JUDGES IN A MULTICULTURAL SOCIETY

The Right Honorable Chief Justice Beverley McLachlin, P.C.

1 Canada is a multicultural society. It was founded on diversity – two different colonies, one French and Roman Catholic, the other English and Protestant, against the backdrop of a host of aboriginal nations. Instead of seeking to destroy its constituent cultures in a national melting pot, it has continued to protect the diversity of its constituent groups and has indeed augmented it. Today, Canada's citizens are drawn from races and peoples from every corner of the globe. We proudly assert that our country permits these diverse peoples to maintain their cultural and religious practices.

2 Most Canadians think this is a good thing; certainly it is a policy that successive governments have pursued throughout our history and has thus far served us well; we are, after all, a prosperous and peaceful nation that affords its citizens a high quality of life. Yet multiculturalism brings with it certain challenges. The first is the challenge of inter-group tension – tension manifesting itself in discrimination or in extreme cases violence against members of minority groups on the basis of their "different" cultural and religious practices. The second is the challenge of decision-making – the danger is that the divergent moralities and values of different cultural groups will make it difficult to find answers to social problems facing the nation. The third is the challenge of national identity – the concern that a nation that sees itself as an amalgam of a plethora of cultures will find itself without its own identity and ultimately wither away.

3 How do we guard against these dangers? The answer is: in many ways. We work to strengthen our Canadian culture. We focus on our common values and beliefs. And we use the law. Today, I offer some thoughts on how the law, and more particularly judges, help to alleviate the

three potential dangers of multiculturalism I have identified and thus help to strengthen the fabric of our nation. I will first discuss the role courts play in meeting the three challenges faced by the multicultural state -- intergroup conflict, good decision-making, and national identity. Against this background, I will then explore the way in which the law resolves the conflicts inherent in a multicultural society. Finally, I will discuss how judges may best go about discharging their role.

2. The Challenges Facing a Multicultural Society and the Role of the Courts

4 The first challenge faced by the multicultural state is inter-group tension, manifesting itself in discrimination, marginalization and even violence against members of minority groups. If a multicultural society is to survive, members of all groups must be accorded equal protection. The views of the majority cannot be used to discriminate against minority groups, even if moral opinion is against the views or practices of those groups. Benjamin Franklin recognized this over two centuries ago. He wrote:

> History affords us many instances of the ruin of states ... the ordaining of laws in favor of one part of the nation to the prejudice and oppression of another, is certainly the most erroneous and mistaken policy ... An equal dispensation of protection, right, privileges and advantages, is what every part is entitled to, and ought to enjoy.[1]

This is not to say that the state can never forbid religious or cultural practices. In the context of religious belief, the then Chief Justice Dickson stated in 1985 that

> The values that underlie our political and philosophical traditions demand that every individual be free to hold and manifest whatever beliefs and opinions his or her conscience dictates, provided ... only that such manifestations do not injure his or her neighbours or their

[1]B. Franklin, *Emblematical Representations* (1774).

parallel rights to hold and manifest beliefs and opinions of their own.[2]

The same may hold true for the exercise of other rights. Put simply, freedom from coercion must not extend into the freedom to coerce. No one has the right to use his or her right to harm another. But the harm must be clearly demonstrated and must amount to more than an apprehension of moral decline before a majority can outlaw a religious or cultural practice or otherwise discriminate against members of a minority group. One group's evil may be another group's good. In this way, the shifting sands of who is in the majority and who in the minority bespeak our common interest in peaceful coexistence. It is a high threshold for interference, the rule that we may maintain our practices and beliefs so long as they do not bring demonstrable harm to others. In a diverse, multicultural society, we all find protection and the means to co-exist through this high threshold.

5 Claims of discrimination in Canada arise in the context of Human Rights Statutes and the *Charter*. Judges play an important role in interpreting these doctrines and applying them to the conflicts in question. Over the years, we have developed a coherent body of doctrine relating both to rights and remedies. In the workplace, a duty of reasonable accommodation to the religious and cultural practices of the employee has been elaborated. The results represent important milestones in accommodation: Sikh R.C.M.P. officers can wear turbans instead of the specified police hat; women on construction sites are entitled to have separate washroom facilities; employees whose religious days fall on Saturday are entitled to have that day off instead of Sunday if feasible; women cannot be excluded from employment as firefighters on the basis of an aerobic standard not shown to be essential to the discharge of their duties. All of this is part of finding a way to live and work and enjoy full lives together as co-citizens in a diverse multicultural society. And the process

[2] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 346.

continues. New conflicts and problems will inevitably arise. And as they do, judges will be required to apply our anti-discriminatory norms to these new situations. People of divergent beliefs come to court to express their views, to receive serious consideration by judges, striving to ensure that impartial justice is done. In this way, the conflicts between different groups may be resolved and inter-group tensions defused. This is a result in which we all have an interest, and a process in which we all are stakeholders.

