

April 2016

Canadian Constitutionalism and the Ethic of Inclusion and Accommodation

The Right Honourable Beverley McLachlin, PC, Chief Justice of Canada
Supreme Court of Canada, reception@scc-csc.ca

Follow this and additional works at: <https://ir.lib.uwo.ca/uwojls>

Recommended Citation

The Right Honourable Beverley McLachlin, PC, Chief Justice of Canada, "Canadian Constitutionalism and the Ethic of Inclusion and Accommodation", (2016) 6:3 online: UWO J Leg Stud 1 <<https://ir.lib.uwo.ca/uwojls/vol6/iss3/1>>.

This Article is brought to you for free and open access by Scholarship@Western. It has been accepted for inclusion in Western Journal of Legal Studies by an authorized editor of Scholarship@Western. For more information, please contact tadam@uwo.ca, wlsadmin@uwo.ca.

Canadian Constitutionalism and the Ethic of Inclusion and Accommodation

Abstract

The Remarks of The Right Honourable Beverley McLachlin, PC, Chief Justice Of Canada, delivered at the 2016 Pensa Lecture on Human Rights in London, Ontario, on March 31 2016.

CANADIAN CONSTITUTIONALISM AND THE ETHIC OF INCLUSION AND ACCOMMODATION

REMARKS OF THE RIGHT HONOURABLE BEVERLEY MCLACHLIN, PC, CHIEF JUSTICE OF
CANADA

THE 2016 PENZA LECTURE ON HUMAN RIGHTS
LONDON, ON MARCH 31, 2016

INTRODUCTION

It is a great honour to be invited to deliver the 2016 Pensa Lecture. The honour is heightened by the distinction of Claude Pensa, for whom the lecture series is named. In the course of a legal career spanning six decades, Mr. Pensa made an enormous contribution to his profession, the rule of law, and the University of Western Ontario. Mr. Pensa has worked ceaselessly to promote human rights and the peaceful resolution of disputes. My topic tonight—Canadian Constitutionalism and the Ethic of Inclusion and Accommodation—is therefore fitting.

Modern governance is increasingly beset by a single, overarching question: How can people of diverse culture and creed live peacefully and productively together in the bosom of a single nation-state?

A century ago, the world took for granted that states were comprised of people who were more or less homogenous—people who shared the same culture, race, religion, customs, and values. Within a certain range, diversity was accepted, even protected. But the range was narrow. The assumption on which the nation-state—the dominant model of the eighteenth and nineteenth centuries—was based was that most people shared the same traits and the same values.

That is no longer the case. Global travel and communications, combined with historic phenomena of exodus and exile, have exponentially increased the diversity quotient within most nation-states. The world is, quite literally, on the move, pushing through the porous borders of western democracies. Within those democracies, diverse groups vie for position, each with its own distinct voice. How is the nation-state to deal with this? More and more, this is the critical question of modern democratic governance.

Current responses disclose two basic answers to this question, each with its variants.

The first response to diversity is to minimize and deny diversity. Keep people who are different out, if you can. Variants on this response include calls for restrictions on immigrants and refugees, calls for deportation of “foreigners”, and suppression of modes

of dress and conduct that don't conform to the majoritarian norm.

The second response to diversity is to find ways for people of different backgrounds and cultures to live together peacefully, despite their differences, in a way that allows them to find common values, become productive co-citizens and, ultimately, maintain trust in the social order. This approach allows differences to exist and seeks to accommodate them, insofar as they do not run counter to the basic legal and cultural values espoused in the country's constitution and fundamental laws.

The first response—the response of exclusion and negation—is largely in the hands of the politicians. I am a judge, not a politician, and so I shall say little about this response. I note only that whatever its attractions, it has legal and practical limits. On the legal side, a matrix of international conventions and covenants makes it difficult for any civilized nation to exclude and eject people simply because they are different. On the practical side, economically advanced nations face the dual truth (1) that it is hard to keep people out and (2) that they need to allow people who are different into their countries to ensure that their economies grow in a sustainable manner—who is going to pay our greying demographics' pensions, after all? Because of these limits, the response of exclusion in all its variants is unlikely to be complete or successful.

