note 87.

[105] [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1, rev'g in part (*sub nom. R.* v. *Videoflicks*) (1984), 48 O.R. (2d) 395, 14 D.L.R. (4th) 10 (Ont. C.A.).

contained provisions that allowed smaller stores to remain open on Sunday, upon certain additional conditions being met. Section 27 was nonetheless mentioned, by various members of the bench, as being useful in supporting freedom of religion.

Although it has not yet been used for this purpose, section 27 might naturally be just as helpful in cases involving a secular version of freedom of conscience.[106] After all, as Professor Cotler writes, section 27 itself "transcends the sphere of traditional theistic beliefs."[107]

The Courts in the above cases appended their section 27 analysis to the general discussion of freedom of religion. In *R.* v. *Keegstra*,[108] however, the Supreme Court of Canada suggested that sections 15[109] and 27 could, in the case of a violation of free speech under section 2(b) of the *Canadian Charter*, be discussed during the section 1[110] analysis. Doctrinal writers followed suit, submitting that section 27 may be used in conjunction with section 2, section 1,[111] or both.[112]

How would section 27 be applied in a case of illegally practiced medicine, when the form of treatment or diagnosis is rooted in another culture? To summarize my conclusions in Part II of this essay, the practitioner charged with illegality—or, better yet, the patient whose therapist was thus charged—could challenge the constitutionality of sections 31 and 43 of the *Medical Act*, on the grounds that these provisions deprive patients of the therapies of their choice. Counsel would then invoke freedom of conscience and argue that a belief in the consequences of certain forms of treatment is a matter of conscience and is thus constitutionally protected. In a case involving traditional Chinese herbalism or naturopathy, counsel could then submit that the protected belief in a form of natural healing, rooted in tradition, must be interpreted "in a manner consistent with the preservation and enhancement"[113] of the East Asian community's cultural heritage.

Two problems would arise from such an argument. One has to do with the fact that courts might still choose to uphold the violations of sections 7 and 2(a) of the *Canadian Charter* under section 1, on the grounds that traditional Chinese medicine is currently not supervised by a professional corporation and might therefore leave the public without protection. This matter will be discussed in greater detail in Part IV of this essay.

The other problem concerns the meaning and consequences of multiculturalism. Although section 27 attaches to section 2(a) of the *Canadian Charter* in this context and centres mainly around arguments concerning freedom of conscience, the courts may still want to inquire into the content of multiculturalism generally, in order to decide whether science, health, and the practice of medicine form part of what constitutes culture and cultural heritage. A discussion of what multiculturalism entails is therefore paramount in finding answers to these questions.

### B. *Does Multiculturalism Have a Fixed Meaning?*

Authors have argued that the term "multiculturalism" is imprecise, as it fails to distinguish

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[105] See Gibson, *supra* note 95 at 594.

[107] Cotler, *supra* note 87 at 174.

[108] [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193.

[109] S. 15 of the *Canadian Charter* targets government action of a discriminatory nature.

[110] S. 1 of the *Canadian Charter* reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[111] Magnet, *supra* note 95 at 601.

[112] See Bottos, *supra* note 95 at 633.

[113] *Canadian Charter*, s. 27.

between multinationalism and polyethnicity.[114] The aim and content of section 27 of the *Canadian Charter* is consequently uncertain. The concept of "culture," in particular, poses problems, because it encompasses so much. To J. Burnet,

> culture, including language, can only be maintained and developed when it is fully employed in all areas of life. So far as this is so, it cannot have been the intention of the framers of the policy to promote multiculturalism; that there was to be a bilingual—English and French—framework makes this evident. Rather, the policy makers wished to endorse polyethnicity.[115]

Although I agree in part with Burnet's point, I continue throughout this essay to use the term "multiculturalism" to describe what is, in fact, a state of polyethnicity. Unfortunately, the *Canadian Multiculturalism Act*, enacted in 1988 to recognize and support the multicultural character of the country, fails to define the notion of multiculturalism. Section 3 of the *Act* reveals a patchwork of political aims that run the gamut from the assurance that Canadian institutions are respectful and inclusive of diversity (section 3(1)(f)) to the promotion of "policies, programs and practices that enhance the understanding of and respect for the diversity of the members of Canadian society" (section 3(2)(c)). Specific policies or programmes are left open.

Critics of multiculturalism abound.[116] Some view the concept as an assimilationist tool and complain that it only helps immigrants adjust to Canadian life.[117] Others feel that the policy lays too much stress on symbolic forms of ethnicity and focuses on "food, clothes, dance, and music" to the detriment of political issues, such as the social and economic disadvantage under which many immigrants live.[118] Members of ethnic minorities worry that a strong multicultural policy will only succeed in ghettoizing immigrants, while stressing their differences, as they try to thrive or survive amidst what might be perceived as a hostile majority.[119]

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[114] See especially W. Kymlicka, "Liberalism and the Politicization of Ethnicity" (1991) 4 Can. J. Law & Jur. 239 at 240-41: "In multination states, the component nations are inclined to demand some form of political autonomy or territorial jurisdiction so as to ensure the free development of their culture. At the extreme, nations may wish to secede, if they think their self-determination is impossible within the larger state. In polyethnic states, ethnic groups demand the right to freely express their particularity (e.g., in private ethnic associations and presses), without it hampering their success in the economic and political institutions of the dominant culture, and are inclined to demand state support for these actions (e.g., cultural exchanges and festivals, ethnic studies in schools, bilingual education). [footnote omitted]"

[115] J. Burnet, "Multiculturalism, Immigration, and Racism: A Comment on the Canadian Immigration and Population Study" (1975) 7 Can. Ethnic Studies 35 at 36.