6 The second challenge for a multicultural society is the challenge of effective decision-making – the danger that divergent moralities and values may make it difficult to find answers to social and moral problems facing the nation. There is no doubt that social diversity complicates law-making. Different interests and values must be balanced; compromises must be made on all sides. This is a challenge facing democracies everywhere in the world. The unitary ethnic nation state is increasingly a thing of the past, replaced by the ethnically and culturally diverse market state.[3]

7 The simple model of democracy as majority rule by elected representatives is increasingly seen as inadequate to meet the demands of good decision making in the modern state. This component is seen as essential, but by itself not sufficient, to ensure deliberative decision-making. As Philip Pettit puts it:

> It is now widely accepted as an ideal that democracy should be as deliberative as possible. Democracy should not involve a tussle between different interest groups or lobbies in which the numbers matter more than the arguments. And it should not be a system in which the only arguments that matter are those that voters conduct in an attempt to determine where

[3] P. Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (New York: Knopf, 2002).

> their private or sectional advantage lies. Democracy, it is said, should promote public deliberation among citizens and authorities as to what does best for the society as a whole and should elicit decision-making on that basis.[4]

Decision-making by elected officials, Pettit argues, is hampered by the need to satisfy short-term electoral interests, the need to respond to popular passion, the need to respond to particular moral views, and the danger of undue response to particular organized segments of the community, or interest groups. All this, he argues, in fact threatens democracy. He presents a vision of democracy not as a regime for the expression of some chimeric public will, but "as a dispensation for the empowerment of public reason."[5] This requires broadly contestatory institutions, like courts, which allow people to challenge government decisions:

> Those individuals or groupings who believe that power is not being exercised in the common interest – not being guided by public reasons – must be in a position to challenge a government decision, arguing with some prospect of success that it is not well supported by the public reasons operative in the community and should therefore be amended or rejected.[6]

8 This casts the role of courts in democratic decision-making in a new light. Instead of being seen as undermining democracy by ruling on the validity of Parliament's laws, courts are seen as ways of compensating for the weaknesses of electoral decision-making and contributing to deliberative democracy by providing a forum where citizens can test laws for conformity to the fundamental values upon which the society is premised – the shared commitments and values that constitute the deeper community constitutional morality, to return to Dworkin's phrase. These

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[4]P. Pettit, "Depoliticizing Democracy" (Paper presented to the 21st Annual Internationale Vereinigung fur Rechts- und Sozialphilosophie World Congress, Lund, Switzerland, August 2003) (2003), 7(1) *Associations: Journal for Legal and Social Theory* 22.

[5]Pettit, *supra*, at 31.

[6]Pettit, *supra*, at 34-35.

values may be at risk of being overlooked or overridden in the short-term perspective of elected legislators. Yet they are fundamental to deliberative democracy, the goal of which is decisions that best represent the interests of the community as whole. Independent courts thus emerge as an essential condition of democracy.

9 This brings us to the third challenge facing a multicultural society – the challenge of national identity. The fear is that a state that permits the flowering of a variety of cultural groups will find itself without its own identity and ultimately wither away. The fear may be exaggerated; India with many more cultural groups and languages than Canada has maintained a vibrant democracy for over fifty years. Indeed, Canada itself offers and example of a long-standing, successful multicultural democracy. The fear may also be academic; if the ethnic nation state is more and more being replaced by multicultural market states, as scholars suggest, then as a practical matter national cohesion and identity must be found elsewhere than in the ethic of the clan.

10 The diverse modern state will not be bound by ethnic or ideological uniformity, but by other values. The values that bind its different peoples will lie in common economic and social concerns and values, and the shared commitments and values that constitute the nation's constitutional morality. Canada has many shared values – a decent living and care for its people, promoting peace internationally, and a commitment to the fundamental legal norms enunciated in the *Charter* and the principles of democracy, federalism, the rule of law and protection of minorities that underlie and support our constitution.

11 Here again, courts play an important role. They provide a forum to which citizens may resort when they feel that the fundamental legal premises upon which our nation is founded have been

undermined, and in which the ongoing democratic dialogue between different groups and interests may be furthered. In this way, the fundamental premises upon which the nation rests can be maintained and the heritage of Canada's people preserved for present and future generations.

