Accommodation as a Canadian Tradition

by Senator Pierre Claude Nolin

A debate over "reasonable accommodation" necessary to integrate recent immigrants into society has been taking place in Québec and in other parts of Canada. This article argues that Canadian history is replete with examples of pragmatic compromises made to reconcile various interests and groups. The same pragmatic approach has been apparent in the development of our parliamentary institutions.

The story of our development as a country, and the parallel evolution of our parliamentary institutions, is a story of pragmatic accommodation through adaptation and innovation. And make no mistake: accommodation was often passionately resisted. There have been tensions, setbacks, and bumps along the road. But from the very beginning, there was one overriding fact: for early settlers of an unknown and often hostile new continent, accommodation was a fundamental condition of survival.

When it comes to pragmatism, adaptation and innovation, Canada has been particularly successful. We need to remember that this phenomenon originated in necessity, and was often controversial. Efforts to accommodate competing interests and minority populations were not always successful. When accommodations were made, they were often made begrudgingly. But over time, pragmatic accommodation became more than just a successful strategy for survival. What was once a distasteful and unavoidable imperative evolved into a cultural value that we have come to treasure. Pragmatic accommodation has entered our collective mindset and has become part of our way of life, indeed, part of our very identity as Canadians.

Senator Nolin is a member of the Senate of Canada. This is a revised version of his presentation at the 25th Canadian Presiding Officers Conference held in Québec City from January 24 to 27, 2008.

This legacy has roots early in our history. The successful government of New France – and the security of settlements like Québec – depended on coming to an arrangement with aboriginal peoples in the region. And so it was that in 1701 that the governor of New France, Louis-Hector de Callière, signed the Great Peace of Montreal with 39 First Nations, among them members of the Iroquois Confederacy, the Huron and the Algonquin. Callière chose accommodation over long-term counter-insurgency. It was a choice that would define the evolution of Canada ever since.

The Royal Proclamation of 1763 was another important landmark in the development of a relationship with the Aboriginal peoples. It recognized the First Nations and established the constitutional framework for negotiating treaties with them. Indeed, it is regarded as the Aboriginal "Magna Carta." It is now entrenched in the *Canadian Charter of Right and Freedoms*, which guards against the abrogation or derogation of any Aboriginal, treaty or other rights including the Royal Proclamation of 1763. It is important to acknowledge that there remains much to be done to accommodate First Nations in our country. The Royal Proclamation serves as the base for concluding land claims and honouring other treaty rights.

From the moment it acquired this new territory in 1763, Britain also had to confront the French fact. Of necessity, its colonial policy often had to be more flexible and more pragmatic than its own domestic policy. The Old World assumption that inhabitants of acquired lands would automatically be assimilated did not apply in this case. The New World imperative of pragmatic accommodation would take over in 1774 with the adoption

of the *Québec Act*, an extraordinary measure in many respects. The Act would greatly expand the territory of Québec. It would restore the civil law and the seigneurial system which had been displaced by common law in the years following the French and Indian War. The Act also made Québec unique among British colonies in North America in that it would be governed by a governor and a legislative council, but would not have a representative assembly.

Most notably, the *Québec Act* allowed the free practice of Catholicism in Québec, and modified the oath of allegiance in order to allow Catholics to hold office in the government. It was another 50 years before Catholics in England would be granted the full freedom provided under the *Québec Act*.

This pragmatic approach turned out to be effective in Québec, but it was definitely contentious elsewhere. The *Québec Act* was among the provocations that led to the revolution in the Thirteen Colonies to the south. It was denounced both by the First Continental Congress, and in the text of the Declaration of Independence itself. But the challenges of governing a New World territory such as Québec simply could not be ignored, and the Colonial administration wisely chose the controversial but pragmatic solution that included religious tolerance and minority accommodation. In a sense, this policy was vindicated to the extent that the colonies that would later join the Canadian confederation declined to participate in the revolution that broke out in the American colonies.

The new strategy of accommodation was contrary to Old World instincts. When it first came about, it was the product of survival or absolute necessity. While this new way of doing things began as a tactical device to which there was no practical alternative, it gradually came to be seen as a wise strategic approach to New World realities. Ultimately, pragmatic accommodation has gone beyond its purely self-interested beginnings, and has come to form part of our core values as a society.

Not long after the passage of the *Québec Act*, the establishment of the United States and the resulting migration of the United Empire Loyalists brought new demands for representative government. This led to another illustration of the pragmatic accommodation of the "French fact": the *Constitutional Act of 1791*, which divided Québec into Upper Canada (Ontario) and Lower Canada (Québec). It also guaranteed French-speaking inhabitants the same rights as British subjects in every part of North America.

