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## **Annual Pluralism Lecture 2015**

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### **Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance**

**The Right Honourable Beverley McLachlin, P.C.**

Chief Justice of Canada

At the Aga Khan Museum,

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Tolerance: the willingness to allow the existence of opinions or behavior that one does not agree with. (Oxford English Dictionary)

Canada is a diverse, multi-cultural state. With that comes a plethora of diverse religions, opinions and behaviors.

History shows there are two ways societies can deal with diversity of opinion and behavior. The first is to confine, minimize or eject those who have different views and behaviors. This is the response of segregation and the ghetto; of marginalizing discrimination; in extreme cases, of exile and genocide.

The second approach is to adopt an attitude of tolerance – a willingness to live with people who are different from us – what Jean-Paul Sartre called “the other” – and to co-exist with the opinions and behaviors one does not agree with.

Most modern multi-cultural nations have – sometimes after great struggle and trauma – adopted the second approach of tolerance. They have rejected the responses of segregation, discrimination and exile – these cause too much pain and in the end, history teaches, do not work. The only way forward, these societies believe, is to move forward together. Citizens may not agree with the behaviors and opinions voiced by some of those with whom they share their communal space. But they are willing to allow them to voice those opinions or act as their

particular religion or values dictate. This is what his Highness the Aga Khan has called the “cosmopolitan ethic”.<sup>1</sup>

In a modern democratic society, tolerance must be the norm. It is the point of departure, the default position. But tolerance, most people would agree, has its limits. There are some things that cannot and should not be tolerated in a civilized society, because they harm individuals or the body politic. Sometimes it is right to be intolerant.

This brings us to one of the great debate of the modern, multi-cultural society – the debate between tolerance and intolerance. It is not a question of either tolerance or intolerance; as I have said, in a democracy tolerance is the default position, the norm. It is rather a question of where we draw the line between behaviors and opinions that should be tolerated – the vast majority – and behaviors or opinions that are so nefarious that they cannot be accepted in civilized society. Where to draw the line in a particular situation may not be easy or obvious.

The task of drawing the line when opinions differ falls first to citizens. Fair-minded people, however, may draw the line in different places. When they cannot agree the task of drawing the line between what is accepted and what cannot be accepted falls to the legislators and the courts.

Today, I would like to explore the interface between tolerance and intolerance in Canadian society. I will begin by placing tolerance within a broader context – the philosophical and Canadian historical context which shapes the debate. I will then turn to the limits on tolerance,

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<sup>1</sup> Lecture by His Highness the Aga Khan: The LaFontaine-Baldwin Lecture (Toronto, Canada) 15 October 2010.

using examples drawn from cases that have come before Canadian courts. I will conclude by describing three conditions that I believe are essential to maintaining the norm of tolerance: first, insisting on respect for the human dignity of each person; second, fostering inclusive institutions and cultural attitudes in civil society; and third, maintaining the rule of law.

## **1. Tolerance: the Philosophical and Historical Context**

A perusal of the works of John Milton, John Stuart Mill, John Dewey and John Rawls indicates that tolerance is a cornerstone of democratic societies. It is a necessary condition of peace in a pluralistic society. This said, scholars are quick to point out that tolerance is not the ideal, nor the highest expression of how diverse peoples can live together. As one scholar writes, it is a term for interaction “anchored too much in the old idea of mutual indulgence and not enough in the more constructive idea of active embrace.”<sup>2</sup> Tolerance, without more, suggests that it is enough for us to merely put up with one another.

Tolerance requires that we behave with dignity and consideration toward one another, but it leaves room for us to internally retain our biases and our inclinations to make culturally centric judgments. Tolerance demands that we do a certain amount of important and positive external work, but it does not necessarily insist that we do our internal work.<sup>3</sup>

Ideally, what is needed is not mere tolerance, but the embrace of the validity of other people’s experiences, cultures and orientations. Only by embrace and the active acceptance, these critics argue, can we fulfil our moral obligation to understand that all lives are qualitatively equal.

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<sup>2</sup> Bruce A. Jacobs, *Race Manners for the 21<sup>st</sup> Century: Navigating the Minefield Between Black and White Americans in an Age of Fear* (New York: Arcade Publishing, Inc., 2006) at 202.