2. Law, the Community's Constitutional Morality and the Role of the Courts

12 I now turn to how the law resolves the conflicts inherent in a multicultural society. The Constitution and constitutional conventions deal with the details of what can and cannot be law, whether as decreed by the legislative branch or the courts. These represent the commonly shared commitments or values known as the "community's constitutional morality," to use a term coined by Dworkin and built on by W.J. Waluchow.[7] This, to quote Waluchow, "is not the personal morality of any particular person or institution. Nor is it the morality decreed by God, inherent in the fabric of the universe, or discernible via the exercise of pure practical reason. Rather it consists of the moral norms and convictions to which the community, via its various social forms and practices, has committed itself, ..." Waluchow suggests that constitutional morality is a "subset of a wider community morality,"distinguished by virtue of having received legal recognition.[8] Further, he distinguishes the fundamental norms of constitutional morality from the moral "opinions" held by different groups within society. Moral opinions in society may conflict with each other and with the deeper constitutional morality of the community. Such conflicts occur frequently in a multicultural society where different groups hold different moral opinions. The challenge is to find

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[7] R. Dworkin, "Hard Cases," (1975), in R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), as discussed in W. J. Waluchow, Èfrom Pre-Legal Society to Constitutional Morality," (Paper presented to the 21st Annual Internationale Vereinigung fur Rechts- und Sozialphilosophie World Congress, Lund, Switzerland, August 2003) [unpublished] at 14.

[8] Waluchow, *supra*, at 15.

ways of resolving these conflicts, while at the same time preserving the basic commitment of members of society to the underlying constitutional morality.

13 Where does one find this constitutional morality? In Canada, much of it is expressed in the *Charter of Rights and Freedoms.* Legal recognition is accorded to the democratic freedoms, freedom of expression and association, equality, the principles that must be adhered to in the criminal process, and more. Other aspects of our shared constitutional morality are derived from our historic experience. Even though not expressly set out, they are so fundamental to our consciousness of ourselves and our system of governance that they demand prior recognition. Thus in 1938, long before the Charter, the Supreme Court of Canada in the *Alberta Press* case rule that the right to free political expression was inherent in Canadian democracy and could not be denied by the elected legislative assembly.[9] And in the *Quebec Secession Reference*, the Supreme Court set out four principles that underlie the constitution and demand the adherence of all Canadians.: "federalism, democracy, constitutionalism and the rule of law, and respect for minority rights."[10] The Court explained the origin of these principles in the following words:

> Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.[11]

14 It is in the delicate interplay between moral opinions possessed by different sectors of the community and the fundamental constitutional morality upon which society as a whole is based that

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[9] *Reference re: Alberta Legislation,* [1938] S.C.R. 100.

[10] *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 32.

[11] *Quebec Secession Reference, supra*, at para. 49.

we locate the dynamic through which different cultural and religious beliefs find accomodation within the legal system of a multicultural society.

15 Perhaps the most important of our foundational moral precepts for a multicultural society are the protection of minorities and its correlative, the prohibition of discrimination. These are based on the fundamental notion of the equality of all people, regardless of personal characteristics like race, ethnicity, religion, and sexual orientation. Respect for minority rights, as the *Quebec Secession Reference* stated, finds its roots in Canada's origin. The condition of the country coming into being was the constitutionally guaranteed respect of the English-speaking people of Upper Canada and elsewhere for the Catholic French-speaking people, mainly in Quebec, and vice versa. The *British North America Act* decreed that French minorities in Anglo-Canada and English minorities in Quebec would have the right to maintain their language and religion – in a word, protection of minorities. But in fact the tradition of respect for minorities dates back almost a century earlier, to the passage of the *Quebec Act* in 1774. England had emerged from the long war with France in possession of France's former North American colonies. The French Canadians were determined to retain their language, religion and civil law. In an act extraordinary for the times, the Parliament of England acceded and passed the *Quebec Act.*

16 Despite this tradition of tolerance, Canada's treatment of minorities has often been far from exemplary. Aboriginal peoples were confined to reservations and denied the right to vote until the middle of the 20th century. Until the 1970s, Canada's immigration policy in operation was isolating and discriminatory towards ethnic minorities. Celebration of cultural differences was often

discouraged, and overriding value ascribed to assimilation and conformity.[12] Furthermore, the Chinese who came to the west of Canada to build the railroads were denied even basic civil rights. Afro-Americans settling in Canada faced systemic discrimination. Jews were barred from certain areas and ways of life. Wartime incarcerations of Japanese and others mar Canada's copybook. And women are still struggling for a fully equal place in our society. Sadly, we have often failed to live up to the promise of our own fundamental constitutional morality. The challenge is ongoing, progress is never purely linear.