As a guarantee of their political rights, the *Constitutional Act* provided for an elected Legislative Assembly. It also continued the strategy of pragmatic accommodation, preserving rights for Catholics.

The 1830s saw tensions on the rise throughout British North America. In Lower Canada, the growing French Canadian middle class demanded more power and challenged the authority of the executive. The 1830s saw an agricultural crisis that left many French Canadians on the verge of starvation. Meanwhile, immigration from the British Isles was increasing the proportion of English-speaking residents, particularly in the urban centres of Québec City and Montreal. The improvements of 1791 made meaningful progress towards effective parliamentary institutions, but did not fully meet the expectations of either the English or the French residents of the colonies.

In 1837, rebellions broke out in British North America. They were not limited to French-speaking residents of Lower Canada. Rebellions occurred both in Lower Canada and in Upper Canada, and many of the rebel leaders in Lower Canada were English-speaking. In the aftermath, the British government sent Lord Durham to investigate colonial grievances. His report made a number of recommendations for reforms.

Lord Durham arrived in Québec City on May 27, 1838, bringing with him an Old World perspective on a New World situation. His career up until that point had been as a member of Parliament in London, and a 2-year posting as ambassador to Russia. His term in Canada would last only until September 1839, a scant 15 months. With this very limited experience in colonial life and colonial policy, he approached the "French fact" by advocating assimilation. To this end, he recommended the union of Upper and Lower Canada which was accomplished by the *Act of Union, 1840*. It established a single parliament in which Upper and Lower Canada were represented equally – despite Lower Canada's larger population. The French-speaking residents of Lower Canada went from being a majority in their own territory to being a minority in the newly united province. Regrettably, the Act also made English the only official language for government use, even in the new legislature.

As we know, Durham resisted the already centuries-old New World custom of pragmatic accommodation, opting instead for an Old World strategy of assimilation. Predictably, this plan failed utterly. But something lasting did come from his report, for he had been involved in the electoral reforms that took place in Britain in the 1830's. So it is not surprising that he also recommended instituting responsible government in British North America.

Parliamentary Accommodation

This year we will celebrate the 160th anniversary of responsible government in Canada. It was first instituted

in Nova Scotia in February, 1848, with the swearing in of the first cabinet chosen exclusively from the majority party in the elected chamber. In fact, this was the first responsible government to take office anywhere outside of London. This example would soon be followed in March in the united Province of Canada with the swearing in of the Lafontaine-Baldwin government. I would add that Lafontaine restored the use of French in the legislature that same year.

Responsible government was a tremendous development in and of itself. But it also helps to illustrate the evolving Canadian phenomenon of pragmatic adaptation. Once the colonial governors had to choose the leader of the largest party as premier, it became imperative for premiers to take electoral considerations into account when making a cabinet. This went well beyond the already strong tradition of English-French alliances among the great leaders of the day. The imperative of having an inclusive, regionally balanced cabinet also evolved over time. The gradual embracing of pragmatic accommodation as a Canadian value explains why we would eventually see the first woman in a provincial cabinet in 1921, the first Jewish cabinet minister in 1950, the first woman in a federal cabinet 1957 and the first Aboriginal person in a federal cabinet in 1976. Cabinet making in Canada is a microcosm of a central organizing principle that now animates all our institutions: namely, the inclusion and accommodation of regional, sectoral and minority interests.

This phenomenon is not limited to cabinet making. Through various public offices, notably Governor General, Lieutenant Governor and the judiciary, we have seen the appointment of people from every walk of life, from every background, including immigrants.

The next milestone in the development of our institutions was, of course, Confederation. In many ways, the negotiated compromises and institutional designs that came about as part of the Confederation agreement demonstrate that pragmatism, accommodation and innovation were at the core of our first act as a new country.

Let me focus on one aspect that I have had the privilege to come to know very well. The Parliament of Canada is the very illustration of my theme today. The Fathers of Confederation adapted British institutions to fit the needs of a Canadian reality. They were dealing with a federation, not a unitary state, and they were operating in a new situation of crafting a written constitution to co-exist with the unwritten tradition, what we now refer to as constitutional conventions.

They created a House of Commons, but they gave it democratic characteristics that had yet to be achieved in Britain, such as the use of a regular census to ensure strict representation by population and the approximate equality of constituencies in terms of population. Because they were establishing a Parliament *de novo*, they were able to surpass Britain, which would not implement these democratic changes for decades.