This brings me to my focus tonight—the second response—the response of inclusion and accommodation. This is the response that Canada—although not without some glaring exceptions—has chosen. First, I will ask why we as Canadians have chosen this response, delving into Canadian history to find the answers. Second, I will discuss how our Constitution and our laws have developed to support this response. Finally, I will discuss the boundaries of accommodation—the limits that the law and our legal system must inevitably impose on inclusion and accommodation.

I. THE CANADIAN RESPONSE: INCLUSION AND ACCOMMODATION

From its beginnings, Canada has been a country of diversity. Diversity is both the country's fate and its salvation. Canada has never been a monolith; it has never had a single defining culture or language. We sometimes lament our lack of a defining culture or language, seeing it as a deficit. But our deficit is also to our benefit. This idea was echoed recently by the Prime Minister, who, on a visit to England, declared that “our diversity isn't a challenge to be overcome or a difficulty to be tolerated. Rather, it's a tremendous source of strength.”¹

Canada is known and is respected throughout the world for its inclusive approach to diversity. Thus, in 2014, during a historic address to both Houses of the Parliament of Canada, His Highness the Aga Khan, the spiritual leader of the Shia Ismaili Muslims,

¹ Address by the Right Honourable Justin Trudeau, Prime Minister of Canada, “Diversity is Canada's Strength”, London, UK, 26 November 2015, online: <<http://pm.gc.ca/eng/news/2015/11/26/diversity-canadas-strength>>.

praised Canada for its leadership in the community of nations, and especially Canada's ability to articulate and exemplify a commitment to pluralism and to a cosmopolitan ethic.² And he has said elsewhere that societies can “learn ...[a] lesson from the Canadian experience, the importance of resisting both assimilation and homogenization—the subordination and dilution of minority cultures on the one hand, or an attempt to create some new, transcendent blend of identities, on the other.”³

Canada's inclusive approach to diversity is rooted in its history. We came together out of practical necessity, and we have remained together largely for the same reason. As a consequence, we have developed our own unique ethic—an ethic of inclusion and accommodation.

Canada's first people were—as the name proclaims—its indigenous people. They in themselves were enormously diverse. Over 75 tribes scattered across the vast landscape that is now Canada spoke between 50 and 70 different languages⁴ and developed widely disparate cultures—the farming cultures of the Iroquois and Hurons; the trapping and sealing cultures of the north; the hunting cultures of the great plains; and the fishing cultures of the West Coast.

Compelled by harsh climate and difficult terrain, Canada's first European colonists had little choice but to learn from the indigenous people and work with them as equals. Over four hundred years ago, Samuel de Champlain sailed from France and alighted on the eastern shores of our country. He spent three decades, on and off, exploring the eastern and central parts of what is now Canada. He lived with the Indians, writing and filling his sketch books with their—to him—strange and diverse practices.

With the arrival of the Europeans, a critical question arose. Would the newcomers, like the Spanish in Central and South America, come as conquerors to suppress and enslave the indigenous population? Or would they adopt a more inclusive approach? In Canada, the answer was the latter. Confronted with the harsh climate and uncharted wilds of the future Canada, the early colonizers had little choice but to enlist the assistance of the local populations they found. Champlain, the first of them, set the pattern.

Champlain's writings and depictions of the people he found are imbued with admiration and respect. He, a Frenchman who on arrival knew nothing of the forests and rivers of Canada or its icy winters, would have perished but for the skill and wisdom of the indigenous people he found. In the wars of later centuries, both the

² Address of His Highness the Aga Khan to both Houses of the Parliament of Canada in the House of Commons Chamber, Ottawa, 27 February 2014, online: <<http://www.akdn.org>>.

³ Lecture by His Highness the Aga Khan: The Lafontaine-Baldwin Lectures (Toronto, Canada), 15 October 2010, online: <<http://www.akdn.org/Content/1018/His-Highness-the-Aga-Khan-Delivers-the-10th-AnnualLaFontaineBaldwin-Lecture>>.

