

Putting Reasonable Accommodation in Historical Perspective

Ian BINNIE*

Reasonable accommodation is clearly a subject of high controversy in Quebec at the present time. This is reflected in the *Bouchard-Taylor Report* as well as in the events that gave rise to their inquiry. Moreover, to judge from newspaper commentary a few days ago about a 13-year old Sikh school boy who allegedly threatened a couple of school bullies with his ornamental kirpan, thus earning him a prominent story in *The Montreal Gazette* under the heading, “Kirpan incident raises questions about Court ruling,”¹ the *accommodement raisonnable* psychodrama² has lost none of its legs.

Some of the negative commentary suggests that “reasonable accommodation” is a novel phenomenon called into existence by the Quebec *Charter of human rights and freedoms*³ and the *Canadian Charter of Rights and Freedoms*⁴ as interpreted by an overly aggressive judiciary whose decisions threaten the collective values chosen by Quebecers to govern their collective existence.

However, the fact this conference takes place in Quebec City on its 400th Anniversary serves as a useful reminder that reasonable accommodation in this part of the world has been a major public policy

* Justice, Supreme Court of Canada, Ottawa, Ontario. My thanks to my law clerk Sylvia Rich for her invaluable assistance. Edited remarks given at CIAJ Conference held at Quebec City on September 25, 2008.

¹ *The Montreal Gazette* (16 September 2008) A19.

² A term used in Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences (CCAPRC), *Building the Future – A Time for Reconciliation*, Final complete report in English (Quebec: Government of Quebec, 2008) at 75, online: CCAPRC <<http://www.accommodements.qc.ca/index-en.html>> [*Bouchard-Taylor Report*].

³ R.S.Q. c. C-12 [*Quebec Charter*].

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 [*Canadian Charter*].

objective since at least the initial arrival of the Europeans in the seventeenth century, and no doubt amongst First Nations peoples before that time.

Far from a recent development, reasonable accommodation is one of the founding principles of our society, reaching back to the *Royal Proclamation of 1763*, designed to accommodate the interests of First Nations in the face of expected disruption colonization and settlement. Shortly thereafter, of course, the *Quebec Act of 1774*⁵ sought to reconcile the former residents of New France to British rule by guaranteeing accommodation of the Roman Catholic religion (including the Church's right to collect tithes), and the French Civil Code, while at the same time extending the boundaries of the colony to the Ohio River. A policy of reasonable accommodation, with some notable lapses, has been characteristic of our society ever since, yet the continuation of this policy into the 21st century plainly causes unease in many quarters.

In a poll conducted last year to mark the 25th anniversary of the *Canadian Charter*, a majority agreed that "the Supreme Court of Canada is moving society in the right direction." On the other hand, a significant 37 percent disagreed, mostly citing "too many rights for minorities."⁶

The poll was taken a few months after the release of the Supreme Court's decision in *Multani v. Commission scolaire Marguerite-Bougeoy*,⁷ in which the Court unanimously upheld the right of a Sikh student to attend a public high school carrying a ceremonial kirpan sewn into a cloth envelope wrapped inside his shirt. The Supreme Court in fact reinstated the order of an experienced trial judge, Grenier J., who in turn had endorsed a compromise worked out by the local school and Multani's parents. This compromise had been overruled by the school board on the basis of apprehended incidents of violence although Sikh students had been carrying ornamental kirpans to school in Canada for decades, particularly, in British Columbia, without incident, apparently. (Hence the triumphalist post-*Multani* report about the 13 year-old boy in *The Montreal Gazette*.)

⁵ 14 Geo. III c. 83.

⁶ Kirk Makin, "After 25 years of Charter, most think Supreme Court on right course" *The Globe and Mail* (16 February 2007) A8.

⁷ [2006] 1 S.C.R. 256 [*Multani*].

The *Bouchard-Taylor Report* does a very useful job of collecting incidents of “unreasonable” accommodation controversies in Quebec going back to December 1985.⁸ It concludes that many of the explosive rumours were simply fanned into flames by the media, although calmer voices make themselves heard on occasion. Benoît Aubin, for example, writes in *Le Journal de Montréal*:

Les Québécois qui disent aujourd’hui que les demandes d’accommodements raisonnables venant de minorité religieuses menacent leur identité collective, leur cohésion sociale, font penser aux Canadiens anglais de l’Ouest qui protestaient contre le French power dans les années 1970.