They made provision for a Supreme Court as a general court of appeal. It would not only decide simple questions of law, as British courts had always done, but that would also have to deal with jurisdictional disputes about the legislative competence of the two levels of government. This was a major innovation, creating a domestic court that would have power not only to interpret the law, but to strike it down on constitutional grounds. This was the product of merging the best of both the common law and the civil law traditions, a written constitution that is at the same time a "living tree", to use the now famous words of Lord Sankey.

The Fathers of Confederation also followed the example of having an upper house of Parliament, but they took what was, in Britain, an aristocratic institution entrenched to protect landed interests and wealth, and gave it the role of defender of regional and minority interests. This innovation was an imperative in adapting British institutions, which served a unitary state, to ensure their relevancy and proper functioning in a federal system. Blending Old World traditions with the exigencies of the New, they envisioned an institution filled with what the British call the "great and the good that would include stakeholder representatives who would help build a new country. And again, Québec shows us the extent to which this pragmatic accommodation went.

The Senate balanced the pure principle of representation by population in the House of Commons by providing equal representation to each of the three original "Divisions", regardless of population. This was an important protection for the less populous partners in the new venture. In addition, the seats for Québec were given territorial dimensions, in an effort to guarantee representation to the English-speaking minority in that province. Another major difference was a fixed number of seats. This would of course preserve the careful balance struck for equal representation among the regions. But it meant more than that. Unlike the situation in Britain, where the government of the day could overwhelm opposition in the Lords with the power to create an unlimited number of new peerages, a Canadian government would be limited by a finite number of Senate seats. These innovations brought about a new, uniquely Canadian institution designed to respond to the needs of a new country. The result was a parliamentary chamber that bore little resemblance to the upper house in London.

Accommodation of Minorities

Since Confederation, there are many examples of the accommodation of minorities and of the disadvantaged, an impulse that had already become a Canadian phenomenon. Again, I do not want to paint too rosy a picture. There were stumbles along the way, but the long-term trend of accommodation is unmistakable.

Not long after our new country was formed, religious and language rights suffered a major setback in Manitoba. This new province had been created in 1870 by federal statute. In 1890, the provincial legislature abolished French as an official language and ended funding for Catholic schools, which were the primary vehicle for French-language education at the time. These moves were supported by the Protestant majority. In advocating the creation of a new school board for Catholics, contrary to the position of his own caucus, Conservative Prime Minister Mackenzie Bowell effectively sacrificed his leadership. After the subsequent federal election, Bowell's successor, Liberal Prime Minister Wilfred Laurier, engineered a compromise with Manitoba Premier Greenway, based on a formula that we would today characterize as "where numbers warrant." French-language instruction was restored in public schools where there were a minimum of 10 francophone pupils, and a new Catholic school board was created, although it did not receive government funding. The result was mixed. The impulse to accommodate was evident, but in this case, resistance to complete accommodation was very strong, and would not be overcome for nearly a century.

Accommodation has been a theme not just in our constitutional negotiations and in the design of our institutions. From the beginning of our Confederation, fiscal equalization has been a feature of the relationship between the two major levels of government. This arrangement was purely informal in the years following Confederation, but in 1957 equalization was given a statutory base. The principle behind the transfer program was to ensure that Canadians in every part of the country, regardless of economic circumstance, would have a provincial government with the fiscal capacity to provide basic public services on a par with every other province. This fundamentally Canadian way of accommodating disadvantaged or economically challenged regions was later entrenched in the Constitution in 1982.

In 1915, the Constitution was altered to create what is commonly called the "Senate floor." This new provision was a pragmatic compromise on the rule of representation-by-population in the House of Commons. It would ensure that lesser-populated provinces would have a guaranteed minimum number of seats, a "critical mass" if you will, and that a declining share of the national population would not threaten their interests in the elective chamber. This change to the makeup of the House of Commons was done even though the Senate had already been established as a means of ensuring regional representation.

The evolution from accommodation as necessity to accommodation as an embraced ideal and a shared value was clearly evident in the establishment in 1963 of the Royal Commission on Bilingualism and Biculturalism ("the B&B Commission"). Its final report in 1969 recommended that Canada become officially bilingual. As we all know, this recommendation was implemented, and continues to enjoy widespread support. The Commission also made recommendations respecting minority English and French populations throughout Canada. In the wake of this important report, Ottawa would not only take steps to protect and promote the two founding linguistic cultures; it would also embrace a policy of multiculturalism. That policy continues to be vital today, as it is founded on the pragmatic need to accommodate the immigrants who are so essential to our long-term success.

