

PART II

Multiculturalism in the “Old”  
Commonwealth



# Multiculturalism in a Context of Minority Nationalism and Indigenous Rights

## *The Canadian Case*<sup>1</sup>

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Canada has long been considered a world leader at promoting the values of multiculturalism. In part, this is because Canada is a remarkably diverse society with diversity reflected in its state institutions and, in part, this is because some of the leading normative theorists of multiculturalism have written with the Canadian experience in mind.<sup>2</sup> Canada is globally admired for its success at recognizing and protecting diversity in its laws and Constitution, and at integrating new immigrants as well as long-standing minorities into mainstream life. Yet, despite these successes, some minorities in Canada continue to experience racism, higher rates of poverty and unemployment, and lower rates of educational attainment than the dominant French and English groups.<sup>3</sup> Also, Canada's multicultural policy is not popular amongst the Québécois and Indigenous peoples<sup>4</sup> because, in some respects, the policy has been implemented at the expense of their legal and political status.<sup>5</sup>

The very idea that multiculturalism threatens the status of Quebec and Indigenous peoples is ironic given that the success of multiculturalism in Canada is often explained in terms of Canada's antecedent legal, linguistic, and cultural pluralism. Canada was founded through a set of treaty relations between European settlers and Indigenous people, and through agreements between English and French colonies, both of which inform its Constitution.<sup>6</sup> It would be ironic if multiculturalism turned out to pose a threat to forms of diversity that are often considered foundational to the policy's success.

The claim is also surprising since Canadian multiculturalism was never intended to protect the cultures of Indigenous peoples or French Canada. Multicultural policies aim to recognize and celebrate cultural diversity, to protect minorities

from discrimination, and to facilitate minority integration into the public culture. In contrast, Quebec and Indigenous peoples seek to secure and, in some cases, expand their jurisdictional authority over a territory and over areas of life important to their communities. These jurisdictional claims sometimes include, but cannot be reduced to, protecting their cultural values and practices. Both groups are considered founding peoples with constitutional status that supersedes the cultural and religious protections targeted by multiculturalism. This difference—between founding peoples and cultural minorities—is reflected in Canada’s federal division of powers, which guarantees Quebec legislative supremacy over numerous areas of public life in which the protection of cultural and linguistic distinctiveness is especially important (such as educational policy). It is also reflected in the constitutional protection of Aboriginal rights,<sup>7</sup> which separates and shields these rights from others that are guaranteed in the document.<sup>8</sup> As Kymlicka observes, the policies governing Canadian diversity regarding ethnic minorities, Quebec, and Indigenous peoples have different origins, are embodied in different legislation, refer to different parts of the constitution, are administered by different government departments, and are guided by different concepts and principles; “each forms its own discrete silo, and there is very little interaction between them.”<sup>9</sup> Yet despite attempts to separate these different kinds of protections, they can become entangled and, on occasion, attempts by courts and policy-makers to manage cultural diversity generate a hornet’s nest of political controversy amongst these groups.

In this chapter I examine three key features of Canadian multiculturalism in practice and explain why they are perceived as threatening to either Quebec or Indigenous peoples. These three features—constitutional recognition, reasonable accommodation and cultural rights—comprise the leading approaches by which the normative ideals of multiculturalism are translated into laws and policies in Canada. As a normative ideal, multiculturalism is sensitive to the ways in which possessing a minority identity can be a source of disadvantage and disrespect, and as a form of liberal justice is committed to rectifying them.<sup>10</sup> Whereas the multicultural ideal can be attained in different ways, the three features I examine here are central to the Canadian approach and, I argue, have sometimes politicized and distorted relations amongst Canada’s founding peoples and cultural minorities.

#### THE POLITICS OF CONSTITUTIONALLY PROTECTING MULTICULTURALISM IN CANADA

Over the past forty years, over forty nation-states have entrenched cultural or Indigenous rights in their constitutions.<sup>11</sup> In 1982, when Canada added the Charter of Rights and Freedoms to its constitution, it included a section (§27) that states: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” This was initially

viewed as a statement of national values rather than a justiciable means of protecting cultural diversity, but when combined with other Charter rights, it has successfully strengthened the identity of Canada as a multicultural society and enhanced the protection of minority rights. At the same time, the constitutional protection of multiculturalism has met with strong resistance in Quebec. To understand why this is the case, it is worth briefly considering how minority rights were protected before 1982, and the impact on Quebec of constitutionally entrenching these rights.

