

2009

# Human Rights Protection in Canada

Beverly McLachlin

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## Citation Information

McLachlin, Beverly. "Human Rights Protection in Canada." *Osgoode Hall Review of Law and Policy* 2.1 (2014): 3-21.  
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# OSGOODE HALL REVIEW OF LAW AND POLICY

VOLUME 2

MARCH 2009

ISSUE 1

LECTURE

HUMAN RIGHTS PROTECTION IN CANADA <sup>♦</sup>

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Chief Justice of Canada <sup>\*</sup>

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*This lecture scans the development of human rights law in Canada from a period of judicially implied rights, to the era of legislative protection, and finally to the status quo of constitutional entrenchment. Progress to this final stage has ensured that human rights are not threatened in Canada. Nevertheless, significant challenges have arisen: The first involves a challenge between advocates of civil liberties and advocates of anti-discrimination rights. The second growing challenge is the practice of removing human rights from judicial review to specialized tribunals free from judicial scrutiny in the interests of national security. The third challenge lies in applying the concept of accommodation inherent in anti-discrimination rights in our increasingly diverse, multi-cultural societies. Through our legal institutions and our institutions of citizenship and community inclusion, these challenges can be acknowledged and brought into the democratic dialogue, thereby ensuring that human rights can be strengthened and sustained.*

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<sup>\*</sup> The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada. The Chief Justice's remarks were delivered at the Fourth Annual Human Rights Lecture of the Law Society of Ireland, Dublin, Ireland, May 7, 2008.

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### I

#### INTRODUCTION

It is a great honour to be asked to deliver the 4<sup>th</sup> Annual Law Society of Ireland Human Rights Lecture.

I came to law almost by accident, and to human rights late in my career. Having completed my BA hon., I was uncertain what to do. Someone said, “What about law?”. So, without really believing I could be a lawyer, I wrote to the Dean of the University of Alberta law School, asking for information. He wrote back: “You’re accepted”. So when September came, I decided to give it a try.

Human rights came even later. Of course I knew what they were, but it was not until I became a trial judge, and came to share vicariously, day in and day out, the experiences of the men and women who passed through my courtroom, that I began to appreciate the fundamental importance of human rights. To be sure, I had not reached that point in my life and career without encountering stereotypical attitudes. But it was judging that brought the persistence and perniciousness of inegalitarian and discriminatory thinking home to me.

Discrimination, I came to see, was not confined to the overt evils of racism and ethnic cleansing — although sadly the world still knows these. Casual marginalization and inadvertent devaluation — these too were forms of discrimination and for all their subtlety,

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capable of perpetuating prejudice, disadvantage and unfair denial of opportunity.

Tonight, as you know, my topic is human rights. In the first part of my talk, I will discuss briefly what we mean by human rights and will talk about the history of protections for human rights in Canada, from a few unwritten rights to a constitutionally entrenched *Charter* which we have now had for 25 years. In the second part, I will suggest that while we may feel justifiedly proud about our achievements in securing human rights, they are not as secure as we sometimes assume, and important challenges face us.

Human rights are rights founded on a simple but profound idea — that every individual possesses equal worth and is equally entitled to respect. This simple idea has given rise to two types of human rights: one based on liberty, the other on the right to equal treatment. Rights that are based on liberty focus on individual rights and freedoms, such as freedom of expression, and rights to be free of unreasonable seizure and detention, such as habeas corpus. These rights we call civil liberties. Rights that focus on equal treatment, by contrast, are aimed at ensuring individuals are not denied the benefit of law or equality of treatment because of personal characteristics or circumstances related to membership in a minority or disadvantaged group, such as race, religion, gender or ethnic origin. These rights are called anti-discrimination rights.

Human rights of both types have old, indeed ancient, roots. They are grounded in the work of thinkers and scholars that have preceded us, from the ancient Greeks onward. They have grown strong and borne fruit through historic struggles like the struggle against slavery. But human rights are also new. Only in recent generations have nations enshrined the fundamental freedoms of their citizens in constitutions. The US did this in 1791, Ireland in 1937, Canada in 1982. And only in the last 60 years or so has the anti-discrimination right been recognized by the law, beginning with the *United Nations Declaration of Human Rights*.