17 Yet the tradition of tolerance and respect upon which our nation was founded was never completely lost. It is this legacy which we must honour and endeavour to carry forward. The horrors of Nazi Germany and World War II evoked global recognition of the need to affirm the equality of all human beings and to end discrimination on the basis of those personal characteristics that have historically been treated as markers of inferiority. Across Canada, Provinces passed anti-discrimination legislation in the form of Human Rights Acts, as did the Federal Parliament. Increasingly, our nation's fundamental commitment to protection of minorities was cemented in Canadian law. This process culminated in 1982 with the adoption of the Canadian *Charter of Rights and Freedoms,* which recognized the basic human rights, including equality, as fundamental constitutional norms to which all other laws and all government action must conform. Section 15 of the *Charter* proclaims that

> 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.[13]

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[12]Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995) 14-15.

[13]*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, s. 15(1).

18 Notwithstanding our legal embrace of equality and our rejection of discrimination, the practice of these values is far from easy. First, discrimination is often linked to deeply held moral values. By their very nature religious and culturally-based beliefs are core components of a person's sense of both self and society. We may have moved beyond the time when common religious and moral beliefs held some races superior to others. But attitudes intertwined with some religious beliefs still have the potential to prompt discrimination against other members of society. This may result in conflict between "moral opinion" and the fundamental moral tenet of non-discrimination enshrined in our law.

19 On a legal level, the conflict is usually resolved in favour of the fundamental tenet of non-discrimination. This may initially provide little solace to the person torn between two conflicting norms. Resolution can come, however, with recognition that some norms, like non-discrimination, are so fundamental to our multicultural society that they must be respected. Moral opinions occupy a critical place in a pluralistic multicultural society. They are not overridden, so much as absorbed in the continuing conversation between members of different groups so necessary in order for society to make the compromises that allow its members to co-exist. It is a challenging conversation within which we may find it difficult to listen with the necessary respect and openness to those whose opinions, beliefs and practices differ from our own. Yet we must meet the challenge, for in a multicultural society, those in the majority on one moral issue will inevitably find themselves in the minority on another issue. No one group or set of interests is the sole beneficiary of our commitment to constitutional morality. In the end we all find protection and the means to co-exist through the fundamental principles that make up our constitutional morality, like respect for minorities and avoidance of discrimination.

20 The second difficulty the equality ideal encounters is that discriminatory attitudes are deeply rooted in our collective consciousness. The tribal mentality latent in the human mind too often seeks identification with those who are "like" and rejection of those who are different. The dynamic is self-reinforcing. In asserting that those like me are better than those who are not like me, I implicitly affirm my own superior worth. The devaluation of those who are different from me is supported by the fallacious logic of the stereotype; people of a certain colour or religion or sexual orientation tend to be violent, or dangerous, or stupid. The act of the individual is thus transformed into the status of group characteristic. Personal interest may also reinforce the belief that others are less worthy. However, there are many far more healthy and socially constructive sources of self-worth than the creation of hierarchies based on harmful stereotypes. Discriminatory attitudes can be altered through reflection and an understanding of the basic values that infuse the social contract between the citizen and the state. But the process is neither simple nor easy.

21 A third obstacle to non-discriminatory attitudes is the reality that equality claims can often be easily dismissed through the technique of formalism. Historically, the rights of women and minorities were denied while espousing egalitarian ideals by the logic that it acceptable to treat members of the group differently because they are in fact different. The fallacy in this logic is that the differences cited were often irrelevant to the exercise of the right in question. For example, while women are clearly different in a number of respects from men, this has nothing to do with their right to participate in the political process or practice a profession. To guard against this fallacy, the Canadian courts post-*Charter* have adopted a substantive approach to equality, which looks at how the denial in fact relates to the actual situation of the person alleging discrimination. It is not enough to espouse equality with fine but perhaps ultimately empty words; we must practice

it.

22 In summary, law in a democratic legal system like Canada's provides a way to reconcile the moral opinions of divergent groups, within the context of the fundamental constitutional morality upon which the society as a whole rests. One of the fundamental values upon which the modern multicultural nation of Canada rests is the value of respect for minorities and avoidance of discrimination. This value, expressed through law and the decisions of tribunals and courts, permits members of diverse groups to peacefully work out the accommodations that make life together possible.

3. How Judges Can Best Discharge their Role in a Multicultural Society

23 We have seen that judges play an essential role in the dynamic that holds a multicultural society together, resolving intergroup conflicts peacefully, offering a process by which fundamental community values may enter into democratic deliberation, and preserving the fundamental constitutional morality that underpins the constitution and unites the diverse national community. This raises the question of how judges can best discharge this vital role.