[116] See, *inter alia*, Y. Abu-Laban & D. Stasiulis, "Ethnic Pluralism Under Siege: Popular and Partisan Opposition to Multiculturalism" (1992) 18 Can. Pub. Pol. 365.

[117] *Ibid.* at 368. Not that this is, in itself, a bad thing. The argument is, rather, that multiculturalism, as it stands, does nothing for the immigrants' sense of pride in their roots and identity.

[118] K. Moodley, "Canadian Multiculturalism as Ideology" (1983) 6 Ethnic & Racial Stud. 320 at 326.

[119] See Abu-Laban, *supra* note 117 at 377-78. See also N. Bissoondath, *Selling Illusions: The Cult of Multiculturalism in Canada* (Toronto: Penguin Books Canada, 1994) at 85. Bissoondath illustrates the point in a thought-provoking passage about the way the Chinese are perceived in Canada:

> We are proud of our Chinatowns. We show them off to visitors. It is a sign of how far we have come. Once victims of xenophobia, prey to the discriminatory head-tax, the Chinese, whether of Hong Kong, Taiwan or the People's Republic of China, now find Canada, officially at least, a welcoming place. We even have a special program to lure them (or at least their money) here.
>
> But there are problems still, resentments that arise towards any burgeoning group of immigrants, visible or invisible. Some blame the Chinese for the cost of housing in Vancouver; some resent their successes in school, the fashionable clothes, the costly cars.
>
> It was all so controllable before. The Chinese were seen as a silent, hard-working, dispassionate

Several reasons have been given for the current mistrust of multiculturalism,[120] but beyond those reasons, what strikes the reader most is the general absence of agreement concerning the actual content of multiculturalism. Philosopher Charles Taylor gives the concept a broad definition: multiculturalism consists, generally, in the political incarnation of minorities' legitimate need for recognition.[121] Details as to what that recognition might entail are, however, lacking.

But answers may be found among the proponents of the notion. To some, the very existence of a policy of multiculturalism in Canada has had the effect of responding to the "symbolic/cultural needs" of various groups.[122] This would seem to conform to Burnet's view of polyethnicity. The ethnic individual, according to Joseph Magnet,

> completes a significant aspect of personality—forms a self—by voluntary identification with an ethnic group. This process is here termed "symbolic ethnicity." Symbolic ethnicity is a psychological idea which conceives of "cultural heritage" as a voluntary identification of the self with the traditions and history of a particular group. The link completes the ethnic individual's identity in the sense that it allows that individual to form a self—to experience his being from the attitudes and reflexes of his ethnic community.[123]

According to this vision, the promotion of differences in "food, clothes, dance, and music" would, in itself, have a positive effect on the psyches of minority members. Symbolic ethnicity would then be one of the "mediating principles" according to which section 27 of the *Canadian Charter* could be understood.[124]

Another such mediating principle would be that of "structural ethnicity," defined as the more controversial "capacity of a collectivity to perpetuate itself, control leakage, resist assimilation and propagate its beliefs and practices."[125] To quote Magnet again, structural ethnicity requires the creation of "an institutional infrastructure which can nurture the well-being of the group and maintain the group's sense of self-justification."[126] As such, "[s]tructural ethnicity is significantly more difficult to 'preserve and enhance' than symbolic ethnicity because the autonomy and power required to support, operate and expand the minority's institutional structure brings the minority into direct conflict with other groups."[127] Magnet strongly suggests that the creation of such

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> people. They kept mostly to themselves, procreating rather spectacularly, living in tiny, dark rooms, playing mah-jong, gambling in "dens." Now, though, they are going beyond their traditional enclaves, are even unblanding the Toronto suburb of Scarborough with a new Chinatown. And this is profoundly unsettling to those who would rather have their multicultural exoticism safely caged, costumed and staged.

[120] Will Kymlicka attributes this mistrust to three factors, which he lists as: the rather unbending liberal tradition; the abuse of minority treaties by German minorities in Czechoslovakia and Poland on the eve of World War II; and racial desegregation in the United States: *supra* note 114 at 243-47. Yasmeen Abu-Laban and Daiva Stasiulus find reasons for this "assault on multiculturalism" in the increased talk of "national unity" in Canadian politics. If the end goal is unity, diversity will automatically be demonized as the root of disunity: *supra* note 116 at 378-79. This argument, however, fails to take into account the fact that it may be possible to achieve what the Trudeau government of the 1960s and 1970s had labelled "unity in diversity." In the end, the cause of disunity may well be a lack of political will to unity rather than the existence of diversity.

[121] C. Taylor, "The Politics of Recognition" in D.T. Goldberg, ed., *Multiculturalism: A Critical Reader* (Oxford: Blackwell, 1994) 25.