Les Québécois les trouvaient bêtes, obtus et méchants. Eux se voyaient plutôt comme une majorité assiégée dans ses valeurs et son identité, sur son propre territoire, par les revendications des Québécois. Pour ces Canadiens anglais, l’imposition du bilinguisme officiel, du système métrique ou la décriminalisation de l’homosexualité étaient un complot du frog power pour détruire l’identité.⁹

In the particular case of *Multani*, the victorious Sikh student made his own contribution by turning up at a press conference after the release of the decision wearing what looked like a scimitar in a silver scabbard, looking for all the world like Sulieman the Magnificent at the head of the Ottoman armies before the gates of Vienna in the 16th century. This is not at all what the Supreme Court had approved but it allowed the media to intimate that the Supreme Court had unleashed weapons of mass destruction in the schools.

There is further critique which I should flag at the outset which is reflected in the sub-title of this Conference, “*Reasonable Accommodation: A Democratic Challenge.*” The sub-title suggests a tension between the need to remain faithful to the popular will expressing community values, and the vindication of individual human rights

⁸ A useful starting point being the 1985 Supreme Court of Canada decision in *Ontario Human Rights Commission v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536. In that case it was held that Theresa O’Malley, a Seventh Day Adventist, should not have been terminated by her employer because she refused to work Friday evening and Saturday morning to enable her to observe the Sabbath as required by her religious belief.

⁹ “Dur, dur d’être majoritaires” *Le Journal de Montréal* (15 November 2007) 27.

aggressively pursued by unelected judges apparently heedless of the consequences. In fact, Professor Christopher Manfredi of McGill laments “the emergence of an unprecedented degree of judicial hubris in [the court’s equality rights] judgments even if [the Court’s judgments are] cloaked in the language of democratic humility.”¹⁰ Professor Manfredi is not alone in denouncing the court’s human rights jurisprudence. Professor Robert Martin of the University of Western Ontario has written a book about the judiciary which he calls “the most dangerous branch” of government,¹¹ and Norman Spector, a former Clerk of the Privy Council in Ottawa, began one of his columns in the *Vancouver Sun* with the headline “*Notwithstanding clause: rescuing democracy from the tyranny of unelected judges.*”¹² Indeed in a story in *Le Devoir*, under the headline “*La Cour suprême s’est trompée,*” my former colleague Claire L’Heureux-Dubé is reported as having contacted the newspaper to say that in her view the Supreme Court “a fait fausse route dans ses jugements sur la souccah juive et le kirpan et que ses raisonnements juridiques ont ouvert la porte à des accommodements “déraisonnables.”” Expressing particular concern about “[le] givrage des vitres au YMCA de Montréal ainsi qu’à l’ouverture, quelques heures par semaine, de piscines publiques montréalaises pour usage exclusif féminin afin de soustraire les femmes du regard des hommes,” my former colleague reportedly takes the view that such “accommodements tout à fait “déraisonnables ... sont des conséquences directes de jugements défailants rendus par ses anciens collègues à la Cour suprême, après son départ à la retraite.”¹³

¹⁰ Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Don Mills, Ont.: Oxford University Press Canada, 2001) at 34. See also F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000) at 38: “The fact that the *Charter* revolution is more a judicial than a legal revolution is evidence in the many cases that brought about dramatic legal change without any textual warrant for such change.”

¹¹ Robert Ivan Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (Montreal, McGills-Queen’s University Press, 2003).

¹² *The Vancouver Sun* (2 January 2004) A11.

¹³ Hélène Buzzetti, “Les affaires du kirpan et de la souccah juive – la Cour suprême s’est trompée” *Le Devoir* (9 November 2007), online : <<http://www.ledevoir.com/2007/11/09/163719.html>>.