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## II

### THE DEVELOPMENT OF HUMAN RIGHTS IN CANADA

Having identified the subject-matter generally, let me turn to Canada's experience with human rights. Canada's experience can be divided into three phases: 1) Judicially implied rights; 2) Legislatively protected rights; and 3) Constitutionally protected human rights.

#### A. JUDICIALLY IMPLIED RIGHTS

Canada's 1867 Constitution, while grounded in the rule of law and democratic governance, did not provide for or protect human rights, whether civil liberties or anti-discrimination rights. But in the tradition of the Common Law, courts sometimes found these rights implied, even striking out laws under the principle of freedom of expression. Still, this left many denials of rights unrecognized and unremedied, such as the detention of persons considered to be "enemy aliens" during the Second World War, and the detention of thousands of Quebecers on the basis of suspicion of sympathy with separatists during the 1970's. Nor did this prevent grievous intrusions on the liberties of Aboriginal peoples.

Before human rights legislation and the *Charter*, courts in Canada relied on the theory of an "implied bill of rights" to protect traditional civil liberties such as freedom of speech and association. The theoretical foundation for these rights was the importance of free political speech and discussion in a democracy. Because such discussion is necessary to the functioning of democratic institutions, the argument went, it must be implicitly guaranteed as essential to the functioning of democratic institutions.<sup>1</sup> Thus, in 1938, in the *Alberta Press* case,<sup>2</sup> the Supreme Court of Canada held that a provincial legislature could not require newspapers to give the government a right of reply to criticism of provincial policies. In a 1953 case called *Saumur v. Quebec*,<sup>3</sup> a member of the Jehovah's Witnesses challenged a Quebec municipal by-law that forbade the distribution of pamphlets

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<sup>1</sup> Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Canada Ltd. 2007) at 34-10 to 34-13; The Hon. Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 3rd ed., (Toronto: Irwin Law, 2005) at 9-11 .

<sup>2</sup> *Reference Re Alberta Statutes*, [1938] S.C.R. 100.

<sup>3</sup> *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299.

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without the prior permission of the chief of police. The Supreme Court of Canada struck down the by-law on the basis that it amounted to a government power to censor political speech, which was inconsistent with democratic government. And in 1957, in a case called *Switzman v. Elbling*,<sup>4</sup> the Supreme Court held that a province could not prohibit the use of a house to propagate communism.

These decisions constituted an important recognition of civil liberties. But the protection of the implied bill of rights was limited, and uncertain.

It was limited in the rights it protected. It was applied in only a few cases. Indeed, the three cases I have mentioned are the only cases in which the Supreme Court relied on the theory of the implied bill of rights to strike down government action which restricted freedom of speech or religion.

The implied bill of rights was also limited in that it only protected classic liberal rights such as the right to freedom of speech and freedom of assembly. These rights are, of course, fundamentally important, but they do not capture the full panoply of what we think of when we talk about human rights today.

The protection offered by the implied bill of rights approach was also uncertain. As it was not codified either in legislation or in the Constitution, its scope was unclear, and judges resorted to it in only a handful of cases. Presumably these were cases where judges viewed the government's actions as particularly egregious. Thus, while the implied bill of rights did protect rights in some important cases, it did not provide for consistent protection of human rights.

## B. LEGISLATIVE PROTECTION OF HUMAN RIGHTS

The modern human rights movement in Canada, and around the world, sprang from the ashes of the Second World War. In response to the atrocities of the Holocaust and the totalitarian regimes of the Axis powers, early proponents of human rights advocated creating domestic and international laws to recognize and protect the inherent dignity of the human person.

Internationally, the United Nations adopted the *Universal Declaration of Human Rights* in 1948. A Canadian law professor and

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<sup>4</sup> *Switzman v. Elbling and A.G. of Quebec*, [1957] S.C.R. 285.