<sup>3</sup> *Ibid.* at 202

Yet, while we acknowledge the ideal of embrace and active acceptance and strive toward it, the hard reality of day-to-day life is that citizens living in a diverse, multi-cultural society – even those who consider themselves fair-minded and unbiased – are sometimes confronted with beliefs and practices with which they do not agree – indeed, which they may abhor.

The question then becomes, what should be tolerated. Whether we like it or not, we are forced to draw lines between what we can accept – the basic norm of tolerance – and what we cannot accept.

This brings me to Canada’s experience with tolerance – the historical context in which the Canadian tolerance – intolerance debate is embedded.

Canada sees itself and is seen by others as a nation of tolerance. We are a peaceful multi-cultural country. A Canadian, John Humphreys, was a principle drafter of the United Nations *Declarations of Human Rights*. In 1982, we adopted the *Charter of Rights and Freedoms*, constitutionalizing our commitment to freedom of religion, equality and a multi-cultural society. As the Supreme Court of Canada stated in 2007:

Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada’s mainstream based on and notwithstanding these differences has become a defining part of our national character.<sup>4</sup>

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<sup>4</sup> *Bruker v. Marcovitz*, 2007 SCC 54 at para. 1.

Canada, we like to boast, is founded on the coming together of three peoples – our First Nations, the French and the English.<sup>5</sup> It is built on successive waves of immigration – a tradition it maintains to this day. We accept refugees and immigrants from all parts of the world and from all cultures. When the Ismaili community in east Africa faced expulsion, we opened our doors to them. A decade later, we once again opened our doors to fleeing Vietnamese refugees. In the years that have followed, many thousands of people fleeing war and persecution around the globe have found homes in Canada. Canada has been enormously enriched by the presence in its midst of these people and by their contributions.

Yet while celebrating our inclusionary historical record, we should not forget its blemishes.

In the 19<sup>th</sup> century, we welcomed Chinese men to build our railroads – dangerous and arduous work – but denied them the right to bring their wives and families unless they paid a head tax – a tax which remained on the books until 1923.<sup>6</sup> When Jews fleeing the Holocaust in 1939 aboard the *St. Louis* sought refuge in Canada, we turned them away. Denied entry here and the United States, they returned to Europe, where many of them perished. When Japan bombed Pearl Harbour in World War II, we dispossessed the Japanese population of British Columbia of their homes and businesses and locked them up in camps. Slavery was not unknown in our country in the 18<sup>th</sup> and 19<sup>th</sup> centuries, and black people suffered systemic exclusion throughout much of the 20<sup>th</sup> century.

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<sup>5</sup> John Ralston Saul, *A Fair Country: Telling Truths About Canada* (Toronto: Viking Canada, 2008) at 3.

<sup>6</sup> In addition, in 1923, Parliament passed the *Chinese Immigration Act*, known today as the *Chinese Exclusion Act*, which banned most forms of Chinese immigration to Canada. This act remained in place until 1947.

The most glaring blemish on the Canadian historic record relates to our treatment of the First Nations that lived here at the time of colonization. An initial period of cooperative inter-reliance grounded in norms of equality and mutual dependence (described eloquently by John Raulston Saul in his book, *A Fair Country*), was supplanted in the nineteenth century by the ethos of exclusion and cultural annihilation. Early laws forbade treaty Indians from leaving allocated reservations. Starvation and disease were rampant. Indians were denied the right to vote. Religious and social traditions, like the Potlach and the Sun Dance, were outlawed. Children were taken from their parents and sent away to residential schools, where they were forbidden to speak their native languages, forced to wear white-man's clothing, forced to observe Christian religious practices, and not infrequently subjected to sexual abuse. The objective was to "kill the Indian in [the child]; save the man",<sup>7</sup> and thus to solve what was referred to as the "Indian problem". Canada's first Prime Minister, John A. Macdonald, explained the policy as follows: "The great aim of our legislation has been to do away with the tribal system and to assimilate the Indian people in all aspects with other inhabitants of the Dominion, as speedily as they are fit for change."<sup>8</sup> "Indianness" was not to be tolerated; rather it must be eliminated. In the buzz-word of the day, *assimilation*; in the language of the 21st century, *cultural genocide*.