⁴ Olivia Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earlier Times*, 3d ed (Oxford: Oxford University Press, 2002) at 45, 47.

French and the English forged shifting symbiotic alliances with indigenous people. By and large, Europeans and indigenous people lived and fought together as equals.

The same story unfolded in different ways as exploration moved westward onto the prairies and through the mountains to the Pacific Coast. If nineteenth century Europeans were better able than Champlain had been to endure the rigours of the west, they still needed Indians and Metis to guide them as they explored the new terrain. And the *Royal Proclamation of 1763* committed the Europeans to “treat” with the indigenous population, sparing Canada the Indian wars that raged south of the forty-ninth parallel. Inherent in the obligation to treat with the first nations—to seek their permission to take their lands—was an acceptance of their dignity and autonomy.

The result was that relations between early explorers and indigenous peoples developed in a way that, on the whole, was marked by a spirit of inter reliance based on mutual respect. It is a story that John Ralston Saul describes eloquently in his book *A Fair Country*. Sadly, as our country’s subsequent history records, the relationship between European settlers and Canada’s indigenous peoples was damaged, and we are still trying to mend it. But my point is that the early interactions set the pattern that is still the defining characteristic of Canada—a pattern of mutual respect and cooperation.

Just as diversity characterized the early interactions between Europeans and indigenous peoples, so diversity lies at the heart of the birth of the modern Canada. The country that came together in 1867 was a union between two very different European peoples who had been locked in bitter warfare for decades. They spoke different languages and practiced different religions, and suffered from the accumulated hostilities associated with a century of intermittent warfare between England and France.

After the British conquest of 1763, the question arose: How were these two very different peoples to live together and be governed? The norms of the time suggested that the conqueror would impose its language and religion on the conquered. But that is not what happened. For a variety of reasons, the ethic of accommodation imposed itself—the French at the time were more populous than the British, and the British had just lost the American colonies and didn’t want another North American war. The Lieutenant Governor of the new Quebec colony—Carleton, lobbied his government to allow the French to retain their traditions. Finally, in 1774, the British Parliament passed the *Quebec Act*, guaranteeing the people of the colony the right to speak French, practice the Catholic religion, and retain the law of the Napoleonic Code.

The same pattern of unity through acceptance of diversity led almost a century later to the union of English-speaking provinces of the Maritimes and what is now Ontario with the predominantly French-speaking colony of Quebec, and the formation of the Dominion of Canada. The protections for diversity of the *Quebec Act* found new expression in the *British North America Act, 1867*, both in the form of continued language and education guarantees for minorities and in the division of powers between the federal state and the provinces.

Mutual respect and cooperation continued to define Canada, as successive waves of immigration washed over the country. The Great Migration of Canada brought over 800,000 people from Britain between 1815 and 1850. At the end of the nineteenth century and beginning of the twentieth, immigrants from the UK, Europe, the US, and China flooded into western Canada. In 1913, the highpoint of Canada's immigration saw over 400,000 immigrants come to the country. The influx continued through the roaring twenties, and the aftermath of World War II brought large numbers of refugees and immigrants. One and a half million came from Europe in the 1950s.⁵ Refugees followed in the thousands, from places as diverse as Uganda, Chile, Vietnam, Kosovo. Between 2009 and 2013, Canada admitted on average 257,000 new permanent residents every year, and last year, Canada expected to admit between 260,000 and 285,000 more.⁶ And it's not over. Twenty-five thousand Syrian refugees are currently being relocated by the government, and Canadians in all parts of the country have welcomed them warmly. No one is surprised by this. It is inherent in the Canadian way of seeing the world. Canada maintains one of the highest per capita rates of immigration in the world. And generally speaking, the idea of welcoming immigrants to our shores enjoys widespread and increasing support.⁷

To sum up, Canada has, from the beginning, been a place of diversity—a characteristic it maintains to the present day. It has managed that diversity by practices of mutual respect and cooperation. Diversity, Canada's central challenge, has been approached, for the most part, from the stance of inclusion and accommodation. Our history is not a history of exclusion, subjugation, or exile, but a history of coming together in full recognition of our differences and working out those differences in the spirit of mutual respect. In a multicultural global world where other nations are struggling to deal with diversity, we have set a high mark.