The reference to the controversy about the Jewish “succah” was to *Syndicat Northwest v. Anselem*,¹⁴ in which a Jewish condominium owner successfully asserted a right under the *Quebec Charter* to manifest his religious belief by building a temporary wooden enclosure on his balcony for the 9 day Jewish festival of Succot. The Court split 5 to 4, with a minority of judges rejecting the majority’s broad definition of religious freedom. In dissent, I took the view that Mr. Anselem’s claim was barred by his assent to the condominium by-laws which appeared to prohibit such structures. Although I wrote in dissent, I quite accept that many of these issues are close calls. Often there is much to be said on both sides. Reasonable people can differ, sometimes quite heatedly. Slowly but surely, over time, reasonable accommodation will reasonably be accommodated.

Nevertheless the challenge to the legitimacy of judicial intervention in human rights cases overlooks the fact that the *Quebec Charter* and the *Canadian Charter*, imposes on the judges an obligation to intervene where the facts justify, and sections 52 and 24(1), are as much part of the constitution of Canada as is the holding of elections. We live, as former Chief Justice Dickson reminded everybody, in a *constitutional* democracy.

The protection of minorities was held in the *Reference re Secession of Quebec*¹⁵ to be one of the four great unwritten principles of the Canadian Constitution, the others being the rule of law, constitutionalism and federalism. On this point, the Court remarked:

Although Canada’s record of upholding the rights of minorities is not a spotless one, that goal is one to which Canadians have been striving since confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.¹⁶

Of course critics of the court’s role in human rights jurisprudence are not likely to find comfort in the notion of “unwritten” constitutional principles, which they equally regard as the product of the judicial

¹⁴ [2004] 2 S.C.R. 551 [*Anselem*].

¹⁵ [1998] 2 S.C.R. 217.

¹⁶ *Ibid.* at para. 81.

imagination. However, commentators who believe that judges should stick to the text of the constitution are essentially echoing a United States perspective advanced by some academics. The fact is that the Canadian Constitution as interpreted by both politicians in Parliament and by judges has generally qualified the written word to accommodate reasonable accommodation.

In fact, the written word of the *Constitution Act, 1867*¹⁷ provides a woefully inadequate blueprint of how Canadians govern themselves. Nothing is said in the constitutional text about the Office of the Prime Minister or the existence of political parties. Nothing says that the Cabinet must have the support of the House of Commons.¹⁸ In reality, the Houses of Parliament govern themselves according to their own practices and procedures, many of which have ripened into constitutional conventions, which are at odds with the written text of the Constitution.

On the legal side, the present division of powers between the Federal Parliament and the Provincial Legislatures is not at all in accordance with the text of the *Constitution Act, 1867*, which not only gives the central government general authority to pass laws for the peace, order and good government of Canada, but also a trade and commerce power which if given its full amplitude would undoubtedly swamp most provincial attempts to regulate commercial activities within the province. In other words the Constitution as written fails reasonably to accommodate provincial and regional interests. Most egregiously the text of section 56 of the *Constitution Act, 1867* permits the federal government to disallow a provincial enactment simply on the basis that it doesn't agree with it. One can only imagine the explosion of rage that would have flared in Quebec had the federal government in 1977 "disallowed" Bill 101 (*Charter of the French Language*¹⁹) at the time it was passed.

Many Canadians would also be very surprised to learn that the written text of the *Constitution Act, 1867*, as understood by the people who drafted and enacted it, did not accommodate women in public life, reasonably or otherwise. There is no doubt, as the Supreme Court

¹⁷ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.C.S. 1985, App. II, No. 5 [*Constitution Act, 1867*].

¹⁸ The preamble of the *Constitution Act, 1867* provides that Canada shall have "a Constitution similar in principle to that of the United Kingdom."

¹⁹ R.S.Q. c. C-11.

decision in the *Persons Case*²⁰ demonstrated, that the “original intent” of our Founders and the Parliament at Westminster precluded the appointment of women senators. By the 1920s this prohibition had become an anachronism, but the text of section 32 remained unchanged, and of course we had no amending formula to change it. Eventually, the Judicial Committee of the Privy Council²¹ overruled the historical interpretation given by the Supreme Court of Canada in favour of the “Living Tree” doctrine, which allowed, and indeed requires, judges to re-interpret the text of the Constitution “within its natural limits” as society itself evolves.

