

# Book Review: Multiculturalism and the Canadian Constitution, by Stephen Tierney (ed)

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## Book Review

**MULTICULTURALISM AND THE CANADIAN CONSTITUTION, edited by Stephen Tierney<sup>1</sup>**GRAHAM HUDSON<sup>2</sup>

IT IS TRITE BUT NONETHELESS TRUE that one should never judge a book by its cover. Yet, occasionally, a book's title and cover convey much meaning. Stephen Tierney's recent collection, *Multiculturalism and the Canadian Constitution*, is a fine example. The title is printed in white and set on a red background, which is divided into the shapes of a few maple leaves and variously sized boxes. The letters of the title are refracted through these boxes, producing a kaleidoscopic image of the Canadian flag. In this image, readers glimpse the essence of multiculturalism, federalism, and constitutionalism. The integrity of the title is preserved, though its constituent elements are separated, disjointed, and circumscribed within their own private boundaries.

Tellingly, the first word of the text is "Canada," not "multiculturalism." Editor Stephen Tierney begins his introduction by stating that "Canada has long been the focus of international attention for its success as a multicultural society and, in particular, for its ability to manage its cultural diversity through a federal constitution."<sup>3</sup> We have heard this before, but many of the eleven contributors turn a critical eye to Canada's performance in this role. After rationalizing the selection and organization of the essays, Tierney expresses hope that they will offer "fresh perspectives" on new and complex issues arising from the interaction between claims for diversity and changing environmental factors such as the evolving constitution, globalization, and shifting ideologies.<sup>4</sup>

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1. (Vancouver: The University of British Columbia Press, 2007) 246 pages [*Multiculturalism*].

2. Ph.D. Candidate, Osgoode Hall Law School.

3. Stephen Tierney, "Introduction: Constitution Building in a Multicultural State" in *Multiculturalism*, *supra* note 1, 3 at 3.

4. *Ibid.* at 22.

The book accomplishes this goal admirably, conveying both the strength and the fragility of multiculturalism as well as the importance of balancing tradition with contemporary innovation in actualizing this ideal.

This text can also, in many ways, be called mythological. The conjunction of the terms “multiculturalism” and “Canadian constitution” was meant to evoke an appreciation for history and for beginnings, as though these terms and concepts by themselves are institutions that have helped to create, and which continue to shape, contemporary social life. True to this mythological motif, each contributor is concerned with exploring the origins and possible future of Canada’s multicultural society, which is described in the singular and whose existence is simply assumed. Similarly, “multiculturalism” is never defined and, at different times, seems to refer to demographic realities, normative frameworks, and official law-making policy. These mythological components are, however, supplemented with more “scientific” elements, as the contributors employ methods from law, political science, and sociology to give meaning to the concepts. Yet, perhaps reflecting a certain degree of positivism and lego-centrism, the objects of analysis are usually Canadian laws, policies, officials, or an aggregate citizenry rather than those groups and people who make up the diverse, differentiated, and fragmented society conveyed on the cover. In Tierney’s collection, multiculturalism is understood principally as official law and policy. Readers are expected to assume that official laws and policies do, or at least can, reflect and reinforce a multicultural *society*; but that is something we should not accept without social science research. In contrast to the book’s many strengths, the absence of research of this kind constitutes its most serious weakness.

The first half of the book comprises five essays on the historical development of multicultural policy and federalism in the Canadian Constitution. Hugh Donald Forbes argues that Canada’s current multicultural identity is anchored in Pierre Elliott Trudeau’s principled, philosophical, and essentially liberal actions.<sup>5</sup> The story of Canadian multiculturalism begins, then, with its emergence as official governmental policy on 8 October 1971. By contrast, Michael Temelini argues that “juridical” multiculturalism did not result from the will of any one group or individual. Rather, multicultural policy, including minority rights, rode the crest of a broadly based civic

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5. Hugh Donald Forbes, “Trudeau as the First Theorist of Canadian Multiculturalism” in *Multiculturalism*, *supra* note 1, 27 at 27.

engagement that stretched back at least as far as the Royal Commission on Bilingualism and Biculturalism in the 1960s.<sup>6</sup> Relying on a civic virtue perspective rather than a “liberal theory of minority rights,” Temelini demonstrates the role of citizens in engendering shared values and understandings, out of which a comprehensive rights regime can emerge.