### *Legislative Protections for Multiculturalism*

Minority rights are protected through hundreds of policies and regulations passed by all levels of government in Canada, which advance the aims of cultural equality and integration in relation to immigration and settlement, education, housing, zoning, employment, arbitration, translation, policing, recreation, security, and other areas of public life. Some of these policies were initially passed in the 1970s and 1980s in response to federal and provincial human rights acts and the Multiculturalism Act (1988), all of which remain central sources of multicultural values today.<sup>12</sup> The Multiculturalism Act established four political commitments to guide federal legislators in policy-making: (1) to provide funding for programs aimed at the cultural maintenance of ethno-cultural groups; (2) to remove cultural barriers to full participation in Canadian society; (3) to encourage cultural interchange; and (4) to support official language acquisition by immigrants. Throughout the 1980s and 1990s, these aims, together with a generous infrastructure of legislators and bureaucrats, led to numerous initiatives and policy changes that together changed the symbolic order of Canada. In the words of one critic, until that time, Canada had been fixated “on Anglo-conformity . . . and, to a lesser extent, cultural dualism.”<sup>13</sup>

Even before the Multiculturalism Act was passed, minority rights were protected by provincial human rights acts, which were passed province-by-province after World War II to help realize Canada’s commitments as a signatory of the UN Universal Declaration of Human Rights.<sup>14</sup> Starting with Ontario in 1948 and ending with Quebec in 1976, the provinces passed nonidentical acts that protected provincial residents against discrimination on numerous grounds (e.g., gender, age, ethnicity, race, religion, political affiliation) and in numerous areas of life (e.g., in relation to employers, landlords, insurers, schools, on billboards and signs, in restaurants and other businesses). The acts are nonidentical in the sense that some offer broader protections in more contexts than others do. The acts are also statutory rather than constitutional, which means they can be altered by an act of the provincial legislature rather than requiring a constitutional amendment. As creations of provincial governments, they are controlled by provincially designed processes and by tribunals that are appointed and funded by provincial governments.<sup>15</sup> Provinces each have a good deal of control over the content of the acts and how aggressively they are enforced.

Whereas most of the human rights acts were passed before multiculturalism was on the agenda, the acts provide some of the most important protections for minorities in the public sphere. Unlike constitutional rights, which ensure that law is consistent with guaranteed rights, human rights acts protect individuals from discrimination in the context of everyday life. They play a crucial role in facilitating cultural integration in the workplace, consumer interaction, rental accommodation, and other areas of public life where people are most likely to experience discrimination in ways that marginalize them from the mainstream and deny them equal access to opportunities and resources.

These two important sources of multiculturalism—the Multiculturalism Act and provincial human rights acts—remain key to the protection and management of social diversity in Canada, but both have lost considerable symbolic power compared to what they had in the past. The global backlash against multiculturalism has been felt in Canada as well.<sup>16</sup> Today, fewer bureaucrats work directly on initiatives connected to the Multiculturalism Act, and the cabinet no longer includes a minister of multiculturalism, as once was the case. The Multicultural Directorate has lost some of its funding and the high profile it had twenty years ago.<sup>17</sup> In many respects, multiculturalism is no longer presented as a priority of the federal government, except rhetorically, where it is sometimes used to project an image of Canada intended to attract skilled immigrant labor and expand Canada's economic opportunities on the global market.<sup>18</sup> In short, even though some of the infrastructure inspired by multiculturalism remains in place, the resources committed to it, and the political resolve of nationally elected governments to advance the values and ideals of multiculturalism, have diminished.

Provincial human rights acts have also lost much of their symbolic power and legal status, mainly due to the constitutional entrenchment of the Charter of Rights and Freedoms. The Charter contains powerful guarantees of equality rights (s15), religious freedom, and freedom of conscience (s2a), which have been used in hundreds of cases to strike down law and shape government policy affecting cultural and religious minorities. Once the Charter came into force, the protection of rights, including minority rights, was increasingly overseen by courts, which have the power to require all federal and provincial law to conform to provisions guaranteed in the Charter. This includes provincial human rights acts, which are a form of provincial law. So, whereas before 1982, the protection of minority rights was generally the responsibility of provincial governments, after entrenchment, rights protection became a judicial responsibility, with the Supreme Court of Canada in Ottawa being the court of final appeal. Provincial human rights acts continue to address claims of discrimination in everyday life, but these acts are symbolically and legally subordinate to the Charter. Similarly, the jurisdictional authority of provincial governments over the protection of nondiscrimination rights for minorities is now also subordinate to the Charter.<sup>19</sup>

*Quebec and the Charter*

This transfer of power from provincial governments to a national court system was especially problematic in Quebec because in 1982 it refused to endorse the amended Constitution as all other provinces had done. To date, Quebec has still not agreed to the constitutional package, even though the Constitution is legally binding on the province. In negotiations leading up to entrenchment, many Quebecers suspected that the constitutional amendments were part of a strategy orchestrated by the central government to weaken Quebec nationalism by enhancing the power of federal institutions, such as the Supreme Court of Canada, to establish and protect the rights of citizenship. And they were not far wrong in their suspicions. The Charter has proven to be a powerful source of “citizenization” and is symbolically and legally crucial to the integration of Canadians, including new immigrants.<sup>20</sup>

Today, some thirty years after this conflict, these tensions remain unabated. For instance, in 2013, the then-Quebec government proposed to pass legislation, which it called the *Chartre des Valeurs*, that would prohibit provincial government employees and teachers from wearing religious symbols such as crosses, kippahs, hijabs, niqabs and turbans, to work. The legislation, which failed to pass following the electoral defeat of the government that proposed it, would have changed the terms by which religious minorities had access to the public sphere and employment within the province.<sup>21</sup> The broad consensus amongst legal commentators was that the *Chartre* would not survive a constitutional challenge and was “plainly” unconstitutional.<sup>22</sup> But, in the context, this was hardly a redeeming fact. The controversy served to underline a message, which was helpful to Quebec nationalists at the time, that the management of social diversity in the province had been transferred from the province to the federal courts.