We now understand that the policy of assimilation was wrong and that the only way forward is acknowledgement and acceptance of the distinct values, traditions and religions of the descendants of the original inhabitants of the land we call Canada. In a moving ceremony in

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<sup>7</sup> Richard Pratt, speaking of the similar U.S. Policy, cited in Thomas King, *The Inconvenient Indian* (Toronto: Anchor Canada, 2012) at 107-108.

<sup>8</sup> Return to an Order of the House of Commons, dated 2 May 1887, Canada, Sessional Papers (No. 20b) 1887, 37, quoted in James Rodger Miller, *Skyscrapers Hide the Heavens: A History of Indian-white Relations in Canada* (Toronto: University of Toronto Press, 1989) at 189.

Parliament in 2008, the Prime Minister formally apologized to Canada's First Nation people for the abuses of the residential school system. A truth and reconciliation commission, whose report is about to be released, was established. Yet the legacy of intolerance lives on in the lives of First Nation people and their children – a legacy of too much poverty, too little education, and over-representation of aboriginal people in our courts.

Three lessons emerge from the Canadian experience with tolerance and intolerance. First, intolerance – the marginalization of difference – doesn't work. It may seem to provide a solution in the short term. But in the long run it is bound to fail. Second, intolerance imposes inhumane and unacceptable costs in terms of human suffering and lost human and economic potential. Third, the way forward is not to use intolerance to eliminate difference, but embrace tolerance in the spirit of reconciliation.

These lessons from the Canadian experience are replicated wherever intolerance has been systemically imposed – from the Nazi attempts to eliminate Jews, gypsies and homosexuals, to the apartheid of South Africa, to the genocide of Rwanda. Intolerance doesn't work and imposes enormous and unacceptable costs. Ultimately, the only way forward is the way of tolerance.

## **2. The Limits on Tolerance**

For a society made up of a people who share different cultures, religions, practices and opinions – which means virtually every society in the modern world – tolerance is the only way forward . But even tolerance has its limits.



It is one thing to accept the right of others to beliefs and practices that one does not agree with. It is another thing to stand by and allow these beliefs and practices to be used in a way that imposes harm on innocent individuals and groups.

The jurisprudence of the Supreme Court of Canada accepts that some things cannot be tolerated. In *Big M v. The Queen*,<sup>9</sup> the Court held that freedom of religion does not extend to practices that harm others. The state is therefore permitted to ban religious practices that harm others – to say that these practices will not be tolerated. Similarly, in *R. v. Keegstra*,<sup>10</sup> the Court held that hate speech is not protected by the guarantee of freedom of expression because of the harm which such speech may produce.

Tolerance stops where harm begins; this much seems clear. The difficulty, however, lies in defining harm. Religious zealots throughout history have claimed that in forcing assimilation they are in fact benefitting their victims, by encouraging them to repent and accept the true religion. As the priests of the inquisition stoked the flames of their fires of execution, they prayed for the souls of the departed, just as 21st century jihadists claim their elimination of the infidel purges their sin and purifies the state. We are not doing harm, but good, they contend. No one in Canada would accept these arguments, but that is not the point. The point is rather that views on whether a practice is harmful may differ. Even if the harm threshold is set in a generous and tolerant

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<sup>9</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

<sup>10</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697.

fashion, as it is in Canada, people may argue about what constitutes harm and hence a permissible limit on the basic ethic of tolerance.

For example, France it is an offence for a woman to wear a niqab that covers the face, on the ground that to permit this harms women by fostering inequality.<sup>11</sup> In other western states, including Canada, the harm threshold is set higher, and women are generally allowed to wear face coverings. However, in a recent case in the Supreme Court of Canada, the majority of the Court ruled that in some cases, allowing a witness to wear a face covering could harm the accused's right to make full answer and defence.<sup>12</sup> A dissenting Justice took the view that this harm would never suffice to prevent a witness from wearing a face covering required by her sincere religious belief. And not long ago, the Province of Quebec found itself engaged in a debate on what limits the state could impose on religious practices of people engaged in the provision of public services surrounding a proposed Charter of Values.