Temelini’s essay reminds readers of our relatively recent adoption of elements of American-style constitutionalism and of the continued relevance of our traditions of English constitutionalism. This mixture of various traditions is picked up by Will Kymlicka, who highlights the international dimension of Canadian multiculturalism. He notes that multiculturalism, though rarely officially defined and often misunderstood, has become an inseparable component of a distinctive Canadian identity. Exploring our policies on immigration, bilingual federalism, the right of self-government, and treaty relationships, Kymlicka argues that the success of “the Canadian model” cannot be explained simply by reference to the plans, values, and actions of individuals, whether governmental officials or members of civil society. Instead, structural factors such as timing, geography, geopolitical and individual security, and international identity all facilitated the success of Canadian multiculturalism.<sup>7</sup>

Concluding this first section are essays by Ian Peach and by Marc Chevrier. In anticipation of the shift from historical to contemporary foci, Peach studies the Meech Lake and Charlottetown Accords, arguing that the world of constitution-making “is a more democratic and pluralist world than it was in the decades prior to 1982” and that the inability of officials to listen to the

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6. Michael Temelini, “Multicultural Rights, Multicultural Virtues: A History of Multiculturalism in Canada” in *Multiculturalism*, *supra* note 1, 43 at 43-44. For similar works, see Bohdan Bociurkiw, “The Federal Policy of Multiculturalism and the Ukrainian-Canadian Community” in Manoly R. Lupul, ed., *Ukrainian Canadians, Multiculturalism, and Separatism: An Assessment* (Calgary: University of Alberta Press, 1978) 98; Manoly R. Lupul, *The Politics of Multiculturalism: A Ukrainian-Canadian Memoir* (Edmonton: Canadian Institute of Ukrainian Studies Press, 2005). Some argue that civic engagement began in the 1940s, twenty years before the Royal Commission on Bilingualism and Biculturalism. See Reva Joshee, “Learning From the Past to Create the Future: The Vital Role of Communities and Education in Multicultural Policy Development” in Matthew Zachariah, Allan Sheppard & Leona Barratt, eds., *Canadian Multiculturalism: Dreams, Realities, Expectations* (Edmonton: Canadian Multicultural Education Foundation, 2004) 320.
  7. Will Kymlicka, “The Canadian Model of Multiculturalism in a Comparative Perspective” in *Multiculturalism*, *supra* note 1, 61 at 84-85.

people will have serious negative consequences on governmental legitimacy.<sup>8</sup> The relationship between populism and multicultural values is, however, anything but clear, and he leaves this issue open.<sup>9</sup> Marc Chevrier's brilliant piece on federalism scholarship adopts Peach's shift in focus from multiculturalism to intergovernmental relations and participatory politics. Given the expansive tendencies of a national rights regime and the centrifugal forces of regionalism, social pluralism, and claims to self-government, Chevrier argues that "federalism is an unfinished business" and that much of what we take for granted can disintegrate more quickly than we might like to think.<sup>10</sup> He concludes that the management of this confluence of forces can be helped by reflecting on our regionally and culturally based assumptions about what are the purposes and values of federalism.

The second half of the book turns to globalization, international law, and the role of judges in fostering multicultural values. This ambitious collection of perspectives is covered successfully, though the focus of these essays shifts firmly towards law and politics, concluding with a traditional common law perspective on judges and politicians. Daniel Bourgeois and Andrew F. Johnson explore the external impact of economic globalization as well as the internal impact of centrifugal forces such as Québécois and non-territorially based nationalisms on the authority of the Canadian state. Using the 2003 *Action Plan for Official Languages* as a case study, they argue that the federal government has initiated an effective, though still problematic, response to both external and internal pressures by directing its spending power towards the development of economic innovation and "human capital" within the framework of Canada's distinctive cultural and linguistic composition.<sup>11</sup>