The politics of minority nationalism combined with constitutional entrenchment has politicized the protection of minority rights in Quebec. With every court decision, Quebecers are reminded that judges, not legislators, decide how the aims and ideals of multiculturalism are translated into public policy, and that the Charter’s protections are imposed by the central state on a national minority without its consent.<sup>23</sup> As a result, objections to decisions of the Supreme Court of Canada are often expressed in Quebec also as concerns about democracy—that the decisions of an unelected and anglophone-dominated court overrule the decisions of local legislators who are accountable to the people of Quebec and more sensitive to their values. Even though Quebec courts also interpret the Charter and often decide cases in a manner consistent with Supreme Court of Canada rulings, the constitutional tensions between Quebec and Canada have enabled Quebec nationalists to frame Canadian multiculturalism and its protection in the Charter as an imposition by the central state on a national minority.<sup>24</sup>

A good illustration of this framing is found in *Multani v. Commission scolaire Marguerite-Bourgeoys*, a case about a Sikh boy who wanted to wear his kirpan

to school in Montreal.<sup>25</sup> The conflict initially involved a disagreement between a parent’s association and the district school board but was eventually appealed to the Supreme Court of Canada, which decided in favor of Multani on the basis of Charter protections for religious freedom (s2a) and multiculturalism (s27). The Court emphasized that accommodating Multani helps to realize multicultural values by demonstrating “the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities.”<sup>26</sup> The decision led to widespread debate in Quebec about minority rights and to a government-commissioned report, written by two prominent scholars—G rard Bouchard and Charles Taylor—on minority accommodation in Quebec. Perhaps as a way of assuaging minority nationalist sentiment, Bouchard and Taylor characterize the conflict as a challenge to “local decision making.” They argue that to encourage citizens to manage their own differences, to avoid congesting the courts, and to respect Quebec’s distinctive integration model, conflicts about cultural diversity in Quebec are better resolved through a “citizen route” rather than a “legal route.”<sup>27</sup>

The *Multani* controversy may well illuminate a distinctive “intercultural” approach to integration and social diversity in Quebec. Quebec claims that its interculturalist approach places more emphasis than multiculturalism on the integration of ethnic minorities into the distinct culture of the dominant group.<sup>28</sup> That Quebec should favor such an approach is hardly surprising given that the French majority in the province is, itself, culturally and linguistically vulnerable and insecure as well.<sup>29</sup> But, at the same time, and despite some understandable divergence between Quebec and Canada about multicultural policy, there can be no doubt that debates about minority rights in Quebec are politicized and distorted by ongoing nationalist opposition to the entrenchment of the Charter and the expansion of the Supreme Court’s authority. The controversy about *Multani* was driven by a politically motivated rejection by Quebec nationalists of Ottawa-based decision-making (i.e., the Supreme Court of Canada’s ruling). It provided some political elites in Quebec with an opportunity to exaggerate the distinctiveness of Quebec’s approach to managing cultural diversity in order to enhance the electoral appeal of Quebec nationalist politics. On this more political and strategic view, the conflict over the kirpan in Montreal did not occur because Quebecers reject the values and principles of multiculturalism, but because this high-profile court case was decided outside Quebec by constitutional provisions to which Quebec had never consented.

### *The Risks of Reasonable Accommodation*

In addition to constitutional entrenchment, a second feature of Canadian multiculturalism that politicizes the protection of minority rights is reasonable accommodation. Reasonable accommodation is the legal standard used to translate the values of cultural equality and nondiscrimination into practical reforms in workplaces and public institutions so that they are more fully accessible to minorities.

Over the years, the reasonable accommodation standard has become closely tied to the public philosophy of Canadian multiculturalism. The standard was introduced into Canadian law in the mid-1980s in cases about religious discrimination in the workplace. Employers were required by the court to adapt workplace rules in order to “accommodate” the religious commitments of their employees within the limits of what is “reasonable” and short of undue hardship. As one legal scholar explains the principle, “facially neutral rules that have adverse effects on the basis of creed or religion are a violation of the right to religious equality unless the employer has taken reasonable steps, up to the point of undue hardship, to accommodate religious observance.”<sup>30</sup> Since then, the principle has been used outside the employment context, first in 2006, in the case of *Multani*, discussed above. The court decided that the accommodation of Multani’s kirpan was “reasonable” because it could be managed with minimal risk to school safety.<sup>31</sup> In 2007, the Bouchard-Taylor Commission was mandated to explore whether practices of “reasonable accommodation” in Quebec conform to Quebec’s core values.<sup>32</sup>

In all these contexts, the principal aim of reasonable accommodation is the same, namely, to ensure that individuals are treated equally and in a manner that is sensitive to their differences, including differences related to their cultural and religious identities. As Bouchard and Taylor explain, an appropriate measure of fairness and equality ensures that all people have equal access to the public sphere, including to employment, housing, and public services, in full light of their differences.<sup>33</sup> Where rules disadvantage some groups without that being intended, the solution is to adjust the rule to accommodate the difference. The aim of reasonable accommodation is to mitigate the discriminatory effects of rules and workplace practices by making provision for an exception to the rule or a specific adaptation of it.