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diplomat, John Humphrey, wrote the first draft of the *Universal Declaration*, and jurists and diplomats from many countries were instrumental in its adoption.<sup>5</sup> This was followed in 1966 with the *International Covenant on Civil and Political Rights*.<sup>6</sup>

The basic principle underlying the human rights movement is briefly yet eloquently stated in Article 1 of the *Universal Declaration of Human Rights*:

All human beings are born free and equal in dignity and rights.

Canada was an early leader in the human rights movement. At home, Canada's first Bill of Rights was enacted in Saskatchewan in 1947.<sup>7</sup> Other provinces followed suit with Bills of Rights and Human Rights Codes from the 1950's through the 1970's.<sup>8</sup>

Although there is some overlap between Bills of Rights and Human Rights Codes, generally Bills of Rights protect individuals from governments breaching their rights, while Human Rights Codes generally deal with private action.

This second stage of human rights development in Canada can be characterized as a period of growth. As more and more provinces passed Human Rights Codes, the types of rights protected expanded, as did people's consciousness of their rights. Early provincial Bills of Rights protected traditional notions of rights, such as freedom of speech, press, assembly, religion and association. As human rights law developed, codes expanded to cover the right to be free from discrimination in areas such as employment and housing.

Statutory Human Rights Codes have had lasting success in protecting against discrimination in the private sector. However, statutory Bills of Rights did not have the same success when it came to protecting individual rights against infringement by government. As important as legislation protecting civil liberties and human rights is,

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<sup>5</sup> William Schabas, "Canada and the Adoption of the Universal Declaration of Human Rights" (1998) 43 McGill L.J. 403; Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000) at 10.

<sup>6</sup> Sharpe and Roach, *supra* note 1 at 14-15.

<sup>7</sup> S.S. 1947, c. 35. Repealed and replaced by the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1.

<sup>8</sup> Hogg, *supra* note 1 at 34-7 and 34-8

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it has a major limitation. Courts have described human rights legislation as quasi-constitutional. Yet for all that, it is still legislation. If government chooses to pass other legislation which takes away from human rights protection, it is free to do so. This problem can be seen most clearly in the ultimate failure of the *Canadian Bill of Rights*.<sup>9</sup>

Often referred to as the Diefenbaker Bill of Rights, the *Canadian Bill of Rights* was passed in 1960. Its reach, on paper, was large. It protected fundamental freedoms such as freedom of religion, speech, assembly and association as well as legal rights, including protections against arbitrary detention and imprisonment, and the right to counsel. It also guaranteed equality “before the law.” Yet it was also limited. The *Canadian Bill of Rights* only applied to the federal government, not to the provinces. Further, it was contained in ordinary legislation, not constitutionally entrenched. This led the courts to interpret it narrowly. Where the right claimed by a person conflicted with existing law, the *Canadian Bill of Rights* was generally read as not creating new rights. In the 22 years between the enactment of the *Canadian Bill of Rights*, and the adoption of the *Charter*, in only one case did the Supreme Court strike down a law for breach of the *Bill of Rights*.<sup>10</sup>

In the result, the *Canadian Bill of Rights* is now widely seen as a failure.

### C. CONSTITUTIONAL ENTRENCHMENT OF HUMAN RIGHTS

This leads me to the third stage of human rights protection in Canada, the constitutional entrenchment of human rights. In the wake of the failure of the *Canadian Bill of Rights*, many believed that human rights protection would be truly effective only if it was entrenched in the Constitution. Thus when, following years of on-again off-again constitutional negotiations, the Constitution of Canada was repatriated in 1982, the country included the *Canadian Charter of Rights and Freedoms* in the *Constitution Act, 1982*.

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<sup>9</sup> S.C. 1960, c. 44.

<sup>10</sup> Hogg, *supra* at 35-10; *R. v. Drybones*, [1970] S.C.R. 282.

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The *Charter* protects many of the same rights that were in the *Canadian Bill of Rights*, such as freedom of religion, speech, association and assembly, and legal rights, as well as a number of new rights — a broadened equality guarantee, guarantees of language rights, minority language education rights, and Aboriginal rights. But the biggest change is that the *Charter*, unlike previous Bills of Rights in Canada, is part of the Constitution. The Constitution is the supreme law of Canada. It cannot be repealed — at least not without great difficulty — and all other laws must comply with it. And unlike the *Canadian Bill of Rights*, the *Charter* applies to both the federal government and the provinces.