The simple point is this – what constitutes harm, and when that harm will justify a decision not to tolerate a particular practice, may be neither clear nor easy to decide.

Still, in a society based on tolerance, the lines must sometimes be drawn. How is this to be done? The first avenue is civil debate. When issues like those I have been discussing arise, they find themselves discussed and debated – in coffee shops, living rooms and newspapers; on television and on chat lines. At best, this civil debate may produce some sort of consensus. Failing

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<sup>11</sup> *Loi interdisant la dissimulation du visage dans l'espace public*, Loi n° 2010-1192 du 11 octobre 2010.

<sup>12</sup> *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726.

that, it will provide the context for the legislatures and the courts, if called upon, to draw the necessary lines between tolerance and intolerance.

### **3. Maintaining a Tolerant Society**

I have suggested that absolute tolerance is not possible; in some cases, limits must be imposed, whether by civil society, the legislatures, or the courts. I have also suggested that, in a modern multi-cultural democratic state, tolerance must be the norm. Respect for difference is the essential glue that binds such a society together and allows it to function and move forward in constructive harmony. In this, the final part of my talk, I turn to the question of how a society can maintain the basic norm of tolerance.

Three things, I believe, are essential to maintaining the norm of tolerance: acceptance of the inherent human dignity of every person; inclusive institutions and cultural attitudes in civil society; and the rule of law. Allow me to say a few words about each.

#### Acceptance of the Human Dignity of each Person

The idea that each person is possessed of innate worth and dignity is deeply rooted in western religion and thought. The great religious traditions of Judaism, Christianity and Islam saw man as created in the image of God. Cicero, in *De Officiis*, spoke of the dignity of human beings

qua humans.<sup>13</sup> In the holy Quran we read, “O mankind Be careful of your duty to your Lord who created you from a single soul ... [and] joined your hearts in love”. Kant asserted in profound philosophical terms the unconditional, absolute value of the moral law inherent in human beings, and drew from it the necessity for each person to treat others not as means, but as ends in themselves.<sup>14</sup>

In the aftermath of the Holocaust and World War II the concept of human dignity moved beyond the domains of theology and philosophy and entered the discourse of legal rights. The *United Nations Universal Declaration of Human Rights* in 1948 set out in clear and ringing terms the intrinsic worth and value of every human life. In the half century that followed the precept was ensconced in seminal constitutional documents around the world.<sup>15</sup>

The principle of the innate human dignity of each person may be seen as fundamental to all other human rights. Thus Justice Bertha Wilson, the first woman to sit on the Supreme Court of Canada, wrote:

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 occupation they will pursue.<sup>16</sup>

To read Justice Wilson’s words is to understand how important the concept of human dignity is to a tolerant society. If individuals, by virtue of their innate human dignity, have the right to choose

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<sup>13</sup> See Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, MA: Harvard University Press, 2012) at 11.

<sup>14</sup> *Ibid.* at 30.

<sup>15</sup> See, for example, the 1949 German Basic Law, the *Grundgesetz*; the 1992 Israel *Basic Law: Human Dignity and Liberty*; and the 1982 Canadian *Charter of Rights and Freedoms*.

<sup>16</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 166.

their own religion and philosophy of life, that choice must be respected. No individual or group of individuals has the right to impose their beliefs, practices or choices on another individual.

To be sure, the right to the choices human dignity affirms is not absolute. Sometimes human dignity conflicts with other values, requiring us to balance the two.<sup>17</sup> How a society defines the core content of human dignity may evolve.<sup>18</sup> And care must be taken to ensure meaningful and realistic content to the idea of human dignity, lest it become, as philosopher Arthur Schopenhauer warned, “the shibboleth of ...perplexed and empty-headed moralists ...”<sup>19</sup>

Despite these qualifications, the concept of human dignity – that every person has innate value and worth and hence the right to make fundamental life choices – remains the fundamental underpinning of the basic attitude of tolerance in a diverse, multi-cultural society.