Despite the commitment to equality that animates the standard, some critics argue that, in practice, reasonable accommodation is far too protective of the status quo and has been used too often to shield unjust workplace practices. This is because the standard, at least in the context of employment cases, requires minorities to be accommodated only to the degree that doing so is “reasonable” and does not cause the employer undue hardship.<sup>34</sup> This means that the more fundamental a rule is to workplace practice, the less likely it is that accommodation will appear to be reasonable, even if the rule will cause minorities, people with disabilities, or women to be treated unfairly. The chief justice of Canada’s Supreme Court, Beverly McLachlin, recognized this in a ruling relating to the exclusion of women as firefighters through fitness standards for recruits that favored men. Reasonable accommodation, she argued, prevents the court from transforming standards despite their discriminatory and exclusionary effects: “The right to be free from discrimination is reduced to a question of whether the ‘mainstream’ can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination

receives the law’s approval. This cannot be right.”<sup>35</sup> On her view, the alleged hardship of reforming status quo practices can be a poor test of whether accommodation is unfair and instead may indicate only the degree to which the dominant group’s position of power is written into the way that social institutions work.<sup>36</sup>

Instead of enhancing equality, the framework of reasonable accommodation can preserve and protect dominant norms and practices that disadvantage less powerful groups. It thereby offers a conservative translation of the normative ideals of multiculturalism, and one that favors reforms consistent with protecting the status quo. Using this standard, multiculturalism will appear to favor inclusivity as long as being inclusive is consistent with mainstream norms and practices. Beyond these limits, minority accommodation could appear “unreasonable.”

In addition to these conservative tendencies, a second drawback of reasonable accommodation is the adversarial incentive encouraged by the standard. Because accommodation depends on whether it is “reasonable” or not, the standard incentivizes managers, employers, landlords and other respondents who wish to resist minority accommodation to articulate reasons why, in the case of their business, accommodation is “unreasonable” and will cause them undue hardship. For instance, employers can avoid accommodating minorities only if they provide convincing evidence to show that accommodation will significantly compromise their profits, unduly restrict their productivity, or undermine workplace standards (as in the case of fitness tests and firefighting) to an unreasonable degree. These kinds of arguments were made in *Multani*, where the school board tried, unsuccessfully, to convince the court that allowing Multani to wear his kirpan would compromise the safety of other children and thereby undermine a central purpose of school, which to provide a safe environment in which children can learn.<sup>37</sup> In these and many other cases, the standard creates an incentive for respondents to define the status quo as intrinsically tied to practices that cannot change without jeopardizing the very enterprise at issue.

Unsurprisingly, a similar adversarial incentive can motivate state actors in disputes about whether minority rights ought to be protected. In order to resist accommodating minorities, political actors have an incentive to articulate ways in which accommodation will unduly burden public values. Recent debates in Quebec again offer a good illustration. The Quebec government defended its proposed *Charte des Valeurs*, which would have prohibited religious dress and ostentatious religious symbols, on the grounds that religious dress in the public sphere undermined Quebec’s identity and core public values, which reject religion in the public sphere. At the same time, it defended, as important features of Quebec’s historical *patrimoine culturel*, a crucifix that hangs in the main chamber of Quebec’s National Assembly, and the illuminated cross that overlooks Montreal from the top of Mont Royal. These seemingly contradictory positions on the religious symbols of minorities and the majority can be reconciled only if one believes that minority accommodation must be consistent with the majority’s existing cultural preferences.

As these conflicts show, reasonable accommodation can work in conservative ways. It can reduce cultural equality to a project that, at best, inserts minorities into the public culture only insofar as doing so does not upset the dominant group's position of power. Its adversarial incentive can lead dominant groups to raise the stakes in a dispute by claiming that their identity or core values will be threatened if they have to accommodate minority practices. These tendencies, along with the ongoing dispute in Canada about constitutional entrenchment, point to some of the deeply political features of Canadian-Quebec debates about minority rights, and to two ways in which multiculturalism becomes entangled in the politics of minority nationalism.

### THE PROTECTION OF CULTURAL RIGHTS

We now turn to what is often recognized as the central feature of multiculturalism, the protection of cultural rights. These rights are integral to the central aim of multiculturalism, which is to acknowledge that people's attachment to features of their identities can be a legitimate basis for the recognition and protection of their cultural practices and beliefs. The recognition and protection of cultural identity have been linked to broader principles of justice, equality, human rights, and democratic citizenship.<sup>38</sup> Over the past thirty years, a leading task of scholars and policy-makers who work on issues related to multiculturalism has been to distinguish between cultural claims that advance these important values and those that do not. As a result of these efforts, the success of states in protecting human rights and democratic citizenship is partly measured today in terms of how well they protect minority cultures.

The Canadian experience suggests, however, that the state's protection of cultural rights is no substitute for the fair treatment of minorities, and this is perhaps nowhere more evident than in cases about protecting the cultural rights of Indigenous peoples. As previously mentioned, in Canada, Aboriginal rights are legally distinct from rights protected by multiculturalism, and Indigenous peoples are recognized as possessing unique status as "First Nations," rather than as the ethnic minorities whose interests multiculturalism is meant to address. Yet the limitations of protecting cultural rights are similar for both groups.