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8. Ian Peach, "The Death of Deference: The Implications of the Defeat of the Meech Lake and Charlottetown Accords for Executive Federalism in Canada" in *Multiculturalism*, *supra* note 1, 91 at 104-105.
  9. For a powerful critique of populist politics and the consequences of civic engagement on multicultural values during this time, see Eva Mackey, *The House of Difference: Cultural Politics and National Identity in Canada* (New York: Routledge, 1999) 107-140.
  10. Marc Chevrier, "Federalism in Canada: A World of Competing Definitions and Views" in *Multiculturalism*, *supra* note 1, 108 at 122-123.
  11. Daniel Bourgeois & Andrew F. Johnson, "Repositioning the Canadian State and Minority Languages: Accountability and the Action Plan for Official Languages" in *Multiculturalism*, *supra* note 1, 129 at 143-144.

These spatial metaphors of the internal and the external are fruitfully challenged by Hugh Kindred.<sup>12</sup> Kindred explores how the use of international law by Canadian courts can facilitate law's responsiveness to the "many transnational relations of a culturally diverse society" in a globalizing era.<sup>13</sup> Blurring the boundaries between inside and outside, Kindred argues that judges' use of "human-centred" international law improves the depth, responsiveness, and quality of their reasoning.<sup>14</sup> Jameson W. Doig, in turn, argues that judges also have a special role to play in fostering multiculturalism. Using as examples a number of Chief Justice Brian Dickson's *Charter* judgments in areas such as Aboriginal rights, hate speech, and language and cultural rights, he states that rights-respecting courts "have a crucial influence on the cultural diversity of a nation."<sup>15</sup>

The final three essays in the text all expressly discuss the *Charter*. Robert J. Currie provides a rich and informative description of the Canadian law of evidence, noting that a number of formal rules, principles, and doctrines have been "evolving in a manner that addresses some cultural concerns."<sup>16</sup> Like Kindred and Doig, however, he recommends that research and reform should be directed towards "social context education."<sup>17</sup> Joan Small then provides a thoughtful and compelling review of multiculturalism jurisprudence under sections 15 and 27 of the *Charter*. She explores the ways in which multiculturalism is an imprecise

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12. For a similar perspective, see Stephen J. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) 80 Can. Bar. Rev. 534 at 539.
  13. Hugh Kindred, "Making International Agreements and Making them Work within a Multicultural Federal State: The Experience in Canada" in *Multiculturalism*, *supra* note 1, 147 at 147.
  14. For a similar view, see Karen Knop, "Here and There: International Law in Domestic Courts" (2000) N.Y.U. J. Int'l L. & Pol. 501.
  15. Jameson W. Doig, "New Constitutions and Vulnerable Groups: Brian Dickson's Strategies in Interpreting the 1982 *Charter*" in *Multiculturalism*, *supra* note 1, 164 at 179. See also The Right Honourable Chief Justice Beverley McLachlin, P.C., "Judges in a Multicultural Society" (2003), online: Law Society of Upper Canada <[http://www.lsuc.on.ca/news/pdf/mclachlin\\_judges\\_multicultural\\_society.pdf](http://www.lsuc.on.ca/news/pdf/mclachlin_judges_multicultural_society.pdf)>.
  16. Robert J. Currie, "Whose Reality? Culture and Context before Canadian Courts" in *Multiculturalism*, *supra* note 1, 182 at 190.
  17. For an excellent study on the relationship between multiculturalism and lawyering, see Sue Bryant & Jean Koh Peters, "Five Habits for Cross-Cultural Lawyering" (2004), online: Clinical Legal Education Association <<http://www.cleaweb.org/documents/multiculture.pdf>>.

term and argues that greater use of section 27, and more imaginative use of section 15, would be constructive.<sup>18</sup>

In concluding the volume, Katherine Eddy's topical essay on welfare rights under section 15 picks up earlier themes about challenging the liberal assumptions found in much *Charter* jurisprudence. She examines the complex case of *Gosselin v. Quebec (Attorney General)*,<sup>19</sup> demonstrating that the *Charter* can protect the economic and social rights of Canadian citizens.<sup>20</sup>

These essays provide a rich, thoughtful, and topical discussion that weaves together a wide range of complex historical issues, situates them in a contemporary context, and provides insight into how "the changing Canadian story"<sup>21</sup> may continue to develop. In this aspect, the claim that "the essays illustrate how deeply multiculturalism is woven into the fabric of the Canadian constitution"<sup>22</sup> rings true. These more empirical dimensions are supplemented with a diverse range of theoretical perspectives that convey the current state of academic discourses in a variety of disciplines.