[122] Abu-Laban, *supra* note 116 at 369.

[123] Magnet, *supra* note 95 at 758.

[124] *Ibid.* at 756-59.

[125] *Ibid.* at 759.

[126] *Ibid.*

[127] *Ibid.*

institutional infrastructures would go a long way toward achieving native self-government.

In Part IV of this essay, as well as in my Conclusion, I argue that Magnet's thesis also provides a broad blueprint for the inclusion of traditional forms of medicine into a majoritarian health system. I submit, as well, that Magnet's fear that structural ethnicity might pit one group against another is, in the case of alternative traditional medicine, unfounded.

A final concern arises with Quebec's traditional resistance to multiculturalist policies. There have always been fears, in Quebec, that multiculturalism would succeed in reducing local nationhood claims to the status of yet another minority complaint.[128] Thus, "interculturalism" was conceived as a way of conciliating francophone aspirations and local pluralist realities.[129] Again, the content of interculturalism is unclear; although it certainly betrays an unwillingness on the part of the provincial government to encourage the formation of neatly defined ethnic enclaves within its territory. The alternative, amorphous as it may be, consists of fostering a climate of exchange and understanding among a majoritarian society and its resident minorities.[130] Interculturalism could, more negatively, be perceived as an integrationist policy that weakens ethnic identity, were it not for the fact that the majoritarian group would, in an intercultural climate, also benefit from (and be weakened by) contact with minorities.[131]

### C. *Conclusion*

The content of multiculturalism is, therefore, uncertain and at times ambiguous. While some argue that it is concerned only with matters of identity and psychological well-being, others would grant it greater political force. It is, therefore, conceivable that in analysing the impact of section 27 on freedom of conscience, the judiciary might accept arguments supporting institutional infrastructures, the aim of which would be to grant autonomy and power to minority groups. The Supreme Court of Canada has so far conceded no such thing and has been content with endorsing alternative days of worship for Christian minorities and non-Christians alike. Thus, section 27 has been appended, in the most fundamental way possible, to freedom of religion. The debate concerning the place of minorities within Canada has just begun, however, and section 27 may yet be applied in divergent or more radical ways.

Questions arise as to the application of the *Canadian Charter* to Quebec policy. Would the courts defer to provincial intercultural objectives or abide by federalist policies? Also, would an action taken under the *Quebec Charter* result in a different outcome than one taken under the *Canadian Charter*? These questions, although they are somewhat beyond the scope of this essay, merit consideration.

It is, at any rate, my opinion that Quebec's intercultural preferences may actually favour the

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[128] See Abu-Laban, *supra* note 116 at 367: "The assumption inherent in multiculturalism that 'we are all immigrants' has...less resonance in Quebec where the emphasis is on the history of French settlement since the 17th century, and there exists a strong sense among the Quebecois of their own territory, controlled by their own government, and characterized by a separate language, culture and legal tradition. [cite omitted]"

[129] *Ibid.* at 368.

[130] See J. Grey, "Bridging Solitudes" *The [Montreal] Gazette* (16 November 1995) B3.

[131] On this note, s. 43 of the *Quebec Charter* provides that: "[p]ersons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group." This provision forms part of the *Quebec Charter*'s Chapter IV, on economic and social rights. It has yet to be litigated, although it was based, like s. 27 of the *Canadian Charter*, on art. 27 of the *ICCPR*. Whether the absence of litigation invoking s. 43 is a reflection or a result of Quebec's intercultural tendencies remains to be seen. See Commission des droits de la personne du Québec, *Texte annoté de la Charte des droits et libertés de la personne du Québec*, Y. Deschênes, ed., 2d ed. (Montreal: SOQUIJ, 1989).

legalization of therapies rooted in minoritarian cultures. Given the interest of Quebeckers in alternative forms of healing,[132] members of the majority only stand to profit from the inclusion of such methods into their health system. Often, a visit to a regular physician proves frustrating, as patients leave the doctor's office after a five-minute consultation, during which they had no time to discuss issues of concern to them, such as sleeping habits, nutrition, stress, anxiety, grief, or prevention. Many leave with a mere prescription that may well relieve pain or even cure an infection, but which often does nothing to attack the root of the problem. Traditional Chinese practitioners, because they aim to reestablish balance within the patient, tend to deal with illness in a more comprehensive way, often investigating what may seem like issues that are peripheral to the illness or condition itself. Thus, questions will be asked about a person's diet, the source of his or her stress, and so on. In fact, the entire health care system in Quebec could benefit from the integration of Chinese medical practice, as it would unclutter the current system. Both types of physicians would have more time to devote to their patients and patients would have a real choice of therapies and physicians.

In the next part of this essay, I look, more specifically, at the second problem raised by the *Canadian Charter* arguments outlined above, and thus attempt to deconstruct the fear and misconceptions that surround differing norms and lead to their exclusion.