In the case of Indigenous peoples, since the 1990s, one of the leading approaches taken by the courts to Indigenous rights in Canada, has been to recognize distinctive and integral cultural practices as Aboriginal rights. On the face of it, this kind of recognition is desirable and is certainly an improvement on previous approaches adopted by the state. Until the 1970s and 1980s, the Canadian state used Indigenous cultural differences as a justification for denying Indigenous peoples rights to jurisdictional authority on their ancestral territories, the right to vote, the right to educate their children in traditional practices, and even the right to basic civil liberties.<sup>39</sup> Against a historical background in which Indigenous culture was

denigrated, the possibility of having it recognized, constitutionally protected, and socially respected through state-mandated guarantees appears attractive.

Yet despite some significant improvements over the past thirty years in the treatment of Indigenous peoples, cultural rights have not fulfilled their initial promise. Beginning in the 1970s, Indigenous peoples advanced legal claims for rights and resources, some of which were based on arguments about the need to recognize and protect features of their cultural identity. Eventually, in the 1990s, the courts became receptive to the cultural aspect of these claims, but simultaneously imposed guidelines, in the form of a “distinctive culture test,” to distinguish claims that would receive protection from those that would not. The test requires Indigenous claimants to submit evidence to show that the cultural practice they are seeking to protect (e.g., to hunt, fish, or trade in particular customary ways) is “distinctive and integral” to their culture, a “defining characteristic” of their culture, and that their community has adhered to the practice since before contact with European settlers.<sup>40</sup>

No such legal test is applied to the rights claims of cultural and religious minorities in Canada, but these disputes about cultural rights share a feature with Indigenous claims. In most of these cases, the court assesses and interprets the cultural practice at issue before deciding whether it should be legally protected. For instance, in cases about wearing kirpans, kippahs, or veils, or practicing polygamy, judges often assess how important the practice is to the individual or group in order to determine the extent to which claimants will suffer disadvantage in the absence of cultural protection. Such assessments are characteristic of cases involving religious practices, despite the deeply personal nature of religious practices. For instance, in *R. v. N.S.*, 2012 SCC 72, a Muslim woman refused to remove her niqab, which covered her face as she gave evidence against those she accuses of sexually assaulting her.<sup>41</sup> Judges resolved the conflicts in two stages; firstly by determining how important the niqab is to the woman who wears it, which requires scrutinizing features of the practice, the woman’s religious beliefs, and her personal behavior; secondly, only once the judges have determined what is at stake for this woman do they weigh the importance of the niqab in this context against the importance of the rule in criminal cases that accusers face those they accuse when giving testimony. Such assessments of cultural or religious values can be hazardous. Judges, as cultural outsiders, will sometimes misinterpret minority practices and, as several studies show, stereotype and essentialize minority cultures in the course of their rulings.<sup>42</sup> But in addition to this problem, such assessments are likely to be experienced as highly intrusive by minorities, and may lead them to become more insular and resistant to outsider influence in general.

In the case of Indigenous claimants, these problems are intensified by the historical backdrop of colonialism. Through the distinctive culture test, the Canadian court places itself in a position of deciding whether Indigenous cultural practices

are sufficiently central and integral to a community's culture to merit legal protection. The distorting effects of requiring Indigenous claimants to justify their cultural practices are many, but three are sufficient to explain the problem: first, requiring a cultural practice to be justified in this manner encourages communities to self-essentialize by reducing complex practices to a set of pre-defined scripts that claimants believe will be easily understood by judges; second, insofar as cultural practices are more likely to be protected if they have historical continuity and are widespread, such justifications discourage communities from revealing internal disagreement about how important practices are or how long they've been considered important; and, third, such justifications may create incentives for communities to marginalize members who do not participate in the practice or do not understand it. In at least these three ways, legal tests to establish cultural rights are likely not only to distort the claims of Indigenous peoples but also to distort Indigenous cultures.<sup>43</sup>

While these are important concerns, little evidence exists that Indigenous communities have become more culturally static or homogeneous as a result of how the state now protects cultural rights. Instead, the main consequence of the "distinctive culture test" is to dissuade claimants from seeking legal protection from Canadian courts for their cultural practices. Both the intrusiveness of evidence gathering and the distorting effect of legal argumentation mean that cultural rights are difficult to secure. In addition, cultural rights cases also risk damaging relations amongst community members. For Indigenous peoples, the costs of cultural rights may outweigh the benefits, as all such cases involve asking the court of the colonizing state to decide what counts as central and integral to an Indigenous culture. For this reason alone, a more attractive option for these communities is to look for ways other than state-protected rights to protect their culture and ways of life.