II. THE CANADIAN CONSTITUTION: THE RESPONSE OF INCLUSION AND ACCOMMODATION

Nations shape their constitutions and constitutions shape their nations. So we should not be surprised that the ideas of inclusion and accommodation so central to Canada's history are reflected throughout Canada's Constitution. But before I pursue this idea, allow me to briefly digress to say what I mean when I speak of Canada's Constitution.

⁵ Immigration, Refugees and Citizenship Canada, "Canada Facts and Figures 2014—Immigration Overview—Permanent Residents, historical highlights" (2014), online: <<http://www.cic.gc.ca/english/resources/statistics/facts2014/permanent/>>.

⁶ Immigration, Refugees and Citizenship Canada, *Annual Report to Parliament on Immigration* (2014), online: <<http://www.cic.gc.ca/english/resources/publications/annual-report-2014/index.asp>>.

⁷ Michel Adams, "Canadians Support Diversity and Immigrants", *The Windsor Star* (28 November 2007) A8.

We think of constitutions first and foremost as covenants on parchment. Canada is no exception. The Constitution of Canada is first of all and most fundamentally a document—or, more precisely, two documents: the *British North America Act, 1867* and the *Constitution Act, 1982*. The history of these two documents, put succinctly, is this.

In 1867 the British colonies of what is now Ontario, Quebec, New Brunswick, and Nova Scotia agreed to become a new country called Canada. The *British North America Act, 1867*—or *BNA Act*—was their contract of union. It spelled out the powers of the federal government and the provincial governments, and divided governance between three independent branches—the legislative branch, the executive branch, and the judicial branch.

Under the umbrella of the *BNA Act*, Canada grew from a fledgling colony to a Dominion to an independent country that stretched from the Atlantic in the east to the Pacific in the west to the Arctic in the north. Its people fought with great distinction and equally great sacrifice in two world wars. Canada developed a robust economy and became a player on the world stage. But it was not yet fully independent: its constitution could be changed only by the British Parliament. Nor did it possess a constitutional bill of rights.

In 1982, after years of debate, planning, and negotiation by Canadians, the British Parliament, at Canada's request, adopted the *Constitution Act, 1982*, giving Canada the right to amend its own Constitution, and adopting, in constitutional form, the *Canadian Charter of Rights and Freedoms*.

Together, the *BNA Act* and the *Constitution Act, 1982* form the Constitution of Canada. It is the words of these two documents that the courts interpret when constitutional questions arise.

However, this is not a full picture of the Constitution. Not everything we think of as constitutional is spelled out in the words of our constitutional documents. For example, the *BNA Act* does not refer to the Prime Minister or the cabinet, nor does it mention that a government's mandate rests on maintaining the confidence of the House of Commons. Yet such principles are undoubtedly part of the Canadian Constitution. They are called constitutional conventions.

And over and above constitutional conventions, the Supreme Court of Canada, in the *Secession Reference*,⁸ identified certain fundamental principles that imbue and underlie the Canadian union and its constitution: (1) the principle of federalism; (2) the principle of democracy; (3) the principle of constitutionalism and the rule of law; (4) the principle of respect for minorities. These principles are implicit in the “basic structure,”⁹ or “architecture,”¹⁰ of our Constitution.¹¹

⁸ *Reference re Secession of Quebec*, [1998] 2 SCR 217.

⁹ *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2 at 57.

¹⁰ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 50.

¹¹ *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 at paras 25, 26.

The texts of our fundamental documents, read in light of constitutional conventions and the fundamental norms underlying the Constitution, together describe Canada's constitutional arrangements. Constitutional interpretation focuses on the text of the Constitution, read in the context of constitutional conventions and the basic principles inherent in the country's constitutional norms.

Against this background, I return to the question with which I began. How does the Canadian Constitution, viewed comprehensively in this manner, reflect the ethic of inclusion and accommodation?