Supported by the Constitutional entrenchment of the *Charter*, the courts gave a broad and purposive interpretation to the rights it guaranteed. If existing laws did not comply with the rights in the *Charter*, then those laws had to change. If government action did not comply with the *Charter*, then government had to change the way it acted.

The project of protecting individual rights in a democracy does not mean the interests of society as a whole are ignored. The *Charter* contains an express provision that allows the government to pass laws which limit constitutional rights if the government can justify the reasons for the limit. In this regard, the structure of the *Canadian Charter of Rights and Freedoms* is similar to many modern constitutions, including the *European Convention on Human Rights*.<sup>11</sup>

Section 1 of the *Charter* provides that the rights contained in the *Charter* are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” This does not mean that the government can run roughshod over individual rights. Rather, it requires that the government justify limits on rights. Limits must be prescribed by law. This ensures that the limits on rights are knowable and fixed. There must be an important societal objective which justifies limiting rights. There must be a rational connection between the limit on rights and the

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<sup>11</sup> Lorraine Weinrib, “Canada’s *Charter*: Comparative Influences, International Stature”, in *The Charter at Twenty*, Debra McAllister and Adam Dodek eds., Ontario Bar Association (2002) at 495-98; William Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law*, Thomson Carswell (2007) at 255-59.

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legislative objective. And most importantly, there must be proportionality between the government objective and the limit on rights – rights must be limited no more than necessary to achieve the government objective. Through this exercise of justification, the *Charter* permits a balancing of individual rights and societal needs.

Another reason I believe the *Charter* provides effective rights protection in Canada is that it has been interpreted to give each branch of government a role in rights protection. Human rights protection and the *Charter* are not the work of the courts alone. The courts rule on whether the *Charter* has been complied with or breached in specific cases, either by unconstitutional legislation, or by government actions. But the government and the legislatures must also consider the *Charter*. In passing legislation and carrying out government actions, both the executive and the legislature must give consideration to whether their actions comply with the *Charter*. And if in a particular case the courts strike down a law because it does not comply with the *Charter*, the government and the legislature must consider whether to enact new legislation in response, and if so, how to ensure that the new legislation complies with the *Charter*.

So, that is where we have been. Where are we going? What are the current challenges and future directions of human rights law in Canada? The most serious challenge I see is not just a Canadian challenge, but a challenge for every modern state determined to protect human rights — the challenge of incorporating ideas of multiculturalism, difference, and tolerance into human rights protection. A secondary challenge flowing from this challenge is institutional. It is the task of the courts and of legal tribunals to define the difficult accommodations that maintaining human rights in a multi-cultural context impose. This plants them firmly at the center of controversial political debates about how far a particular society should go in accommodating difference. It is to these two challenges that I now turn.

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### III

#### CHALLENGES FOR THE FUTURE

Human rights are not threatened in Canada. But neither are they fully secure. They cannot be taken for granted. Recent decades reveal three growing challenges. The first challenge is the tension between advocates of civil liberties and advocates of anti-discrimination rights. The second growing challenge is the practice of removing human rights from judicial review to specialized tribunals free from judicial scrutiny, in the interests of national security. The third challenge lies in applying the concept of accommodation inherent in anti-discrimination rights in our increasingly diverse, multi-cultural societies.

#### A. THE CHALLENGE OF THE TENSION BETWEEN PROTECTION OF CIVIL LIBERTIES AND PROTECTION AGAINST DISCRIMINATION

We sometimes hear people talk of civil liberties versus anti-discrimination equality rights — “individual rights” versus “group rights” — as though they are incompatible. The suggestion is that one is more important than the other, and that the practice of human rights must choose between them. This is a false dichotomy. It is not a question of “either/or”. A full, inclusive vision of human rights must recognize both civil liberties and equality rights.