### Inclusive Institutions and Cultural Habits

In 2010, His Highness the Aga Khan presented the 10th Annual Lafontaine-Baldwin Lecture in Toronto. His subject was pluralism. Quoting Adrienne Clarkson in her 2007 Lecture, he cautioned that “we cannot count on the power of ‘love’ to solve our problems”, and stated that “learning to live with people we may not particularly like ... will require concerted, deliberate

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<sup>17</sup> Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015) at 107.

<sup>18</sup> BVefGe 45, 187 at 229 (1997).

<sup>19</sup> Quoted in Michael Rosen, *Dignity: Its History And Meaning* (Cambridge, MA: Harvard University Press, 2012) at 1.

efforts to build social institutions and cultural habits which take account of difference, which see diversity as an opportunity rather than as a burden”.<sup>20</sup>

Federal arrangements, laws and courts can help us live together in an ethic of tolerance. But, the Aga Khan counselled, we need to go further.

We need independent educational institutions, he stated. On this front, it is reassuring that a number of Canadian provinces now require teaching of the world’s major religions as a mandatory part of the curriculum for public and private schools. It is also reassuring that “Canada . . . is recognized as a leader in coping with the challenges of a diverse and polyglot student body” in a recent report of the UN Organization for Economic Co-operation and Development<sup>21</sup>. We also need inclusive institutions of civil society – institutions that focus on bringing people of diverse backgrounds together, on bridging divides instead of deepening them. We need – and fortunately in Canada we possess – an independent press prepared to report not only on conflict but on the stories that celebrate difference and the enrichment it brings to our lives. Above, all, we need, in all our institutions, religious and secular, leaders who understand the richness pluralism brings, and the basic ethic of tolerance that it requires.

Inclusive institutions are supported by and in turn promote a social mindset that sustains pluralism. As his Highness put it, “institutional reforms will have lasting meaning only when there is a social mindset to sustain them.”<sup>22</sup> He stated:

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<sup>20</sup> Lecture by His Highness the Aga Khan: The LaFontaine-Baldwin Lecture (Toronto, Canada) 15 October 2010.

<sup>21</sup> MacLean’s, May 25, 2015, p.5

<sup>22</sup> *Ibid.*

There is a profound reciprocal relationship between institutional and cultural variables. How we think shapes our institutions. And then our institutions shape us.<sup>23</sup>

He went on:

As societies come to think in pluralistic ways, I believe they 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, one the other.<sup>24</sup>

### The Rule of Law

One of the essential tasks of a multi-cultural society is to maintain respect for the human dignity of each person and the individual life choices of the person, even where these choices differ from those of the majority – in a word, to maintain a society where tolerance is the norm. This cannot be done without the rule of law – a system of laws backed by an independent judiciary.

In a diverse, multi-cultural society, the law is the guarantor of the right to hold opinions and follow practices that diverge from the norm. Without the law there is no check on the power of the majority to check beliefs and practices they do not agree with. The confidence of the citizen that her human dignity and right to choose to be different will be respected and enforced through the rule of law is the bedrock upon which civilized intercourse in a diverse society rests. Fear and hatred of the other in our midst is a disease that can destroy social peace. The best antidote to this fear is the assurance that everyone's basic right to hold their own beliefs and follow their own

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

practices – provided they do not harm others – is the assurance of protection by the legal system. This requires that citizens must have access to the legal system, and that the legal system responds with integrity, even in the face of overweening pressure from the majority that sees the belief or practice as aberrant and wrong. It also requires commitment to a culture of legality – a culture that encourages debate about particular decisions, while maintaining respect for the principles and processes of the law and the Constitution.

#### **4. Conclusion**

Let me conclude. The debate between tolerance and intolerance is one of the great debates of our times. Canada, like most other countries around the world, is a pluralistic, multi-cultural nation. It can move forward only by respecting the norm of tolerance. That does not mean that everything must be tolerated – a civilized society has no choice but to condemn practices that cause harm to others and injure citizens or undermine the fabric of peaceful co-existence. But it means the basic rule must be tolerance. Preserving that tolerance is grounded in respect for the innate human dignity of each person. It compels us to cultivate and sustain inclusive institutions and attitudes. And it demands an unwavering commitment to the rule of law.

Living together in the ethic of tolerance is not easy. But it is worth the effort.