As I have already mentioned, the very existence of the *BNA Act* testifies to inclusion and accommodation. It represents a compromise. The federal government is given certain powers, and the provinces—the former colonies—retain other powers important for their local governance. The *BNA Act* also affirms the French-English duality of the new country and grants religious and language rights to minorities within Quebec and Ontario respectively. In these ways, the document proclaims that Canada is based on the coming together of diverse peoples, and that diversity is to be respected and accommodated.

The *Constitution Act, 1982* carries the ethic of inclusion and accommodation further; first by giving constitutional recognition and affirmation to aboriginal and treaty rights of Canada's aboriginal peoples, and second by introducing a constitutional bill of rights, the *Charter of Rights and Freedoms*. The *Charter* is a document of inclusion and accommodation suited to the diverse makeup of Canadian society. The rights and freedoms the *Charter* refers to are guaranteed equally to men and women (s. 28). Section 27 instructs us to interpret the *Charter* “in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada.” And the rights guaranteed by the *Charter* are all underpinned by the principle of innate human dignity of each person. This truth was recognized early on in the life of the *Charter* by Justice Bertha Wilson, the first woman to sit on the Supreme Court of Canada. She said,

The idea of human dignity finds expression in almost every right and freedom guaranteed by the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupations they will pursue.¹²

Perhaps nowhere in the *Charter* is the principle of human dignity better expressed than in its central guarantee of inclusion: the guarantee of equality. Section 15(1) of the *Charter* states:

¹² *R v Morgentaler*, [1988] 1 SCR 30 at 166.

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Finally, the *Charter's* very first section embodies the practice of compromise, balance, and accommodation so essential to making diversity work. The *Charter* sets out rights and freedoms, but recognizes that they are not absolute. Section 1 provides that the state can impinge on those rights—limit them—provided it can show that the limit is reasonable and justifiable in a free and democratic society.

Section 1 provides a way to balance the public interest in achieving an important goal with private rights that may be infringed by the public measure. For example, free speech or freedom of religion may be required to yield to laws aimed at preventing harm to others that may arise from the speech or religious practice in question. Insofar as reasonably possible, individual rights should be respected and accommodated. But where they unduly impinge on other important interests and values, they may be limited. In short, section 1 of the *Charter* provides a mechanism for resolving the tensions inherent in a diverse society.

This brings me to the final part of my talk: how, in practice, our Constitution works to impose limits on rights, and the implications of this for the ethic of inclusion and accommodation in our diverse society.

III. INCLUSION, ACCOMMODATION, AND LIMITS ON RIGHTS

When diverse peoples live together, conflicts are bound to arise. Lines must be drawn, people insist; this or that type of conduct should not be tolerated. On the other side of the equation, the person affected is likely to assert that it is his or her right, guaranteed by the Constitution, to behave as he or she does.

It is essential that a diverse country committed to peace and democratic governance have ways to resolve these conflicts when they arise. As stories from other parts of the world sadly remind us from time to time, the inability to resolve inter-cultural and religious conflicts in a timely, peaceful manner may lead to violence and even war. It is not enough for a nation to possess an abstract ethic of inclusion and accommodation; it is also necessary to have in place a method of avoiding clashes if possible, and resolving clashes when they cannot be avoided.

The Canadian Constitution confers this essential task on all three branches of governance: the legislative branch (Parliament and the provincial legislatures); the executive branch (the cabinet); and the courts.

The primary responsibility for balancing the public interest with individual rights, and finding compromises between conflicting individual rights, lies with Parliament and

the legislatures. Section 1 of the *Charter*, as I mentioned, allows legislatures to pass laws that infringe rights and freedoms, provided these laws have an important goal and are measured and proportionate. The first step in the process of accommodation is laws that achieve this balance and signal to the public where lines are to be drawn. A host of laws, ranging from the mundane to the exceptional, draw such balances. By and large, the lines set out by the laws passed by Parliament and the legislatures are respected. Such laws are preventative—by setting out the norms of accommodation, they avoid conflicts that might otherwise arise.