24 The first requirement is that judges maintain their independence from the elected and executive branches of government. Pettit makes this point in arguing for courts and tribunals to hear challenges to government decisions on the ground that they do not represent the collective constitutional values of the community:

> The bodies responsible for hearing ... contestations – courts, tribunals, ombudsmen, and the

> like – will have to be distinct from the elected forums and personnel that gave rise to the laws and decrees that are being contested. Otherwise there would be little or no hope of having a process that genuinely tested those laws and decrees for the extent to which they answer to public reasons. Certainly there would be no hope of having a process that would command the confidence of those making the contestation.[14]

25 Judicial independence has both a subjective and an objective aspect. Subjectively, each judge must strive to decide the case before her on its merits. It goes without saying that the judge must not be influenced by bribes, threats or political policy. But subjective independence does not stop there. It extends to more subtle – sometimes unacknowledged – sources of influence. The judge must not be influenced by concerns that the decision may be unpopular. The judge must not allow herself to be affected by the possible effect of the decision on promotion. And the judge must not be influenced by the views of others, be they family, peers or the press. The judge must make her decision fearlessly and objectively, on the basis of her best evaluation of the evidence and best understanding of the law.

26 The objective aspect of judicial independence concerns the institutional conditions of judicial appointment and service. The aim is to ensure that judges are not only independent in fact, but are seen to be independent so that the public retains its confidence in them. Procedures for the appointment and remuneration of judges should be as free from political influence as possible. Governments should not be able to demote or remove judges because they do not agree with their decisions. Nor should courts be deprived of the resources necessary to hear the cases that come before them.

27 But independence is not alone enough to meet the challenges of judging in a multicultural

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[14]Pettit, *supra*, at 35.

nation. Achieving impartiality in such a society presents special challenges. The judge inevitably comes from a particular ethnic and cultural group. As a human being, he cannot be neutral in the machine-like sense of that word. He quite understandably brings with him a set of values and preconceptions. Conscious or unconscious cultural attitudes may incline him against a particular person or position, or pre-dispose him to reject a critical aspect of the case. Several things flow from this reality.

28 First, judges should consciously strive to understand themselves and how their particular background and experience may affect their decision-making. They should ask themselves if they harbour unacknowledged prejudices that may affect the case. This is essential to impartial decision-making.

29 Second, judges must carry the ethic of equality into what they say and do. They must banish discrimination from the courtroom and ensure that all who come before them are treated with equal dignity and respect. Otherwise, the courts will lose the respect of the multicultural society they serve.

30 Third, judges must strive to understand the lived reality of the person whose culture may differ from theirs. How did the law or government act in question affect the claimant, from her perspective? How would a person be expected to react to a particular situation, given their cultural background? Without an understanding of relevant cultural background, judges may disbelieve witnesses they should have believed, dismiss as insignificant wrongs that require redress. Judges have come to understand that in order to be impartial judges they must understand the social context of the events they are called upon to evaluate.

31 Fourth, judges must practice conscious objectivity. By an act of imagination they must seek to put themselves in the position of the person whose conduct they are judging and ask how things would appear from her perspective. They are not required to condone or approve. But they have a fundamental duty to understand.

32 Fifthly, judges should practice thoughtful reflection. Their work in a multicultural society will inevitably require them to balance conflicting values. They must be capable of distinguishing between moral opinions and the deeper constitutional morality shared by the community as a whole and on which the nation and its laws rest. Before they decide a difficult issue, they should carefully consider and articulate the competing considerations. And they must take the long view, unswayed by passion or the current popular view.

33 Finally, judges must, in everything they do, communicate to citizens the basic principles of constitutional morality that safeguard every person's place in society. Living up to our constitutional morality need not result in segments of society becoming afflicted by alienation or disaffection, and indeed for constitutional morality to flourish it must not be so. Judges must strive to explain to those Canadians who feel that their moral opinions have been left behind why they should nonetheless celebrate and feel invested in the constitutional morality upon which their communal co-existence is based – a commitment to federalism, democracy, the constitutional rule of law, respect for minority rights and the basic values set out in the *Charter*.

34 Judges must take the long view and practice courage. The task of negotiating justice in a multicultural society is difficult. Decisions on matters where different groups hold different views

are bound to be condemned by some. Indeed, in a diverse society, criticism, sometimes vehement, is the judge's lot. But if the judge has grounded her decision in enduring values that underpin the constitution and the nation, she can have the satisfaction that she has contributed, in some small way, to a process that helps bind her country together.