## V. WHO'S AFRAID OF TRADITIONAL CHINESE MEDICINE?

As touched upon briefly in Part III, one of the problems with arguing that section 27 may be used to interpret the right of patients to the method of treatment of their choice is that the legal norms on the subject create a kind of fortress mentality, according to which salvation (or public protection) can be ensured only by adhering to the *status quo*. It is, therefore, conceivable that courts will, in the name of public protection, end up upholding a violation of freedom of conscience under section 1 of the *Canadian Charter*. In *Hothi* v. *R*,[133] for instance, a Sikh was prohibited from wearing his Kirpan (a short knife that must be worn for religious reasons) in a courtroom. Although it was held that this prohibition violated religious freedom, the Court held that the prohibition constituted a reasonable limit under section 1, for the Kirpan, while being worn for a symbolic purpose, remains a dangerous weapon.

Similarly, a court might find that a violation of a patient's sincere belief in the ethics and benefits of traditional Chinese medicine can be upheld under section 1 of the *Canadian Charter*, on the grounds that this form of healing, because it is not supervised by a professional corporation, may be harmful to the public. Such finding is conceivable, because the *Medical Act* must be interpreted in light of the *Professional Code*, which lists as its sole object the protection of the public.

There is, however, no rule prohibiting the creation of new professional corporations. In the 1970s, the College of Physicians became unable to suppress the widespread use of, and demand for, acupuncture in Quebec. In 1977, acupuncture was added to the *Medical Act*, as an exception to the rule that only physicians may carry on certain medical procedures.[134] In 1994, *An Act respecting Acupuncture*[135] was enacted, creating the Professional Order of Acupuncturists of Quebec, which became operative on 1 July 1995. The *Acupuncture Act* defines "acupuncture" as well as the legal and illegal practices thereof. It also amends the *Medical Act*, so that section 40.1

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[132] See text accompanying notes 56-59.

[133] [1985] 3 W.W.R. 256, 18 C.C.C. (3d) 31 (Man. Q.B.), aff'd 35 Man. R. 159 (Man. C.A.).

[134] *Medical Act*, s. 43(e) (subparagraph repealed).

[135] S.Q. 1994, c.37 [hereinafter *Acupuncture Act*].

of the latter now excludes physicians from the practice of acupuncture. The College of Physicians, however, remains responsible for the adoption and implementation of regulations concerning the training of acupuncturists.[136]

In China, however, acupuncture is not divorced from herbalism and naturopathy. The three methods of treatment are interconnected, just as surgery, in conventional Western medicine, might be recommended to a patient along with chemotherapy and therapeutic counselling. Furthermore, Quebec students, under the *Acupuncture Act*, receive training in "acupuncture techniques."[137] Under this scheme, acupuncture is no longer described as an ancient healing art, as it is in China, but as a "technique." It may well be that in the area of health, the price of inclusion, or of interculturalism, is that culture and technique are seen as severable. The outcome of this is that the Quebec Legislature has managed, much like a surgeon, to excise some of what was once vital to traditional Chinese medicine. Chinese medicine has been cut and divided several times, until all that remains are "acupuncture techniques." The rest has been deemed superfluous to a majoritarian society, or even illegal.

The medical establishment has reacted in a similar manner. In their "Cultural Issues in Critical Care: A Chinese Case Study,"[138] K. Bowman and R. Lee present the rather telling case study of Mr. L., a 64 year-old man from Hong Kong, who was comatose upon admission to the medical-surgical intensive care unit of a Toronto teaching hospital. Prognosis was poor and, after 48 hours, Mr. L. was declared to be in a "persistent vegetative state." The attending physicians recommended to the family that the patient be gradually weaned from the ventilator. According to the authors,

> [t]he family requested permission to try a traditional Chinese procedure. The health-care team respected the family's wishes. The physicians asked that the procedure would neither be invasive nor involve oral intake.
> The procedure requested was *Chi-Kung*, which is an ancient Chinese treatment based on Taoist principles; "*Chi*" literally translates into "air," which is the vital energy in the human body... "*Kung*" literally translates into "work." *Chi-Kung* works on the movement of *Chi* by applying external energy to attain the *Yin-Yang* balance.[139]

The procedure, which consisted in part of topical applications of metal pieces on strategic meridian sites, was briefly successful. Mr. L. opened his eyes and spoke to those around him. Within the last six days of treatment, his condition had improved considerably. Three days later, however, Mr.

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[136] Collège des médecins du Québec, "Le premier Bureau de l'Ordre des acupuncteurs du Québec" (1995) 35:1 Le Collège 15.

[137] S. 28 of the *Acupuncture Act* provides that: "[t]o obtain a permit for the practice of acupuncture,
(1) the diploma of college studies awarded by the Collège de Rosemont in "acupuncture techniques" is recognized as valid if awarded before the date of the coming into force of a regulation of the Government made pursuant to the first paragraph of section 184 of the Professional Code...and whose object is to make an initial determination of diplomas which give access to a permit issued by the Order;
(2) a diploma in acupuncture awarded outside Québec is recognized as equivalent if awarded by an institution affiliated with a university or recognized as an educational institution by the government authorities of the country in which the institution is located, provided that the training of the holder of the diploma is considered to be equivalent by the Bureau before the date of the coming into force of the first regulation made by the Bureau pursuant to paragraph *c* of section 93 of the Professional Code the object of which is to fix standards of equivalence of diplomas."

[138] *Supra* note 7.

[139] *Ibid.* at 339.