In the same year as the B&B Commission reported, New Brunswick became officially bilingual by virtue of a provincial statute. Its bilingual status would later be entrenched in the Constitution in 1982.

In my view, the patriation of the Constitution was the culminating milestone of the process started centuries earlier with the founding of Québec. Pragmatic accommodation is now enshrined in our Constitution, recognizing it as a core value embraced by Canadians everywhere. It acknowledges what Canada had become and the common values her citizens have come to share. From the inclusion of a set of constitutionally guaranteed human rights, to the embracing of bilingualism and multiculturalism, to the entrenchment of fiscal equalization, to the achievement of our full self-determination, the 1982 patriation is a defining moment in our history.

The best-known part of the 1982 changes is the establishment of the *Canadian Charter of Rights and Freedoms*. From our perspective now, looking back 25 years to the advent of the *Charter*, we can see that it was a kind of "tipping point." In a way, it made concrete something that, as I have been explaining, has always been a feature of our political evolution: the pragmatic accommodation of minority interests. Somewhere among the examples of France, with its civil law heritage, Britain with its common law and unwritten constitution and the United States, with its melting pot and its near-absolute framework of rights, Canada forged its own unique constitu-

tional settlement. In doing so, it honoured a proud New World tradition of pragmatism and accommodation. Moreover, these initiatives went beyond lofty pronouncements in constitutional documents. Commissions and tribunals were established to ensure that citizens whose constitutional rights had been violated could obtain a meaningful remedy.

But pragmatic accommodation does not always involve grand institutional design or the balancing of complex legal equations. Many examples are every-day occurrences that demonstrate just how much this Canadian principle is now ingrained in our national psyche. We all see instances of this every day, but may not consciously recognize them as such.

I am thinking of the extent to which our parliamentary institutions have strived to ensure the accommodation of persons with disabilities – both for members of the public and members of the assembly. We see the use of sign language in television broadcasts of parliamentary proceedings, level access to public areas and to the Chamber alike. In the Senate, I recall the example of Senator Gauthier, whose full participation in debate in the Chamber and in committees was accommodated by the provision of real-time transcription, which allowed him to overcome his severe hearing impairment. I think of my colleague in the House of Commons, Steven Fletcher, the first quadriplegic Member of Parliament in our history. He has been elected, and re-elected, in Winnipeg. The House of Commons took steps to ensure that he is able to participate fully as a member in the Commons and in its committees, and as a Parliamentary Secretary to a Minister. Making this possible required pragmatic accommodation on a "micro" level. This included modifying the rule that excludes "strangers" in order to allow an assistant to sit with Mr. Fletcher on the floor of the House. These are specific cases, but they are not merely anecdotes. They are illustrations of the extent to which the impulse to accommodate has entered our collective consciousness – not just on an abstract and theoretical plane, but in every day real-world situations.

Even such initiatives as holding committee proceedings by videoconference show the extent to which we are willing to adapt. Canada is a huge country with a dispersed population. Committees often need to reach out to far-flung communities in the course of their work, but cannot always take on the cost of travelling across the country. Videoconferencing has emerged as an important alternative to travel. Such developments are evidence of our urge to accommodate, making our democratic processes inclusive of people in every part of the country. At the same time, in the micro level, this evolution in our institutions has also obliged us to confront the challenges posed by ancient concepts of parliamentary privilege, to adapt old principles and values to new realities.

And that trend continues. The Nunavut Assembly facilitates the use of the Inuit language in addition to English and French. The use of Aboriginal languages in debate is an issue that we are currently grappling with in the Senate. We have Aboriginal members whose first language is neither English nor French, and there is concern that our arrangements do not allow them to participate fully. Discussions are under way in our Rules Committee to determine how best to address the matter.

Conclusion

Each of the cases of pragmatic accommodation I have mentioned today shape and define our national character. In the struggles of our cultures to maintain their individual characteristics, a new national identity was forged. The whole would be greater than the sum of its parts. Each of the conflicts and disagreements we have encountered in our history has become a knot that ties our federation together. Resistance to accommodation was originally overcome by the basic need to survive. In the end, resistance has become acceptance.

We cannot know what challenges the future will bring to our established constitutional and parliamentary traditions. Whatever comes our way, we know that we have the means and the creativity to adapt. Our institutions have shown themselves to be both resilient and reliable in the face of the evolving demands we place on them.

Moreover, we have an even greater asset in the New World approach to change. Canadians have a willingness – more than that, we have a desire – to accommodate every segment of a constantly changing society. That pragmatic adaptability, began as a necessity, but has become a core value and a source of national pride. It is the legacy of our founding cultures.