This said, tensions between the two types of human rights — individual-based civil liberties on the one hand and group-based equality rights on the other — are real, and must be resolved. Anti-discrimination rights can be taken to imply that criticism or denigration, direct or indirect, of minority groups is off-bounds. This may conflict with the basic civil liberties, notably freedom of expression. In *Keegstra*,<sup>12</sup> the Supreme Court of Canada upheld anti-hate laws as constitutional and justified. In *Zundel*,<sup>13</sup> by contrast, the Supreme Court of Canada struck down “false-news” laws as violative of free speech. Generally, the Court has drawn the line so as to permit

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<sup>12</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697.

<sup>13</sup> *R. v. Zundel*, [1992] 2 S.C.R. 731.

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a robust level of criticism. Freedom of expression is highly valued; intrusions must be strictly justified.

None of us would or should condone the slander of a particular religion or ethnic group. Nor should we be blind to the harm this can cause, both to the affected group and to social harmony. But by the same token, the right to debate and discuss ideas, upon which democracy and our ability to live together rests, must be preserved. When freedom of expression conflicts with other rights or interests, it falls to those seeking to limit the right to free expression to justify the limit. Courts and tribunals may be called on to determine whether the proposed limit is justified. In this way, the dispute is resolved.

However, tensions continue. Recently, several Canadian Human Rights Commissions have taken speech that is alleged to denigrate a particular group to task. In a Canadian take on the Danish cartoons issue that recently dominated the European press, a publisher published cartoons that were said to blaspheme the Prophet, and was brought up before the Alberta Human Rights Commission.<sup>14</sup> Members of the Muslim community filed a human rights complaint alleging that the cartoons constituted promotion of racial or ethnic hatred. The proceedings were ultimately dropped, but generated considerable debate on where the line should be drawn between free speech and maintaining a respectful attitude toward minority beliefs.

These and similar cases show that not everyone agrees on where the line is to be drawn. But thus far, I believe we can say that in Canada it has been drawn in a fair and principled way. Justice has been preserved. The need to respect difference has been acknowledged. Peaceful co-existence has been affirmed.

## B. THE CHALLENGE OF MAINTAINING NATIONAL SECURITY AND HUMAN RIGHTS

We live in an era of terrorism. Concerns for national security dominate the news. You in Ireland know all too well the destructive

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<sup>14</sup> “Western Canadian magazine publishes Muhammad cartoons”, CBC News, February 13, 2006, online: <<http://www.cbc.ca/story/canada/national/2006/02/13/cartoons060213.html>>; “Muslim leader drops Ezra Levant cartoon complaint”, National Post, February 12, 2008, online: <<http://www.nationalpost.com/news/canada/story.html?id=303895>>.

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impact of dedicated and ruthless terrorists and the threat they pose to peaceful democratic governance. Terrorism, we all agree, must be fought.

However, this poses a challenge for human rights. Human rights may be attenuated and indeed denied as a result of security fears and concerns. This may be done by executive action or legislation. The power of elected officials to enact laws limiting rights to the extent as may be reasonable and necessary to combat terrorism cannot be denied. However, in a democracy, these actions must conform to the constitution and be subject to judicial review.

My point is simple: to preserve human rights while fighting terrorism, we cannot deny the courts, the traditional protectors of human rights, the right to independently review executive and legislative decisions affecting the rights of persons suspected of being threats to security, or we risk casting these persons into legal black holes. We must not place our policies and places of detention outside the domain of the courts and beyond judicial review.

The Supreme Court of Canada has taken the position that this cannot happen. In dealing with security certificate laws, in the *Charkaoui* case,<sup>15</sup> the Court insisted that the state justify deprivations of liberty of immigrants alleged to be terrorists. To admit that there are zones where individuals are not protected stands in direct contradiction to the fundamental principle of human rights that all human beings are of equal worth and should be treated accordingly. Judicial review is the condition precedent of human rights. The matter, to be sure, is not simple. There may be documents or secrets that cannot be fully disclosed to the parties for security reasons, for example. But the bottom line is that when the state seeks to deprive a person of his or her liberty, there must be meaningful judicial review. In the recent *Khadr* case,<sup>16</sup> the Court re-asserted the overriding importance of judicial review in the protection of human rights. The case concerned Omar Khadr, a Canadian citizen detained by U.S. forces at Guantanamo Bay since 2002, and now being prosecuted by the U.S. on terrorism-related charges. Canadian intelligence agents interviewed Mr. Khadr in Guantanamo, and subsequently handed over the products of these interviews to U.S. authorities. The Court

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<sup>15</sup> *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.