L. passed away.[140]

In commenting the case, Bowman and Lee endorse what was referred to in Part III of this essay as "symbolic ethnicity." "From a Western scientific perspective," the authors write,

> the clinical assessment of such interventions can be difficult. The first step is to learn what the treatment entails. Some interventions seem to be therapeutic, for example, *Tai-Chi* involves breathing exercises and gentle physical movement that is beneficial for most people. Such therapeutic practices should be encouraged....
> If the therapeutic value of the intervention does not interfere with the treatment regimen, then such practices should be supported. It gives emotional and psychological benefits to the family, and it enhances trust and respect. Interventions are generally considered benign if the therapeutic benefits are not obvious and are non-invasive, for example, the display of religious icons, and the reciting of religious verses.[141]

Detrimental forms of intervention are described as "invasive procedures that could conflict with the ongoing treatment regimen, for example, the ingestion of herbal remedies with medicinal properties similar to those of the patient's pharmacological therapy."[142]

Thus, the medical establishment "cuts off" therapies rooted in culture in much the same way as the legal establishment does. Procedures are divided into those that are benign and therefore acceptable and those that are not. Medical authorities, however, use an interesting metaphor: unacceptable procedures are labelled "invasive."[143] Considering that Western institutions have virtually succeeded in dismantling the ancient wholeness of traditional Chinese medicine within their territory, the use of this metaphor is revealing. In the realm of psychoanalysis, the attribution of one's own motives to another is called a projection and reveals a certain amount of anxiety about the unacceptability of one's behaviour.[144]

Discrimination against that which is different or foreign is often rooted in fear and misunderstanding. Today, Asian immigration to Canada is a major and unavoidable fact of Canadian life,[145] yet it was already significant in the 19th century. Many Chinese subjects fled their feudal homeland to attain better living conditions in Canada and the United States. A large proportion of Chinese immigrants to Canada settled in the West Coast, particularly in Vancouver, and were employed by the Dominion government and the Canadian Pacific Railway Company. Chinese labour was considered cheap and those who were then described simply as "Chinamen" were willing to work hard. Consequently, resentment built up among the Anglo-Saxon population. The Chinese were accused of creating unfair competition and riots ensued. In time, the Chinese were driven out of worker camps and segregated into what later became Chinatown. They were also, for a time, disenfranchised.[146]

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[140] *Ibid.*

[141] *Ibid.* at 340.

[142] *Ibid.*

[143] See e.g., *ibid.*

[144] Curiously, apocalyptic and war metaphors abound in medical jargon. Cancer patients are encouraged to look upon their white cells as small bands of guerrillas attacking the enemy. AIDS has been described as a new millennial "plague." See S. Sontag, *AIDS and Its Metaphors* (New York: Farrar, Straus and Giroux, 1989).

[145] See D. Lam, "Pulling Together: Canada's Chinese Celebrate the Promise of a Better Life" *Maclean's* (30 January 1995) 28; C. Wood, "Gambling on Growth," *ibid.* at 36.

[146] See K.J. Anderson, "Community Formation in Official Context: Residential Segregation and the 'Chinese' in Early Vancouver" (1988) 32 Can. Geographer 354. See also B. Ryder, "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909"

As one author puts it, overcrowding in the Chinatown area "caused unhealthy living conditions which offended non-Chinese sensibilities."[147] Thus, by 1890, the Chinese became associated with unsanitariness. In an 1897 report to the B.C. Board of Health, Sanitary Inspector Clive Phillipps-Wolley wrote the following: "[I]n British Columbia I have found Chinamen living like sewer rats, a grave danger to white men's health."[148]

How many of these discriminatory clichés have seeped into today's institutional distrust of traditional-Chinese medicine is hard to tell. To be fair, the legal and medical establishments are wary of *anything*—Chinese or otherwise—that fails to conform to what is referred to in the *Code of Ethics* as "current medical science." Conventional Western medicine, however, sometimes borrows from Chinese pharmacology. Prestigious Western medical periodicals often contain articles describing the beneficial effects of Chinese herbs, or of a combination of herbs and acupuncture, in a number of medical conditions.[149] This, in itself, is laudable, for as Professor Harding suggests in her essay, "Is Science Multicultural?":

> Some knowledge traditions that were appropriated and fully integrated into modern sciences are not acknowledged at all....The magnetic needle, rudder, gunpowder, and many other technologies useful to Europeans and the advancement of their sciences (were these not part of scientific instrumentation?) were borrowed from China. Knowledge of local geographies, geologies, animals, plants, classification schemes, medicines, pharmacologies, agriculture, navigational techniques, and local cultures that formed significant parts of European sciences' picture of nature were provided in part by the knowledge traditions of non-Europeans....
> Thus modern science already is multicultural, at least in the sense that elements of the knowledge traditions of many different non-European cultures have been incorporated into it."[150]

It would, however, be dangerous to essentialize Chinese medicine by portraying it as a harmless and always benevolent science. Herbal remedies in general must be administered with extreme prudence, since few have been subjected to rigorous testing.[151] Native Chinese herbs in particular may cause allergic reactions in patients exposed to them repeatedly. Knowledgeable

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(1991) 29 Osgoode Hall L.J. 619; V. Lee, "The Laws of Gold Mountain: A Sampling of Early Canadian Laws and Cases That Affected People of Chinese Ancestry" (1992) 21 Man. L.J. 301.