As in any short book, however, important information had to be left out. In the absence of any serious social science research, the text fails to deliver on its promise of demonstrating "how deeply multiculturalism is woven into the fabric of ... the everyday lives of Canadians,"<sup>23</sup> a gap that Kymlicka identifies when he observes that multiculturalism is "neither popular nor well understood" among everyday Canadians.<sup>24</sup> This observation might well be the most important statement in the volume, yet it appears only anecdotally. It is clear that this text is not a story about Canadians if, by "Canadian," something more than simply a citizen of Canada is meant.

Marginal attention to Aboriginal perspectives, for instance, underscores the authors' narrow conception of multiculturalism as post-1971 official law

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18. Joan Small, "Multiculturalism, Equality, and Canadian Constitutionalism: Cohesion and Difference" in *Multiculturalism*, *supra* note 1, 196 at 204-209.

19. [2002] 4 S.C.R. 429.

20. For similar arguments from a more international perspective, see Bruce Porter, "Judging Poverty: Using International Human Rights to Refine the Scope of *Charter* Rights" (2000) *J.L. & Soc. Pol'y.* 117.

21. *Supra* note 1 at back cover.

22. *Ibid.*

23. *Ibid.*

24. Kymlicka, *supra* note 7 at 63.

and policy directed towards immigrants. The most comprehensive treatment of Aboriginals appears in Doig's study of Supreme Court jurisprudence during the Dickson era. In two short pages, Doig reviews *R. v. Sparrow*,<sup>25</sup> the first section 35 case that offered some hope for genuine change.<sup>26</sup> Missing are subsequent cases, such as *R. v. Van der Peet*,<sup>27</sup> *Delgamuukw v. British Columbia*,<sup>28</sup> and *R. v. Marshall*,<sup>29</sup> in which the scope of Aboriginal rights and title has been confused and tightly circumscribed,<sup>30</sup> sometimes in response to negative public pressure.<sup>31</sup> These cases amply reflect the degree to which Aboriginal culture has consistently been regarded by the judiciary as a relic of the past that is fundamentally distinct from Canadian culture, must be reconciled with Canadian sovereignty, and should be preserved, much like artifacts in a museum.<sup>32</sup> Given the broader meanings of multiculturalism, it is surprising that so little attention was devoted to Aboriginal self-government, history, or views about constitutionalism.<sup>33</sup> It is also troubling that no mention is made of the marked increase in Aboriginal protests over the past twenty years,<sup>34</sup> the continued neglect these protests highlight, the repressive and sometimes violent governmental and civilian responses, and Canada's continued receipt of international criticisms for the human rights violations Aboriginals routinely endure.<sup>35</sup>

25. [1990] 1 S.C.R. 1075.

26. Doig, *supra* note 15 at 170-73.

27. [1996] 2 S.C.R. 507 [*Van der Peet*].

28. [1997] 3 S.C.R. 1010 [*Delgamuukw*].

29. [1999] 3 S.C.R. 533 [*Marshall*].

30. See *Van der Peet*, *supra* note 27 at para. 74. See also *Delgamuukw*, *supra* note 28.

31. This was especially pointed in *Marshall*, *supra* note 29. See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Charter Dialogue* (Toronto: Irwin Law, 2001) at 91.

32. *Van der Peet*, *supra* note 27 at paras. 31, 55-57, 62-67.

33. Ian Peach is a notable exception, as he briefly discusses the negative aspects of Canada's non-recognition of Aboriginal agencies during intergovernmental negotiations. See Peach, *supra* note 8 at 95, 100, 104.

34. Howard Ramos, "What Causes Canadian Aboriginal Protest? Examining Resources, Opportunities and Identity, 1951-2000" (2006) 31(2) *Can. J. of Sociology* 211.