<sup>16</sup> *Canada (Justice) v. Khadr*, 2008 SCC 28.

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held that Mr. Khadr was entitled to disclosure of the interview documents passed on to the U.S. authorities, because Canada had participated in a process that was contrary to its international human rights obligations. Under these circumstances, the *Charter*, and the courts' ability to hold government action to human rights standards, could exceptionally apply outside of Canada.

### C. THE CHALLENGE OF ACCOMMODATION

Canada is by history a nation of diverse cultures and ethnicities. But even countries that do not have histories of colonial conquest and generational immigration, such as Ireland, face the challenge of diversity. World populations are, quite literally, on the move. Increasingly, we are all confronted by the other in our midst, forced, whether we like it or not, to find accommodations between our traditional ways and new ways that may seem strange, even wrong.

Against this background, let me return to the Canadian situation. Many of the human rights protected by Canada's Human Rights Codes and the *Charter* focus on diversity. Section 2(a) protects freedom of religion. Section 15 of the *Charter* makes it clear that all individuals in Canada, regardless of race, religion, national or ethnic origin, colour, sex, age or physical or mental disability, are to be considered equal. Section 27 provides that the *Charter* is to be "interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". Other sections protect minority language and education rights, and Aboriginal rights.<sup>17</sup> It follows that the increasing diversification of Canadian society will affect the interpretation of rights.

It is inevitable that rights as diverse as these may lead to on-the-ground conflicts. Sometimes the conflict is between different rights. Freedom of religion may conflict with gender equality, for example, or it may run up against freedom of speech. Sometimes the conflict may not be between rights, but between a particular right and a societal interest, such as security or freedom of contract. When conflicts such as these come before the courts, judges are called upon

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<sup>17</sup> *Canadian Charter of Rights and Freedoms*, ss. 16-23, 25, 35.

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to reconcile and balance the competing claims, a process we refer to as reasonable accommodation.

A recent judgment of the Supreme Court of Canada presents a graphic example of the complexity of the competing demands that can result from a commitment to protecting human rights in a multi-cultural society. In a 2006 decision, known as the *Multani* case, the Court considered the issue of whether a Sikh student, whose religion required him to wear a kirpan, should be permitted to wear it while he attended public school.<sup>18</sup> A kirpan is a religious object that resembles a dagger, and must be made of metal. The case, brought under the *Canadian Charter of Rights and Freedoms*, and under the Quebec provincial Charter, required the Court to weigh freedom of religion against student safety in public schools.

Mr. Multani and his family claimed that the *Charter* guarantee of freedom of religion protected his right to wear the kirpan. The school board, on the other hand, argued that he should not be permitted to carry a kirpan because it contravened a code of conduct which prohibited students from carrying weapons and dangerous objects. What tipped the scale for the Court was that the evidence did not support the conclusion that the kirpan, which was sewn inside a small pocket inside the boy's clothing, posed a real risk to the security in the school. In fact, it posed no more risk than many objects that are readily available in schools, such as scissors, compasses, baseball bats and table knives in the school cafeteria. It followed that the school board had not established that the restriction on Mr. Multani's religious duty was reasonably necessary, and the board was consequently required to accommodate his religious practice by letting him carry the kirpan. The Court interpreted freedom of religion broadly, as protecting beliefs or practices that an individual sincerely believes are required by his or her religion. Yet it also stated that freedom of religion is subject to reasonable limits, which it is for the government to justify. To allow the student to carry a bare kirpan might well have been unreasonable. But by accommodating the way he exercised his religious right in order to meet security concerns, Mr. Multani satisfied those security concerns put against him. In the end, both freedom of religion and security were protected.

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<sup>18</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256.