[147] L. Ford, "Out of Sight, Out of Mind: Sixty-Five Years of Leper Colonies in British Columbia" (1990) 48 Advocate 65 at 66.

[148] Quoted in *ibid.*

[149] See, *inter alia*, Y. Latchman *et al.*, "The Efficacy of Traditional Chinese Herbal Therapy in Atopic Eczema" (1994) 104 Int. Arch. Allergy Immunol. 222; M.P. Sheehan *et al.*, "Efficacy of Traditional Chinese Herbal Therapy in Adult Atopic Dermatitis" (1992) 340 Lancet 13.

[150] S. Harding, "Is Science Multicultural? Challenges, Resources, Opportunities, Uncertainties" in D.T. Goldberg, *Multiculturalism: A Critical Reader* (Oxford: Blackwell, 1994) 344 at 347-348.

[151] It is, however, known that certain commonly used herbs have toxic or undesirable effects. Comfrey tea, which is administered by herbalists as a natural remedy against ulcers, contains a constituent alkaloid that has been linked to liver cancer. Chamomile, described as a "gentle relaxant" may induce anaphylactic shock in a small percentage of the population. The fact that something is "natural" does not necessarily make it safe. Poison ivy, after all, is "natural." See P. Harridan, "Herbal Remedies" (April 1984) Protect Yourself 11; "Médicaments à base de plantes—Quelle sécurité? Quelle efficacité?" (1986) 3 Bulletin thérapeutique 101.

In Quebec, a new research group, the Société nord-américaine d'ethnopharmacologie, has been founded to gather, classify and submit to clinical testing all of the province's medicinal plants. A sub-group within the Société has been appointed to establish a dialogue with Quebec's aboriginal communities in order to better understand their traditional forms of healing. See M.-N. Marie, "Les plantes médicinales du Québec scrutées à la loupe" (1995) 16 Actualité médicale 14.

supervision is of the essence. Furthermore, dosages may be problematic.[152] Some authors also denounce the selling of herbal remedies to vulnerable and credulous persons; that herbal medicine is also a business should not be forgotten.[153]

This is not to say, however, that Western medicine is a perfect alternative. Ironically, dissatisfaction with Western medicine is, in large part, what drives many Canadians to consult alternative therapists.[154] Pharmaceutical companies hold tremendous power over medical institutions in North America and manufactured drugs are rarely without side effects, some of them dangerous. One only has to pore over a compendium of pharmaceutical products to realize, for instance, that certain ASA (acetylsalicylic acid) analgesics may induce asthma attacks in patients who are prone to allergic reactions.[155] There have also been many reports in the past of unnecessary surgical procedures being carried out by physicians. As for incompetence, it exists in all professions.

Finally, the "battle" between marginal and institutional healing, if there is one, is not being carried out only in terms of Western *versus* alternative or "culturally-based" medicine. Indeed, professions have traditionally carved out their respective territories by excluding those who refuse to play by the rules and conform to a body of knowledge or dogma. Mavericks, in turn, have always tried to pit themselves against monolithic institutions. It would be beyond the scope of this essay to review the history of the Western medical profession.[156] Generally, however, while the protection of the public is presently the sole official goal of a professional corporation,[157] the creation of hierarchies and the ruling out of competition have, traditionally, motivated the creation of such corporations in the West.[158]

China, on the other hand, was for a long time a semi-colonial country. As pointed out by one author,

> [a]s the aggressiveness of imperialist powers increased through the nineteenth century, especially after the Opium War, the progress of introducing Western medicine changed gradually from one of pure academic exchange to one in which medicine was used as a tool for aggression.[159]

The result was that Western medicine became, along with international trade, firmly implanted in Chinese urban centres. Traditional medicine was thus relegated to the countryside. In 1949, however, the Chinese Communist Party came to power and China witnessed a revival of traditional medicine. The country now accommodates the two streams of medicine. Western-style physicians are encouraged to learn about the traditional healing arts and vice versa.[160] The two streams are complementary and are used as such. Traditional Chinese medicine, for instance, is used to alleviate the symptoms of synthetic chemotherapy.[161] Conditions that do not warrant a visit to a

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[152] See P. Dickens *et al.*, "Fatal Accidental Aconitine Poisoning Following Ingestion of Chinese Herbal Medicine: A Report of Two Cases" (1994) 67 Forensic Sci. Int'l. 55.

[153] See Harridan, *supra* note 151.

[154] See Chisholm, *supra* note 56.

[155] See *Compendium des produits et spécialités pharmaceutiques* (Ottawa, Association pharmaceutique canadienne, 1995).

[156] For a detailed discussion of the history of the professions in Great Britain, for instance, see A.M. Carr-Saunders & P.A. Wilson, *The Professions* (London: Frank Cass & Co., 1964).

[157] See text accompanying notes 22-23 above.

[158] Carr-Saunders, *supra* note 156.

[159] Jingfeng, *supra* note 1 at 523.

[160] *Ibid.* at 525-26.