The *Constitution Act, 1867*, was marketed to the public on the basis of telling people in different parts of the country what they wanted to hear. Sometimes, as the *Bouchard-Taylor Report* intimates, reasonable accommodation is a device that dares not speak its name.

When the self-styled “Colonial Statesmen” met in Quebec City in 1864, their discussions lasted a little less than two weeks and produced the 72 resolutions that formed the basis of confederation. There seems to have been little detailed discussion or debate about the content of these powers. The velocity of decision making at Quebec left little time for reflection. There were no philosopher kings visible at the table. As Sir John A. MacDonald later remarked, “Too much whiskey was just enough.” In English speaking Canada, Sir John A. MacDonald proclaimed that the new central government would be strong and powerful and not bedevilled by “state’s rights” as in the United States, where the Civil War was fresh in everyone’s memory.

At the same time, in Lower Canada, politicians like Hector Langevin were preaching quite a different perspective, promising that any power touching on “*nos intérêts comme peuples*” were firmly in the hands of provincial governments.²² Undoubtedly, when the confederation

²⁰ *In the matter of a preference as to the making of the word “persons” in section 24 of the British North America Act 1867*, [1928] S.C.R. 276 [*Persons Case*].

²¹ *Edwards v. the Attorney General of Canada*, [1930] A.C. 124 (JCPC).

²² Hector Langevin told his listeners: “Sous la confédération toutes les questions qui concernent la colonisation de nos terres incultes, la disposition et la vente de ces mêmes terres, nos lois civiles, toutes les mesures d’une nature locale, nos intérêts de race, de religion et de nationalité, enfin tout ce qui intéresse et affecte nos intérêts les plus chers comme peuple seront réservés à l’action de nos législatures locales.”

debate reached British Columbia, similar assurances of local independence were given.

Eventually the courts, particularly the Judicial Committee of the Privy Council, said that the division of power in the Constitution was more or less what Hector Langevin said it was, a highly decentralized confederation designed to accommodate regional differences. To arrive at this interpretation the courts had to substantially dilute the peace, order and good government power and the trade and commerce power. I do not suggest for a moment that this was a bad thing. It certainly reinforced and carried into effect the spirit of reasonable accommodation if not the literal text of the *Constitution Act, 1867*. However the orthodox constitutional doctrine today that every province is as sovereign within its sphere of jurisdiction as is the federal government in its sphere, is simply incompatible with a written constitution that includes a power of disallowance under which provincial legislative enactments can be set aside by a disapproving federal government.

Up to this point I have been talking about reasonable accommodation between the major communities that were thrown together to form Canada. The current debate in Quebec focuses more on smaller communities, mainly distinguished by religion, language or membership in a visible minority. On the positive side, *The Bouchard-Taylor Report* observes that *Multani's* court case should be seen optimistically as a desire by the Sikh community to integrate into ordinary Quebec life. The student wished to attend a public school where he would mix with other Quebecers of all backgrounds and languages rather than retreat to a Sikh religious school where he would be isolated with others of his own background, as is the case, for example, with the Hutterites in Western Canada.

It is important to note that while the spirit of equality was powerful enough to trump the text of section 32 of the *Constitution Act, 1867* in the *Persons Case*, equality was not strong enough to trump the reasonable accommodation of Roman Catholic schools in Ontario under the Supreme Court of Canada's decision in the *Ontario Separate Schools Reference*.²³ In that case, as you will recall, the Government of Ontario sought the opinion of the courts as to whether the state could subsidize Roman Catholic education through to the end of high school, even though

²³ [1987] 2 S.C.R. 1148.

at the time of confederation such funding had stopped at a lower grade. No less an authority than the great John J. Robinette, Q.C. gave his opinion that special funding for schools of a particular denomination, whether Roman Catholic or any other faith, could not stand together with the equality guarantee found in section 15 of the *Canadian Charter*. However, the Supreme Court held otherwise, saying that denominational schools were part of the reasonable accommodation agreed upon as part of the “Confederation compromise”²⁴ and would stand regardless of the *Canadian Charter*.