35. See *e.g.* Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations: Canada, UNESCOR, 36th Sess., UN Doc. E/C.12/Can/Co/5 (2006) at paras. 11, 15-17, 33.

The text also glosses over the many negative features of Canadian immigration and refugee law and policy as well as the continued racial subtext glimpsed in such areas as national security and racial profiling, national immigration surveys, public opinion polls,<sup>36</sup> and in well-documented disparities in employment and education opportunities for immigrants and racialized minorities.<sup>37</sup> While immigration policy may generally have been positively influenced by multiculturalism,<sup>38</sup> state and juridical centrism continues to be rigorously critiqued by academics, activists, and ethnic and racialized communities.<sup>39</sup> Many argue that multicultural policy—originally envisioned as a means of protecting the abilities of individuals and groups to observe their cultural traditions—must give way to policies of anti-discrimination and anti-racism in public/private spheres such as employment and education.<sup>40</sup> Much like the case of Aboriginals, who want simultaneously to preserve their private cultures and to participate in a public life they have helped to create, immigrants and racialized minorities are seeking to *merge* their public and private identities, to eradicate barriers to opportunity, and to redefine what it means to be a Canadian.<sup>41</sup> The success of these efforts requires at least that citizens and governments internalize multiculturalism, understood as a normative framework or ethos and not simply as an amalgam of positive law and policy. Discussion of how well or poorly multicultural norms are faring in

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36. Peter S. Li, "The Racial Subtext in Canada's Immigration Discourse" (2001) 2 J. Int'l Migration & Integration 77.
37. Cheryl Teelucksingh & Grace-Edward Galabuzi, "Working Precariously: The Impact of Race and Immigrants Status on Employment Opportunities and Outcomes in Canada" (2005) Centre for Social Justice/Canadian Race Relations Foundation. See also Peter S. Li, *Ethnic Inequality in a Class Society* (Toronto: Wall & Thompson, 1998).
38. For a contrary view, see Neil Bissoondath, *Selling Illusions: The Cult of Multiculturalism in Canada* (Toronto: Penguin, 2002).
39. See e.g. Richard J.F. Day, *Multiculturalism and the History of Canadian Diversity* (Toronto: University of Toronto Press, 2000).
40. See e.g. Anver Saloojee, "Social Cohesion and the Limits of Multiculturalism in Canada" in Camille A. Nelson & Charmaine A. Nelson, eds., *Racism Eh? A Critical Inter-Disciplinary Anthology of Race and Racism in Canada* (Concord: Captus Press, 2004) 410; Subhas Ramcharan, "Anti-Racism and Diversity" in Stephen E. Nancoo & Subhas Ramcharan, eds., *Canadian Diversity: 2000 and Beyond* (Mississauga: Canadian Educators' Press, 1995) 235.
41. For a brilliant compilation of the various theoretical perspectives underpinning this debate, see Amy Gutmann, "Introduction" in Charles Taylor, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 3.

such areas as education, employment, art, spirituality, and family life could and should have been given more extensive treatment in this volume.

The idea of creating this collection of essays was certainly ambitious. Multiculturalism and Canadian constitutionalism are both subjects that could easily fill multiple volumes. To combine the two topics in one volume, and to consider them from historical and contemporary perspectives, provides insight into an array of interesting issues, as well as an equally rich variety of theoretical optics through which these issues can be viewed. Although much was left out, the high quality of each contribution provides both newcomers and experts alike with the resources needed to explore these areas in more detail and in new ways. Yet, in a text that supposedly integrates law, political science, and sociology, law and politics are given pride of place, especially in the second half of the volume, which deals exclusively with the contemporary management of pluralism through law and policy. Too often readers are expected to accept the myths of Canadian multiculturalism and of the power of state law and policy to direct social relations, and to assume that those excluded from the channels of authoritative decision-making are benefiting from multicultural law and policy. It may be true that the ideals of multiculturalism are actualized in the lives of everyday Canadians, just as it may also be true that state law and policy have successfully shaped Canadian society in the image of multiculturalism. But this outcome cannot be inferred merely from the words and actions of our judges and our politicians; it is something we should also be hearing from Canadians themselves.