[161] *Ibid.* at 527.

hospital may also be soothed or cured by herbal remedies or by acupuncture. Furthermore,

> Western medicine is not in a position to help many sorts of disease. Yet traditional Chinese medicine is capable of curing or successfully treating some of these diseases. Good traditional therapies exist for conditions such as renal failure, some cardiovascular diseases, collagenous disease, allergic disease, chronic liver and kidney diseases, and aplastic anemia."[162]

Ironically, China, which has suffered for thousands of years under the feudal rule of distant emperors and still finds itself under the thumb of a gerontocratic dictatorship of the Left, provides its citizens with more choice in the area of healthcare than do democracies such as Canada and Quebec. "Choice" might well be the operative word here. Even in a multicultural or an intercultural society, complete integration of one form of traditional medicine into the majoritarian system may not be practicable. Citizens should, however, have a choice of medical assistance and relief. In this era of cutbacks, hospitals are understaffed and over-frequented. Also, the legalization of traditional forms of therapies might make all medical practitioners, of whatever school or persuasion, less complacent and more efficient.

In conclusion, it is possible that, in the absence of safeguards to the practice of traditional Chinese medicine, the courts will uphold a violation of freedom of conscience as a reasonable limit in a free and democratic society (section 1 of the *Canadian Charter*). While the arguments above may help convince a member of the bench that a patient must be allowed to risk being treated by an alternative physician, the very nature of the legal profession might stand in the way of such a ruling. The courts have, so far, been entirely reluctant to interpret legislation in a broad manner. The *Lamontagne* case, which is presently on appeal, will prove crucial to the future of *Canadian Charter* challenges to the *Medical Act*. A decision could be reached soon. Doubtful as it may be, the outcome could prove favourable to alternative therapists in general. This would mean that the Court of Appeal would consider arguments based, for instance, on *Morgentaler*, to the effect that the right to life and security of the person extends to such intimate decisions as which type of healer, therapist, or practitioner a person may wish to consult. Although the issue of freedom of conscience may not be appealed in the *Lamontagne* decision (it was not appealed at the Superior Court level), one can only hope that following a victory on the basis of section 7, other alternative practitioners will ask courts to revisit the issue of freedom of conscience and decide that a person's beliefs with respect to the way his or her body must be treated is a matter that may take on cultural, philosophical, and even metaphysical dimensions. After all, Jehovah's witnesses today, if they are of age, may choose to refuse blood transfusions on precisely that basis. Should the outcome of such arguments be favourable to alternative therapists, section 27 arguments may end up bolstering the cause of culturally-based methods of treatment, such as traditional Chinese medicine. The cultural side of health and illness would thus be examined much more seriously than it ever has been.

## VI. CONCLUSION AND RECOMMENDATIONS

I have so far tried to explore the constitutional limits of medical pluralism in the province of Quebec, by using, as a case in point, the practice of traditional Chinese medicine without its acupunctural component. I have argued that practitioners—and more successfully perhaps, patients—may challenge the constitutionality of the *Medical Act* on the grounds that it blocks their

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[162] *Ibid.* at 256. See also U. Wassermann, "Traditional Medicine and the Law" (1984) 18 J. World T.L. 155.

access to traditional therapists. A patient may, therefore, rely on section 7 of the *Canadian Charter* to submit that few physicians (as they are described in the *Medical Act*) would be likely to practice Chinese medicine and that this absence of qualified practitioners may put patients' health at risk. I have shown, as well, that jurisprudence supports the contention that matters of health may conceivably fall under the purview of section 2(a) of the *Canadian Charter*, which protects freedom of conscience. I have, finally, looked into section 27 of the *Canadian Charter* and the content of multiculturalism. My conclusion is that this content is uncertain, although it can surely include both symbolic and structural ethnicity as mediating principles in the interpretation and application of section 27. On a more basic level, section 27 can be appended to section 2(a) to promote the "preservation and enhancement" of Asian medical practices, which are rooted in cultural tradition. Section 1 of the *Canadian Charter*, however, is more problematic. Fears concerning the safety of alternative therapies, as well as an age-old professional propensity to do away with competition, may well render *Canadian Charter* challenges to the *Medical Act* untenable.

However, given the fact that acupuncturists now possess their own professional order, alternatives exist to render the practice of traditional Chinese herbalism and naturopathy legal. One option that I have not yet explored in this essay is that of using the *Acupuncture Act* to argue that Chinese herbalism and naturopathy are not excluded by the *Act*, and are therefore legal. Because many of its members are of Chinese origin and have been trained in the practice of Chinese medicine as a whole, the Order of Acupuncturists of Quebec will eventually have to regulate on the matter of herbalism and naturopathy. In the meantime, "acupuncture" is defined as "any act of stimulation, by means of needles, of specific sites on the skin, mucous membranes or subcutaneous tissues of the human body to improve health or relieve pain."[163] Pursuant to section 9 of the *Act*, the practice further *includes*,[164]

> (1) performing, according to the traditional oriental method, the clinical assessment of the energetic state of a person;
> (2) determining, on the basis of the clinical assessment, the appropriate energetic treatment for a person;
> (3) performing any act of stimulation of specific sites on the skin, mucous membranes or subcutaneous tissues of the human body, by any means other than needles, particularly by the use of heat, pressure, electric current or rays of light, to improve health or relieve pain.