The *Bouchard-Taylor Report* says an important distinction is to be drawn between reasonable accommodation imposed by law (what it calls *la voie judiciaire*), which it considers to be somewhat rigid and confrontational, and the “citizen route” which favours compromise and resolution on a case-by-case basis. Of course this is how the legal system generally operates. Most landlord and tenant disputes are handled privately, as are workplace issues and other controversies of every description. Judicial decisions chart general directions through the disposition of particular fact situations. Implementation of these principles in the broader community is left to the citizens themselves. The law reflects and indeed flows from core community values, including the spirit of reasonable accommodation, and is not some alien structure that stands remote and apart.

In reflecting on the implementation of the principle of reasonable accommodation, and to put the present controversies in an historical context, I think that particular attention should be paid to various decisions of the Supreme Court of Canada in the 1950s. We recall, for example, that an order under the *War Measures Act* at the conclusion of the Second World War offered Canadians of Japanese descent either relocation to Eastern Canada or “patriation” to Japan.²⁵ This “war measure” followed the internment of naturalized Canadians of Japanese origin as well as Canadian-born citizens of Japanese descent, all of whom were treated in the same way by the federal government *diktat*, although their only common characteristic was their race. The reality was that most Canadians of Japanese descent who faced deportation had nothing more in common with Japan than did the Judges of the Supreme Court of

²⁴ *Ibid.* at 1198.

²⁵ *The Cooperative Committee on Japanese Canadians v. Canada (Attorney General)*, [1946] S.C.R. 248.

Canada. Many of these people had lived all their lives in Canada. As Justice Rand pointed out in dissent, it made as much sense to deport Canadians of Japanese ancestry to Japan as it would to send Canadians of British ancestry to Britain for having expressed sympathy with the ideas of Sir Oswald Mosley or to “patriate” Canadians of French descent to France if they had expressed approval of the Vichy Regime. (There was no requirement for the government to show that the Japanese Canadians had expressed any sympathy for Emperor Hirohito as a condition precedent to deportation.)

Regrettably, the majority of the Supreme Court upheld the war measure, but not without strong dissent, which proved to be a harbinger of better things to come.

If the Sikh and Muslim minorities are seen as a threat to Quebec society today, what of the Communist party in the 1950s allied, as it was, with the powerful forces of the Soviet Union? Yet the Supreme Court held in *Smith and Rhuland Ltd. v. The Queen*²⁶ that the Nova Scotia Labour Board was wrong to refuse to certify a trade union because of its domination by Communist leadership. (Lenin, it may be recalled promoted using trade unions in western countries as “instruments for advancing the proletarian revolution under the close supervision of the party.”²⁷) This is surely scarier stuff than elderly Jewish condo dwellers who wish to build temporary wooden structures on their Montreal condo balconies for a 9 day religious festival.

In *Switzman v. Elbing and A.G. of Quebec*,²⁸ the Supreme Court invalidated what was popularly known as the *Padlock Act*, a Quebec statute which made illegal the promotion of Communism in the province and authorized the police to “padlock” any house where such propaganda was to be found. The law was popular in Quebec, particularly with the powerful Roman Catholic clergy, who feared that without it Quebec society could be overrun with godless revolutionaries. The invalidation of such a law, and the implicit message of reasonable accommodation of political dissent, was surely more momentous in its day than the *Multani* and *Anselem* decisions in our day. Nevertheless, reasonable

²⁶ [1953] 2 S.C.R. 95.

²⁷ Thomas Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin, 1981) at 149.

²⁸ [1957] S.C.R. 285.

accommodation of political dissent was affirmed even without any explicit constitutional text to support it other than an alleged trespass on the federal criminal law power.