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In reaching this conclusion, the Court underlined the importance of respect and tolerance for different beliefs in a democratic society:

An absolute prohibition [on wearing the kirpan] would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others.<sup>19</sup>

Another example of the tensions between rights protection and diversity is provided by a case heard last year, which required the Court to decide whether a term of a negotiated civil divorce settlement requiring the husband to give his wife a Jewish religious divorce (a *get*) was enforceable in the civil courts such that the husband could be required to pay damages for not complying with the settlement.<sup>20</sup>

The husband claimed that requiring him to pay damages for not giving the *get* violated his right to freedom of religion. The wife claimed that the settlement was freely entered into, and the husband should pay damages for not complying with it. She claimed that his breach of the settlement caused her harm and violated her right to equality, because unless he gave her a religious divorce, she could not remarry in her faith. Thus, the case raised competing claims of religious freedom, gender equality, the relationship between religion and the state, and how these things impact on a contract freely entered into.

The majority of the Court decided that the term in the settlement requiring the husband to give the *get* was valid and enforceable. As a result the husband was required to pay the wife damages for breaching it. If the husband's right to religious freedom was violated – which was not clear, because the evidence suggested he may have refused to give the *get* out of anger at his wife, rather than for religious reasons – the violation was justified by the competing values of equality, and the modern Canadian approach to the right to marry and divorce, which allows individuals to decide for themselves when their marriage is irretrievably broken, and lets them move on with their lives – rights given equally to women and men.

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<sup>19</sup> *Multani, supra* at 297.

<sup>20</sup> *Bruker v. Marcovitz*, 2007 SCC 54.

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The issues raised by the case highlight some of the complexities and challenges of rights protection in a multicultural society. As the majority noted:

Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.<sup>21</sup>

I have mentioned two Canadian cases that illustrate the difficult and delicate questions that emerge when human rights are applied in a diverse, multi-cultural society. Similar cases have made headlines in Europe and others parts of the world. We are all familiar with the debate about headscarves in France, or the condemnation of the Danish publisher who published cartoons many believed defamatory of the Prophet (the same cartoons that figured in the Western Standard case in Canada which I mentioned earlier). As our countries become ever more diverse, such clashes can only be expected to increase.

In the Canadian province of Quebec, which places great store in its distinctive culture, the debate over cases such as those I have discussed rose to the point where the Province appointed a royal commission to inquire into the subject of reasonable accommodation of religious and cultural minorities. The commission provoked a heated public dialogue about the accommodation of differences,<sup>22</sup> not always easy issues to discuss, as they deal with sensitive issues of individual and group identity. The commissioners crossed and criss-crossed the Province, hearing the views of citizens and interested groups. Some of the comments they heard were harsh, bordering on the xenophobic. But many were supportive of the vision of a tolerant society, in which people of different faiths and creeds can live and work together through the ethic of human rights and reasonable

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<sup>21</sup> *Bruker v. Marcovitz*, *supra* at para. 2, *per* Abella J.

<sup>22</sup> *Order in Council Concerning the Establishment of the Consultation Commission on Accommodation Practices Related to Cultural Differences*, O.C. 95-2007.

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accommodation. The commission's final report concluded that "integration through pluralism, equality and reciprocity is by far the most commendable, reasonable course". The commission recommended adopting the values of interculturalism and open secularism as a way to develop a shared identity based on a citizen culture.<sup>23</sup> These are complex and difficult concepts, which makes it is all the more necessary for all citizens to be involved in the public dialogue.

One thing seems certain; protecting human rights in a diverse multicultural society is an endeavour in which all our institutions must engage, chief among them our legal institutions.

Far from destroying our collective national and community identities, human rights both pre-suppose those identities and sustain them. While we like to say each person is born with rights, in historical terms rights are a social construct, a product of history, of ideas, of struggles and of institutions. Moreover, in functional terms, human rights presuppose and can only be effective in a community or nation where there is general acceptance by all that "we are all in this together".<sup>24</sup> To work properly, the idea of human rights presupposes a degree of cultural solidarity. As citizens, we have special obligations to each other. One of those obligations is to respect the differences of our co-citizens and to accommodate their religious and cultural rights insofar as this can reasonably be done. Citizens compromise because they recognize that this is a responsibility that society imposes on them as the correlative of their enjoyment of their own rights. The rights asserted by some citizens must connect with the obligation felt by others, if human rights are to be sustained. This pre-supposes a sense of communal identity, and in the end strengthens it.