As the distinctive culture test illustrates, cultural rights are no panacea for cultural injustice. In some cases, actual cultural rights—that is, those that are recognized and protected by courts or tribunals—provide only a semblance of cultural recognition and respect. Indigenous peoples in Canada cannot successfully defend their claims for cultural protection through processes that depend on Canadian courts assessing their cultures and deciding what gets protected.<sup>44</sup> In fact, this strategy tends to breed a damaging cynicism. The Canadian state advertises its recognition and protection of Indigenous cultures while neglecting to address the basics of human well-being—pollution, poverty, and child suicide—in Indigenous communities. Cultural rights appear impotent, or worse, a handmaiden of neoliberalism and a cover for neocolonial policies. Modest claims for cultural protection become the focus of attention and debate, while the consequences of colonial dispossession and coercive assimilation are ignored. Ironically, in an age and place where culture has been acknowledged as an important source of respect and empowerment, Indigenous peoples in Canada are less likely to frame their claims in terms of culture and less likely to argue for cultural rights today than they have been in the past.

## CONCLUSIONS

Canada is often portrayed as a “multicultural success story” in light of its numerous policies and programs that successfully manage a highly diverse population guided by the normative ideals of multiculturalism. But understanding multiculturalism in relation to multinationalism and against a background of colonialism, reveals several shortcomings and risks of multiculturalism in Canada, some of which may have resonance elsewhere.

First, the constitutional protection of multiculturalism has entangled minority rights in the politics of minority nationalism. The lesson to be learned in this case is that, if local control of social diversity matters, as it does in many multinational states, the decisions of national courts about minority rights will become politicized and are easily portrayed, whether opportunistically or not, as an imposition of the dominant majority on the minority, and thereby a threat to the local values of the national minority.

Second, reasonable accommodation can have the effect of encouraging a conservative status quo to be even more conservative and unyielding to the protection of minority rights. It can shield dominant norms from serious interrogation about their fairness and inclusivity. In this vein, today we see anxious governments that are quick to emphasize social integration as the sovereign value of multiculturalism, despite social circumstances—such as racism and anti-Muslim sentiment—that erect impenetrable barriers to the integration of minorities. The adversarial incentive contained within reasonable accommodation can motivate opponents of minority rights to exaggerate the significance to them of practices or rules that they might be required to change. Measures to ease the integration of minority rights into mainstream life thereby become politicized, and the national identity of dominant groups takes on heightened significance.

Finally, cultural rights are no substitute for cultural fairness. Even though today Canadians are more likely to respect Indigenous customs and ties to territory than they did fifty or a hundred years ago, the protection of Indigenous cultural rights by the Canadian state has not translated into cultural security for Indigenous peoples. Instead, cultural security has more effectively been enhanced by measures that recognize Indigenous jurisdictional authority over territory and features of community life. This suggests that, of the many different approaches that can be taken to protecting Indigenous rights, the legal protection of cultural rights may not be the best approach. It may also suggest, in the case of ethno-cultural minorities that stand to benefit from multiculturalism, that what matters more than the approach adopted is the political will to ensure that the approach leads to just outcomes. As in the case of constitutional protection and reasonable accommodation, cultural rights are impotent or even damaging in the absence of a political and societal commitment to the normative ideals of multiculturalism, in particular, the ideal that an appropriate measure of fairness and equality requires all people to have equal access to the public sphere in full light of their differences.

## NOTES

1. The author would like to thank Didier Zuniga for his research assistance.
2. In particular, Will Kymlicka, Charles Taylor, and James Tully.
3. See, e.g., Yasmeen Abu-Laban and Christina Gabriel, *Selling Diversity: Immigration, Multiculturalism, Employment Equity, and Globalization* (Toronto: University of Toronto Press, 2002); Himani Bannerji, *The Dark Side of Nation: Essays on Multiculturalism, Nationalism and Gender* (Toronto: Canadian Scholars' Press, 2000); and Neil Bissoondath, *Selling Illusions: The Cult of Multiculturalism in Canada* (Toronto: Penguin, 1994).
4. In this chapter, the term "Aboriginal" is used when discussing constitutional relations in Canada because this is the term used in Canada's Constitution. Otherwise, the term "Indigenous" is used. "Indigenous" is generally understood to include a broader set of peoples, some of whom may not be constitutionally recognized as Aboriginal people.
5. For discussion of Quebec's attempts since 1982 to distinguish its approach to diversity from Canadian multiculturalism, see Will Kymlicka, "Ethnocultural Diversity in a Liberal State: Making Sense of the Canadian Model(s)," in *Belonging? Diversity, Recognition and Shared Citizenship in Canada*, ed. Keith Banting, Thomas Courchene, and F. Leslie Seidle (Montreal: Institute for Research in Public Policy, 2007); Marie McAndrew, "Quebec's Interculturalism Policy: An Alternative Vision," *ibid.*; Daniel Salée, "The Quebec State and the Management of Ethnocultural Diversity: Perspectives on an Ambiguous Record," *ibid.*, 112–17; and Gérard Bouchard, "What Is Interculturalism?" *McGill Law Journal* 56, no. 2 (2011): 435–68, who notes that, for political reasons, "all Quebec governments (federalist or not) have rejected multiculturalism since its adoption by the federal government in 1971" (462). Whereas Quebec's concerns about multiculturalism have been debated and discussed widely in the scholarship, relatively little attention has been paid to the tensions between Canadian multiculturalism and the status of Indigenous people. For one exception, see David Macdonald, "Aboriginal Peoples and Multicultural Reform in Canada: Prospects for a New Binational Society," *Canadian Journal of Sociology* 39, no. 1 (2014): 72–75.
6. See, e.g., Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford: Oxford University Press, 1998), and Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal and Kingston, ON: McGill–Queen's University Press, 1994).
7. Aboriginal rights are entrenched in §35 of the Constitution which reads: "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, 'Aboriginal Peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."
8. In addition to being entrenched in a separate part of the document, §25 of the Constitution Act (1982) states: "The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."
9. Kymlicka, "Ethnocultural Diversity in a Liberal State," 39–40.
10. This definition of multiculturalism is drawn from Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), chap. 5. In *Multicultural Citizenship*, Kymlicka builds into his normative account of multiculturalism distinctions between the claims of national minorities and ethnic groups and his account of "multicultural citizenship" distinguishes between three kinds of group-differentiated rights: self-government rights, polyethnic rights, and special representation rights (*ibid.*, 26–33). Whereas these distinctions, and his subsequent work on applying multicultural ideals to Canadian institutions, help move his account from the purely theoretical and abstract level, to a more sociological level, they are not designed to bridge all the gaps between theory and practice nor to identify, as my account is intended to do, the ways in which institutional