As to unpopular religious minorities, we recall that during the 1950s the Jehovah's Witnesses were dealt with harshly by the Duplessis government, backed by the Roman Catholic Church. The activities of the Jehovah's Witnesses were a good deal more provocative than the wearing of an ornamental kirpan to school. The subject matter of *Boucher v. The King*²⁹ was a pamphlet distributed by the Jehovah's Witnesses entitled "Quebec's Burning Hate for God, Christ and Freedom is the Shame of All Canada." After listing various grievances, the pamphlet concluded that, "the force behind Quebec's suicidal hate is priest domination." This was provocative stuff. A number of Jehovah's Witnesses were charged with sedition but the Supreme Court (at a rehearing) quashed the prosecution. Justice Rand declared that the pamphlet should be seen as a protest by a frustrated (if aggressive) religious minority that had suffered unrelenting attacks by the government. "The fact that some of the expressions [in the brochure] divorced from their context may be extravagant and arouse resentment" should not distract attention from the underlying plea for reasonable accommodation, he wrote.³⁰

Clearly, the Supreme Court considered the accommodation of differences to be a fundamental principle of Canadian life, just as it was to be identified as an unwritten principle of our Constitution in the *Quebec Secession Reference* 50 years later.

The authors of the *Bouchard-Taylor Report* explain that in recent years the issue of reasonable accommodation in Quebec has become what they call a "psychodrama."³¹ The French speaking majority began to feel threatened by the vigorous assertion of rights by various minority communities, including the Muslims and Sikhs. Quebeckers had rejected the strong grip of the Roman Catholic Church in their own communities and had opted instead for a largely secular state. They thus considered the manifestations of religion in publicly funded institutions to be a backward step. Thus accommodation of the assertion of rights by minority religious communities was seen to threaten the process of secularization which had

²⁹ [1951] S.C.R. 265.

³⁰ *Ibid.* at 291-92.

³¹ The *Bouchard-Taylor Report*, *supra* note 2.

become the collective desire of most Quebecers, according to the authors.

Religious minorities claim “reasonable accommodation” up to the point of “undue hardship.” However, the *Bouchard-Taylor Report* takes a different perspective, and advances the idea that the dominant Quebec society (which it describes as French speaking and embodying certain liberal traditions and practices) is entitled to protect and defend its own collective values against those of the newcomers. Accordingly, it rejects “multiculturalism” for Quebec and endorses an alternative approach which it describes as “integrated pluralism.”³² Using this approach, newcomers would be expected to accept the majority values of Quebec society where collective values so require, but would be accommodated where such accommodation would not threaten such core values.

I would put this difference into more orthodox legal jargon by suggesting that whereas the minorities are arguing in traditional human rights terms (“undue hardship”), the *Bouchard-Taylor Report* proposes an approach similar to s. 1 of the *Canadian Charter* under which “reasonable limits” may be imposed on individual rights and freedoms in the interest of “pressing and substantive” objectives of the broader community, provided the limit is reasonably proportionate to what is required to achieve those objectives.

Of course the reasonable accommodation of minorities and, in particular (given the controversies over *Multani* and *Anselem*), the tug of war between religion and secularization, is not an issue localized in Quebec. The role of Sharia Courts, for example, precipitated not only a political crisis in Ontario but has spawned comparable controversies throughout Europe. In the United Kingdom Sharia Courts have functioned for decades to resolve civil disputes in Muslim communities. Their rulings have no official effect but are regarded as binding on the faithful. Although submission to Sharia “arbitration” by litigants is said to be voluntary, whether or not the voluntariness is genuine in many cases is a matter of concern. The Archbishop of Canterbury, Dr. Rowan Williams, received a great deal of public criticism for endorsing a role for Sharia Courts in Britain, while in July of 2008 the Lord Chief Justice came down firmly on the “reasonable limit” that whatever may be the level of *voluntary* compliance of Sharia Court orders, such orders would

³² *Ibid.* at 122.

not be enforced by the ordinary courts unless they complied with ordinary British law.

A similar statement of support for collective values over religious rights was pronounced by the European Court of Human Rights in *Refah Partisi (the Welfare Party) v. Turkey*.³³ In that case the European court upheld the dissolution by the Turkish Constitutional Court of the *Welfare Party*, at the time the largest party in the Turkish Parliament, on the basis that its objectives to establish Sharia law and a theocratic government in Turkey were contrary to the country's secular constitution, which had embodied the values of the Turkish community since the days of Mustafa Kemal Atatürk. The European Court said in part:

It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on Sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules of the legal status of women, and the way it intervenes in all spheres of private and public life in accordance with religious precepts.