The executive branch of government, responsible for applying the laws the legislative branch passes, must also function in a way that appropriately balances the public interest with individual rights and finds just solutions for conflicts between rights. Thus the Supreme Court has held that the decisions of Ministers and administrative agencies must respect *Charter* rights and find appropriate resolutions under s. 1 of the *Charter*.¹³

The final, but equally essential, responsibility for balancing rights against conflicting public interests and resolving conflicts between rights, lies with the courts. Sometimes this involves a constitutional challenge to a law—a person comes to court to argue that the balance struck in a particular law is unconstitutional and that the law is therefore invalid. The courts are thus required to decide whether the law violates the constitution. In other cases, the law is not challenged, but it is argued that it has been applied in a way that denies an individual's constitutional right. In such cases, the court must decide how the balance should be struck and whose interest should prevail. Let me offer an example of each situation—first, the situation where a law is challenged as unconstitutional; and second, a situation where the courts are asked to find a balance between conflicting rights.

The recent decision of the Supreme Court on the right to assisted dying, the *Carter* case,¹⁴ offers an example of a challenge to a law on the ground that it infringed a *Charter* right.

For a very long time, suicide and attempted suicide were crimes in Canada. In 1972, however, as a sign of changing values, the *Criminal Code* was amended, and only assisted suicide remained prohibited. But since the 1990s, there have been calls for the decriminalization of assisted suicide so that people in desperate circumstances could obtain medical help in dying without criminalizing the doctors and others who might assist them.

The claimant in *Carter* suffered from ALS—an incurable disease which causes progressive muscle weakness and which results in death. Anticipating her bleak future, and aware that she could not seek help in ending her life when it became unbearable

¹³ *Operation Dismantle v The Queen*, [1985] 1 SCR 441; *Slaight Communications v Davidson*, [1989] 1 SCR 1038; *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570.

¹⁴ *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.

without putting other people in jeopardy of criminal conviction, she brought a claim in the B.C. Supreme Court, challenging the *Criminal Code* provisions that prohibited assistance in dying. The case pitted the need to protect the public from the risks inherent in assisted suicide against individuals' fundamental right to life, liberty, and security of the person.

The Court ruled that the balance struck by Parliament in the *Criminal Code* was unreasonable. Although Parliament's goal was to protect vulnerable persons from being induced to commit suicide at a moment of weakness, an absolute prohibition on assistance in dying was more than what was necessary to achieve this goal—not everyone who wishes to end their life is vulnerable, and an absolute prohibition is unnecessary given that a permissive regime with properly designed safeguards is capable of protecting vulnerable people from abuse and error. In essence, faced with a clash between a fundamental right and a law, the Court was required to solve the conflict in a way that conforms to the Constitution.

The second situation posits individuals who accept that the law is constitutional, but argue that a court or tribunal or Minister has applied it in an unconstitutional manner. The case of *R v N.S.*,¹⁵ often referred to as the “niqab case” provides an example of this latter situation. Two men were charged with having sexually assaulted a Muslim woman. At the trial, the woman wished to testify, but, on the basis of her religious belief, she sought to do so while wearing her niqab—a piece of clothing that covered her face, except for her eyes. The accused persons objected on the basis of the common law rule, which no one challenged, that effective cross-examination is a trial right of every defendant. The face covering, they argued, would prevent an effective cross-examination and interfere with the jury's ability to assess the credibility of the complainant. The result? A clash between two rights—the right of the complainant to freedom of religion, and the right of the accused to a fair trial.

There were a number of possible ways to resolve the problem. The first way was the response of exclusion: the right to a fair trial means that religion has no place in the courtroom, it was argued, and a witness must always remove her niqab on the witness stand, because the inability to see her face may prevent proper assessment of her credibility. The second response lay at the opposite extreme: the right to freedom of religion is paramount, with the result that a witness may wear her niqab on the stand, provided her sincerely held religious belief requires this. But the solution ultimately chosen was one of accommodation. The majority in the Supreme Court of Canada rejected both extremes. It noted that, traditionally in Canada, potential conflicts between freedom of religion and other values have been solved by respecting and accommodating the religious belief of the individual if at all possible. To accommodate religious beliefs, employers have been required to adapt their workplaces—and schools, cities,

¹⁵ *R v N.S.*, 2012 SCC 72, [2012] 3 SCR 726.

legislatures, and other institutions have done the same.¹⁶ Courts are no different. Consequently, a witness should be allowed to testify with her face covered, provided this does not impinge on the accused's fair trial rights.