practices can distort and limit the very multicultural ideals that they are meant to advance. For an account that focuses on respect, esteem, and the damage caused by misrecognition, see, too, Charles Taylor, “The Politics of Recognition,” in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1994).

11. Explicit mention of “identity,” cultural rights or “indigenous identity” can be found in the constitutions of Argentina, Belize, Bolivia, Brazil, Bulgaria, Croatia, Ecuador, Guatemala, Kosovo, Mexico, Nicaragua, Panama, Paraguay, Peru, Poland, Romania, Slovakia, Slovenia, and Venezuela, as well as in statutes passed by regions in Italy, Spain (Catalonia), and Germany (the *Lander*). See Ilena Ruggiu, *Il guidice antropologo: Costituzione e tecniche di composizione dei conflitti multiculturali* (Milan: Franco Angeli, 2012), 219–33.

12. See Carl James, ed., *Possibilities and Limitations: Multicultural Policies and Programs in Canada* (Halifax, NS: Fernwood, 2005).

13. Abu-Laban and Gabriel, *Selling Diversity*, 109.

14. In addition, the federal government passed the Canadian Human Rights Act in 1977. It protects individuals against discrimination in federally regulated activities.

15. The funding for provincial processes is notoriously dependent on the sympathy of the elected government at the time for public oversight of private business practices in relation to discrimination claims. See R. Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000).

16. See Keith Banting and Will Kymlicka, “Canadian Multiculturalism: Global Anxieties and Local Debates,” *British Journal of Canadian Studies* 23, no. 1 (2010): 43–72.

17. Starting in 1996, the Ministry for Multiculturalism and Citizenship was renamed the Ministry of Canadian Heritage and then subsumed into the Ministry of Citizenship and Immigration (CIC) where the administration of the Multiculturalism Program became a lesser concern. The 2012 *Evaluation of the Multiculturalism Program* concludes that the program’s goals are not well integrated into the CIC mandate and that the program needs better support from the CIC (Citizenship and Immigration Canada 2012). The report also notes that it is difficult to assess whether the program is receiving adequate funding given the diffusion of responsibilities for different aspects of it. It concludes that the approval process for proposals associated with the program lacks transparency and is inefficient.

18. Abu-Laban and Gabriel, *Selling Diversity*.

19. See, e.g., *Vriend v. Alberta*, 1 SCR 493 (1998), in which the Alberta Human Rights Act was found unconstitutional for failing to protect individuals against discrimination on the basis of sexual orientation.

20. As one of Canada’s leading constitutional scholar put it, citizens who became “Charter Canadians” after 1982 were wedded to their newly entrenched rights and hostile to attempts by political elites to revise the constitution further. See Alan Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal and Kingston, ON: McGill–Queen’s University Press, 1992).

21. Assemblée nationale du Québec/National Assembly of Quebec, 40th Legislature, 1st session, Bill no. 60, “Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests,” accessed November 18, 2018, [www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-60-40-1.html](http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-60-40-1.html) (§§38–43).

22. Tsvi Kahana quoted in Sean Fine, “Is Quebec’s Secular Charter Constitutional? Nine Legal Experts Weigh In,” *Globe and Mail*, September 14, 2013.

23. The subordination of provincial legislative autonomy to the national Charter was at the heart of Prime Minister Pierre Trudeau’s political strategy in the 1980s to combat the centrifugal drift of Canadian federalism. In Trudeau’s view, Canadian federalism was being pulled apart by both Quebec nationalism and the economic power of western Canada’s oil-rich provinces. The effect of this drift in Quebec has proven to be lasting.