The European Court thus endorses some of the same themes as the *Bouchard-Taylor Report*, namely, an insistence that accommodation becomes unreasonable when it would undermine one or more of the core principles of the community.

The problem, of course, arises where a minority request for reasonable accommodation could very well be accommodated by the majority without "undue hardship" in the particular case, but where such accommodation would nevertheless contradict community values. *The Bouchard-Taylor Report* implicitly endorses rejection by the majority of reasonable accommodation in such circumstances. However, by expressing a preference for the "citizen route" of case by case compromise the *Bouchard-Taylor Report* avoids the difficult task of defining the limits of its suggested paramountcy of "core" community values.

Despite the preference of the *Bouchard-Taylor Report* for "the citizen's route," I believe experience demonstrates that courts are able to take a long view of the controversies that occasionally roil our society and, for the most part, will hold fast to basic principles including the

³³ (2003), 37 EHRR 1.

reasonable accommodation of minorities regardless of the passing waves of public outcry. The “citizen route” defers to the decency of ordinary citizens dealing in a respectful way with the problems of minorities, but acting collectively the majority will usually be quick to enforce majoritarian values. The checks and balances provided by a court system is essential to the protection of minority rights, even if the “reasonableness line” drawn by the courts may on occasion be denounced by the media and the general public (or indeed by former colleagues).

This leads, in conclusion, to a few general observations.

First, I note the extraordinary continuity of Canada’s commitment to the reasonable accommodation of minorities throughout its history, before the *Canadian Charter* as well as afterwards. The “unwritten” constitutional principles are essentially descriptive rather than normative. Although rooted to some extent in a constitutional text, they are essentially deduced from the way our society has conducted itself over its lifetime.

Second, the courts themselves have identified a number of core values in relation to minorities including French language education e.g. *Quebec Association of Protestant School Boards v. Quebec*³⁴ to *Solski v. Quebec*,³⁵ gender equality e.g. *Weatherall v. Canada*,³⁶ the reasonable accommodation of persons with disabilities e.g. *Eldridge v. British Columbia*,³⁷ and the subordination of religious freedom to the best interest of children, as when the Court held in *B.(R.) v. Toronto Children’s Aid Society*³⁸ that parents who were members of the Jehovah’s Witnesses could not deny a blood transfusion to a child in a medical emergency. Each minority presents its own range of challenges. In the case of the Muslim community, these challenges range from a trivial incident at the Mont St-Grégoire Sugar House in March 2007, where newspapers claimed Muslim visitors insisted on pork-free pork and beans, to horrific events such as the honour killing of his own daughter by a Muslim in Mississauga in December 2007.³⁹ Reasonable accommodation has its

³⁴ [1990] 1 S.C.R. 342.

³⁵ [2005] 1 S.C.R. 201.

³⁶ [1993] 2 S.C.R. 872.

³⁷ [1997] 3 S.C.R. 624.

³⁸ [1995] 1 S.C.R. 315.

³⁹ As noted in the *Bouchard-Taylor Report*, *supra* note 2 at 59.

limits, whether viewed in terms of “undue hardship” or reasonable limits imposed in the interest of “pressing and substantial” community values.

Third, there seems to be a general agreement that reasonable accommodation is a two-way street. The *Bouchard-Taylor Report* says that minority complainants who are intransigent, reject negotiation and go against the requirements of reciprocity will seriously compromise their position.⁴⁰ The same theme is reflected in *Okanagan School District v. Renaud*,⁴¹ where the Court said, “to facilitate the search for an accommodation, the complainant must do his or her part as well.”⁴²

Finally, I note the observation of that wise man, Justice Ivan Rand, who over half a century ago said that, “The object of the law is the reconciliation of the conflict of rights and interests of every sort. That being the case, the rule of law which gives the greatest satisfaction to that total reconciliation is the law which will prevail.” If we substitute the word “accommodation” for Justice Rand’s reference to “reconciliation,” we have I believe an apt statement of the theme of this Conference.

⁴⁰ *Ibid.* at 21.

⁴¹ [1992] 2 S.C.R. 970.

⁴² *Ibid.* at 994.