I conclude this review of accommodation and diversity in the courts by turning to the need to resolve the rights of Canada's indigenous people with conflicting (or so it may appear) rights of non-indigenous people. As I have noted, s. 35 of the *Charter* guarantees the rights of Canada's aboriginal peoples—rights found in treaties or deriving from aboriginal custom and use of the land and sea and their resources. In practice, these rights may come into conflict with other rights, like property rights or development rights. Moreover, in some cases the aboriginal right is inchoate and must be given a legal definition—a definition which must consider conflicting interests. The task of resolving these delicate and important issues has fallen in large part to the courts. The courts have held that the dominant dynamic in the resolution of these issues is the idea of reconciliation—a robust and fair recognition of First Nations' place in our society, coupled with an appreciation that the way forward is through respectful accommodation or diverse interests.¹⁷

CONCLUSION

I began this lecture by asking how the nation-state can address the diversity inherent in contemporary democratic societies. This is vital. If we are to live together in peace, people from different cultures must find ways to accommodate their differences under the Constitution.

The approach I have described—the Canadian approach—is one marked, for the most part, by inclusion and accommodation. Canadian philosopher James Tully in his book titled *Strange Multiplicity: Constitutionalism in the Age of Diversity* likens the Constitution to *The Spirit of Haida Gwaii*, the masterpiece of Haida artist Bill Reid. You may have seen it in the Vancouver airport terminal or on the backs of older twenty-dollar bills—a large, dark bronze, traditional Haida canoe carrying a motley crew: the Raven, the Grizzly bear, his wife and their cubs, the Eagle, the Frog ... and, as the focal point, the Human Shaman. Tully tells the story of his constitutional metaphor as follows:

The passengers are squabbling and vying for recognition and position each in their culturally distinct way. They are exchanging their diverse stories and claims as the chief appears to listen attentively to each, hoping to guide them to reach an agreement [...].¹⁸

¹⁶ *Ibid* at para 54.

¹⁷ *R v Sparrow*, [1990] 1 SCR 1075; *R v Van der Peet*, [1996] 2 SCR 507.

¹⁸ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge

Over the centuries, the passengers in the Canadian ship of state—the indigenous peoples, the European settlers, the immigrants, and refugees—have all contributed to the conversation in their unique ways. They have squabbled, they have vied for recognition. But what distinguishes the Canadian experience is that these passengers have not only squabbled and vied for recognition—they have listened to each other. Sometimes belatedly, sometimes incompletely. But, more than in many nations, they have shared their stories in a spirit of respect, and from that respect has come accommodation and agreement.

The result of this process is an overarching story that belongs to all of us—a story of rights and their limits—rights and limits enshrined in our Constitution and preserved by our legislatures and our courts. By striking the balance between the rights and their limits, the Constitution has shaped the values to which we are committed, and in the process forged our identity. Sometimes the process is difficult; often it is imperfect. But it is the only process we have. As Tully reminds us, diverse as we are, we are all in the same boat. Or, as Chief Justice Lamer put it in *Delgamuukw v British Columbia*,¹⁹ a case dealing with the reconciliation of aboriginal rights, “Let us face it, we are all here to stay.”²⁰

I leave you with the words of Bill Reid himself, the indigenous artist behind *The Spirit of Haida Gwaii* and a man who understood profoundly the value of inclusion and diversity:

Here we are at last, a long way from Haida Gwaii, not too sure where we are or where we’re going, still squabbling and vying for position in the boat, but somehow managing to appear to be heading in some direction. At least the paddles are together, and the man in the middle seems to have some vision of what’s to come.²¹

Thank you very much for your attention.

University Press, 1995), at 24.

¹⁹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.

²⁰ *Ibid* at para 186.

²¹ Bill Reid, *Gallant Beasts and Monsters* (Vancouver: Buschlen Mowatt, 1992) at 15.