As seen above,[165] Taschereau J, in the Supreme Court of Canada decision of *Pauzé* made the point that statutes that create professional monopolies must be strictly applied, so that whatever is not specifically prohibited in these statutes is permitted.[166] Section 9(2) of the *Act* would arguably allow certified acupuncturists to determine the appropriate energetic treatment for a person. The wording of this section is vague enough, it seems, to include herbalism and naturopathy, both of which are used in traditional Chinese medicine to reestablish a person's energetic balance.[167] Should section 9(2) not be interpreted in this manner, however, Taschereau J.'s statement could shelter those rare practitioners of Chinese medicine who do not practice acupuncture, as well as

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[163] *Acupuncture Act*, *supra* note 135, s. 8.

[164] Use of the word "includes" in s. 9 of the *Acupuncture Act*, *ibid.* suggests that the practice is not limited to the three procedures listed.

[165] See text accompanying note 38.

[166] *Supra* note 38 at 18.

[167] See text accompanying notes 71-77 above.

those who do and administer herbal infusions at the same time.

Again, this interpretation of the *Acupuncture Act* will be useful as long as the Order of Acupuncturists does not expressly forbid it.

Another possibility would be to wait, as acupuncturists did, until the Legislature recognizes that traditional Chinese medicine consists of a whole range of therapies and should not be arbitrarily severed. An order of traditional Chinese practitioners would then perhaps be created, along with the safeguards that such an order would require to ensure public protection. In an intercultural society, this kind of demand would ideally arise from both East Asian and non-Asian communities. As acupuncture is costly to those without insurance, and at times painful, many non-Asians presently avail themselves of traditional Chinese herbalism instead. It is possible, as well, that the ancient character of medical practice in China inspires greater confidence than other more recent and non-culturally based alternative therapies. Pressure, however, should be brought to bear on the Legislature to give traditional Chinese medicine its full status and dignity. This last scenario is therefore not that far-fetched, particularly in light of the *Canadian Charter* arguments made in the body of this essay. In fact, frequent, well-grounded *Canadian Charter* challenges should be part of a campaign to change legislators' minds. The outcome of the integration of acupuncture should also be stressed as leading to a less than perfect solution. It is therefore not enough to excise a cultural medical tradition, reducing it to a mere technique based on Western medical principles rather than on diagnostic methods like the Chinese pulse. Moreover, acupuncture should, under the *Acupuncture Act,* include herbalism and naturopathy. Only then would the Chinese medical tradition thrive and truly benefit patients. Any statute enacted by the Legislature under this scenario must also include recognition for Chinese physicians trained abroad in legitimate traditional medicine academies and Colleges. Such physicians might also be recruited to train new practitioners.

Professor Martel also suggests lobbying the provincial government to amend sections 31 and 43 of the *Medical Act* so as to restrict the definition of what constitutes medical practice, thus leaving alternative therapies outside the extent of the statute.[168] As seen above, this would not be extremely helpful to practitioners of traditional Chinese medicine or their patients, since only a handful of physicians would, in any case, be likely to practice that form of healing.

Although the last three suggestions do not involve a direct recourse to multiculturalism, their effect, were they to be used or implemented, would be to promote in a proactive manner both multiculturalism and interculturalism, while reacting to certain societal needs of both the Asian and non-Asian communities, the members of which have, for a while now, shown signs of wanting and needing alternatives to a rather monolithic system. We live, after all, in an increasingly global world. It makes no sense to isolate ourselves, when we all stand to gain from exposure to the wisdom and experience of other cultures.

Changes to the current law would, in fact, go beyond the protection of symbolic representations of the immigrant experience and come closer to a structural version of ethnicity, as they would provide the Chinese community with greater power and autonomy in the area of health. Joseph Magnet's contention that this would bring minorities in direct conflict with the majority[169] is unfounded, since the Chinese community would require the cooperation of the majority to attain greater autonomy, while members of the majority would be able to profit from the minority's added benefits.

To conclude, this analysis is specifically suitable to traditional Chinese medicine and the Chinese community. As such, the answers provided here may not be appropriate to other forms

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[168] *Attention Santé, supra* note 5 at 195.

[169] See text accompanying note 127 above.

of traditional healing like native or ayurvedic medicine. These and other forms of culturally based treatment should therefore be studied individually, to see whether the model provided here applies.

It remains that when a culturally-based medical practice is rooted in a millenary tradition, few local physicians are likely to be familiar with its details and subtleties. Harassing those who can practice this kind of science shows a lack of respect, not only for those communities that revere this particular form of healing, but also for members of other communities, who are eager to learn about new cultures, beliefs and traditions. Such conduct is also clearly contrary to the Canadian policy of multiculturalism and to the Quebec preference for interculturalism. Thus, the above discussion provides a blueprint for ensuring that, in the future, people living in Quebec will have more access to diverse forms of traditional healing. The solution may come about via the courts or the Legislature. More likely, it will come about through a combination of both and, just as importantly, by way of public pressure, whether by greater reliance on alternative therapies or by active lobbying.