Thus human rights should not be seen as undermining our common identities and national commitments. On the contrary, for human rights to work we need nation-states and a sense of adherence to nation-states. And we need to find ways to encourage the minorities within those states to identify with the larger whole. Until

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<sup>23</sup> G. Bouchard, C. Taylor, *Building the Future: A Time for Reconciliation*, <online: <http://www.accommodements.qc.ca/documentation/rappports/rapport-final-abrege-en.pdf>>, at pp. 93-4.

<sup>24</sup> Goodhart, "Has Multiculturalism Had Its Day?" *Literary Review of Canada*, Vol. 16, April 2008 3 at p. 4

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recent times, the basis of this shared identity “would have been mainly ethnicity – shared ancestry, history, sacrifice and myths. In multi-ethnic and multi-racial societies the basis of specialness is the thinner fabric of citizenship itself.”<sup>25</sup>

Canada, which accepts more immigrants per capita than any other nation of the world, recognizes this.<sup>26</sup> Every immigrant has the right to become a citizen of Canada after five years — a full citizen, in every sense of the word, invited to share our future but equally importantly, our past, warts and all. The message is simple: you are now part of us, and we are all in this together. We share rights, but also responsibilities. We recognize that everyone has rights, but we also accept that when clashes between rights or conflicting interests like security arise, the individual exercise of those rights may, by the very nature of rights and the social contract, be constrained.

We need human rights. Whether we like it or not, religious, ethnic and cultural diversity is part of our modern world — and increasingly, part of our national and community reality. Human rights and the respect for every individual upon which they rest, offer the best hope for reconciling the conflicts this diversity is bound to generate. If we are to live together in peace and harmony — within our nations and as nations in the wider world — we must find ways to accommodate each other. Human rights, expressed in the fabric of our law and administered by our courts and tribunals, provide a way to accomplish this.

How do we strengthen human rights and counter the critics who argue against the compromises and accommodations the practice of human rights demands? I would suggest that we do so as we have met social challenges in the past – through our institutions.

The first line of defence is our legal institutions. It is through the law and the courts that the day-to-day accommodations that guarantee human rights in a diverse society are worked out, and our differences thus reconciled. This task places the law and her officers at the heart of some of the most sensitive debates of our time. Inevitably, it requires lawyers to take unpopular stands, judges to make unpopular decisions. Our challenge is to find the courage to discharge this task with integrity.

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<sup>25</sup> Goodhart, *supra* note 24.

<sup>26</sup> Globe and Mail, May 2, 2008.

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The second is through our institutions of citizenship and community inclusion. The minorities among us must be brought into the larger political community, made to feel part of the larger enterprise. Acceptance of the compromises that human rights imply can only work in the long run if there is general agreement that we are “all in this together”. “Rights are not a free lunch — in a democracy, an asserted right can be sustained only if a critical mass of the population accepts the corresponding obligations”.<sup>27</sup>

Courageous lawyers and judges; wise and inclusive statesmanship — these are ultimate guarantors of our human rights, and ultimately, dare I suggest, of peaceful co-existence in our ever-shrinking world.

#### IV

#### CONCLUSION

Canada, like Ireland, has a long and unique history of the protection of human rights. Over the last 75 years, human rights have emerged as a central component of our societal and legal systems. Together with democratic governance, a free economy and the rule of law, human rights have come to define who we are as peoples, and what we stand for.

Despite this achievement — an achievement that I believe represents an advance of huge importance in terms of human social evolution — the battles for individual liberties and equal respect for the worth of each individual are far from finished. Different societies face different challenges. Tonight, I have discussed some of the challenges we face in Canada. You, in Ireland, face your own challenges. By acknowledging those challenges and making them part of the democratic dialogue, as we are doing tonight, we sustain and strengthen human rights and enhance the world we share.

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<sup>27</sup> Goodhart, *supra* note 24.