24. See esp. Bouchard, “What is Interculturalism?” 462.

25. *Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, 1 S.C.R. 256 (2006).
26. *Ibid.*
27. See Gérard Bouchard and Charles Taylor, *Report of the Commission on Accommodation Practices Related to Cultural Difference* (Quebec: Government of Quebec, 2008), 19.
28. The differences between multiculturalism and interculturalism have been subject to several commentaries. For the Canadian debates, see Bouchard, “What Is Interculturalism?”; McAndrew, “Quebec’s Interculturalism Policy”; Salée, “Quebec State”; and Daniel Weinstock, “Interculturalism and Multiculturalism in Canada: Situating the Debate,” in *Liberal Multiculturalism and the Fair Terms of Integration*, ed. Peter J. Balint and Sophie Guérard de Latour (New York: Palgrave Macmillan, 2013). For a broader view that considers European debates, see Nasar Meer and Tariq Modood, “How Does Interculturalism Contrast with Multiculturalism?” *Journal of Intercultural Studies* 33, no. 2 (2012): 175–96.
29. Drawing on Bouchard’s work, Weinstock concludes that “multiculturalism and interculturalism basically agree on the normative principles concerning the fair terms of integration,” but disagree on the facts to which the principle must apply (“Interculturalism and Multiculturalism in Canada,” 97–98). They differ, according to Weinstock, primarily because interculturalism aims at integrating minorities by changing their cultures and identities beyond what is required for linguistic integration, to include such things as “taking into account the Quebec nation”; integrating in accordance with the “moral contract” linking all Quebecers; and emphasizing the “creation of a common public culture, based on shared values, history and respect for both minority and majority groups” (*ibid.*, 103). These kinds of requirements, Weinstock argues, are not part of Canadian multiculturalism and, in his view they are “fraught with peril,” a fact illustrated by the attempts of the Canadian government to use constitutional reform to reshape Quebec values in order to enhance Quebec’s integration into Canada (*ibid.*, 106).
30. Bryce Ryder, “The Canadian Conception of Equal Religious Citizenship,” in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: University of British Columbia Press, 2008), 90.
31. *Multani v. Commission scolaire Marguerite-Bourgeois*, ¶8.
32. Bouchard and Taylor, *Report of the Commission*, 33.
33. *Ibid.*, 161. Bouchard and Taylor use the phrase “concerted adjustment” to describe “reasonable accommodation.” The principle at stake remains the same—that fairness sometimes requires the revision of public rules and values in order to include minorities who adhere to different practices and beliefs. However, “concerted adjustment” implies that, in Quebec, these changes are a two-way street, thereby “concerted,” and require minorities to adapt to the public culture of Quebec.
34. Shelagh Day and Gwen Brodsky, “The Duty to Accommodate: Who Will Benefit?” *Canadian Bar Review* 75, no. 3 (1996): 439.
35. *British Columbia (Public Service Employee Relations Commission) v BCGEU*, 3 SCR 3, 176 (1999) at 42. The ideals spelled out by McLachlin in this decision have recently been reiterated by the Court in *Moore v BC (Education)* SCC 61 at para 61 and 62 (2012).
36. A similar argument is made about the construction of “merit” in workplace settings by Iris Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), 200–206.
37. *Multani v. Commission scolaire Marguerite-Bourgeois*, ¶¶44 and 48.
38. See Kwame Anthony Appiah, *The Ethics of Identity* (Princeton, NJ: Princeton University Press, 2005); Amy Gutmann, *Identity and Democracy* (Princeton, NJ: Princeton University Press, 2003); Kymlicka, *Multicultural Citizenship*; Charles Taylor, *Multiculturalism and the “Politics of Recognition”* (Princeton, NJ: Princeton University Press, 1994); and James Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity* (Cambridge: Cambridge University Press, 1995).
39. Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), 56.
40. See, e.g., *R. v. Van der Peet*, [1996] 2 S.C.R. 507, Summary, accessed November 18, 2018, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1407/index.do>.
41. *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, accessed November 18, 2018, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12779/index.do>.

42. On the problem of essentialism in relation to legal decisions about cultural minorities, see Pascale Fournier, “The Ghettoization of Difference in Canada: ‘Rape by Culture’ or the Danger of a Cultural Defense in Criminal Law Trials,” *Manitoba Law Journal* 26 (2002), 81–113; Anne Phillips, *Multiculturalism without Culture* (Princeton, NJ: Princeton University Press, 2007); and Alison Dundes Renteln, *The Cultural Defense* (Oxford: Oxford University Press, 2004). For a broader exploration of issues regarding “minorities within minorities” see Avigail Eisenberg and Jeff Spinner-Halev eds., *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2001).

43. See Russell Barsh and James Youngblood Henderson, “The Supreme Court’s Van der Peet Trilogy: Naïve Imperialism and the Robes of Sand,” *McGill Law Review* 42, no. 4 (2002): 993–1009; John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster,” *American Indian Law Review* 22, no. 1 (1997–98): 37–64; and Gordon Christie, “Aboriginal Rights, Aboriginal Culture and Protection,” *Osgoode Hall Law Journal* 36, no. 3 (1998): 447–84.

44. For a discussion of different ways in which culture is defined and interpreted by judicial bodies domestically and internationally, see Avigail Eisenberg, “Domestic and International Norms for Assessing Indigenous Identity,” in *Identity Politics in the Public Realm*, ed. Avigail Eisenberg and Will Kymlicka (Vancouver: University of British Columbia Press, 2011).