MULTICULTURALISM AND CANADA'S FOUNDING PEOPLES

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In 1982, many Canadians hoped that a constitution sensitive to multiculturalism and other group differences would promote an expansive set of rights for vulnerable groups and have a democratizing effect on constitutional politics. At the same time, many Canadians recognized that the driving forces behind constitutional renewal were not the claims of ethnic immigrant groups, but rather the claims of national minorities - the Québécois and Indigenous peoples - who had engaged in ongoing struggles to renegotiate the terms of their co-existence with Canada. The 1982 constitutional amendments addressed the claims of both national minorities albeit not to the satisfaction of either group (or set of groups in the case of Indigenous peoples). Indigenous peoples, who had long struggled against colonial policies, and the Québécois, who remained inspired by a separatist politics, might well have wondered what impact the constitutional recognition of multiculturalism would have on their struggles.

On the face of it, the Canadian state seems to keep the aspirations of the founding groups and 'cultural' minorities separate. This separation is reflected in the structure of the Constitution and also in much normative scholarship in which the policies applied to these different groupings are sometimes described as legally and administratively disconnected from each other. 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."[1]

But politics is never fully settled by constitutional and administrative structures and efforts to settle how national diversity is managed in Canada have led to political dynamics that can't be contained in these seemingly distinct silos. One issue facing Canadians today is how to manage these political dynamics more effectively. Identifying a founding peoples or founding moment for Canada will not help that project.

Consider first the case of Quebec, which rejected the constitutional deal in 1982 (albeit for reasons that had little to do with multiculturalism) and has not agreed to the constitutional package since. Some Quebecers suspected that the constitutional amendments were part of a central government strategy to weaken Quebec nationalism by bolstering the power of central institutions as the protectors of rights in Canada. They were not far wrong in their suspicions. Both Quebec and Indigenous peoples, who had long struggled against federal government policies that disadvantaged and excluded them from a full and equal partnership in the Canadian polity, have expressed concern that the 'multicultural framework', if applied to their communities, could reduce them to one of Canada's many ethnic minorities. Is there evidence for this concern?

It is helpful to recall that one of Quebec's concerns in 1982 was that the ascendancy of the Charter of Rights and Freedoms would impose national standards on provincial decision makers. Previous to the Charter, provincial objections (from many provinces) to decisions of the Supreme Court of Canada were sometimes framed as objections to the decisions of an unelected and distant court over provincial or local decision makers who are closer to the people and more sensitive to local values and norms. During constitutional negotiations leading to entrenchment, this same concern was expressed by some provincial leaders, and ended up informing the final document primarily through section 33, 'the notwithstanding clause.'

Over 30 years later this same concern re-ignites nationalist sentiments in Quebec and is used to mobilize opposition to minority accommodation there. It can even be detected in the *Report of the Bouchard-Taylor Commission on Reasonable Accommodation of Minorities*. The Report devotes considerable attention to the *Multani* case about a Sikh boy who wishes to wear a kirpan to school.[2] The challenge posed by this case is characterized in the Report as partly about 'local decision making'. Conflicts that involve cultural diversity, the Report claims, are better resolved in Quebec using a 'citizen route' rather than a 'legal route' in order to encourage citizens to manage their own differences, to avoid congesting the courts, and to respect Quebec's integration model.[3] To be sure, the *Multani*

1 Kymlicka "Ethnocultural diversity in a liberal state: Making sense of the Canadian Model(s)" in Banting, Courchene, Seidle, Belonging?: Diversity Recognition and Shared Citizenship in Canada, Montreal: IRPP, 2007, p. 39-40.

2 Multani v Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256.

3 Bouchard Taylor, unabridged, p. 19.

case raises different kinds of issues. One issue is the claim that Quebec has a distinctive 'interculturalist' approach to social diversity, which emphasizes the integration of ethnic minorities into the dominant and distinct culture of Quebec. Another issue is that the controversy implicated Quebec's ongoing rejection of Ottawa-based decision making in order to promote nationalist politics. The case offered some political elites a strategic opportunity to enhance the electoral appeal of nationalist politics by exaggerating Quebec's distinctiveness on the matter of cultural diversity. According to this strategic view, the conflict over the kirpan did not arise primarily because Quebecers generally reject the kind of multiculturalism adhered to in Canada (which is, after all, also based on integration), but instead because high profile decisions, like *Multani*, are made outside Quebec, based on a constitutional document to which Quebec never consented. On this view, the philosophical differences between Canada and Quebec about multiculturalism have been distorted and exaggerated by nationalist politicking.

But the culprit here is also the imposition of a controversial court decision based on the Charter to which Quebec never consented. Everyone, even in Quebec, considers the decision to be final. But in politics, nothing is ever final or settled.

For Indigenous peoples, Canada's newfound respect for cultural difference initially had promise because cultural difference had historically served as a rationale used by state agents to deny Indigenous peoples rights to exercise jurisdiction on their ancestral territories, to vote, to educate their children in traditional ways, and even to enjoy basic civil liberties. Against a background in which Indigenous cultural difference had been denigrated and then later denied by the state, the possibility of having it protected and respected through constitutional guarantees, might have appeared attractive to Indigenous peoples, as it would have to immigrant groups who had faced racism and exclusion at the hands of the Canadian state.

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 their cultural identities. In 1982, Section 35 provided an additional and seemingly more powerful way to advance claims. Eventually, in the 1990s, the courts became receptive to these cultural claims. But it soon became evident that cultural claims invited the courts to interpret Indigenous culture. In some legal cases, the Court required Indigenous claimants to submit evidence to show that the practice they claimed as a right (e.g.s to hunt, fish, or trade in customary ways) is 'distinctive and integral' to their culture, a 'defining characteristic' of their culture and one that their community has adhered to since before contact with European settlers.[4] Some Indigenous people objected to these cases perpetuated a colonial relationship and were at odds with the treaty-based relations Indigenous peoples sought to establish with the state.

State recognition of 'cultural difference' can require judges to interpret and understand a controversial

4 Van der Peet [1996] 2 SCR 507 at *Summary of Reasons*.

cultural practice as a means to develop an effective remedy that reconciles the practice with mainstream laws. The aim of this process, which is called accommodation, is to treat minorities equally by ensuring that they are not required to abandon their cultures in order to have full access to the benefits of citizenship. Accommodation is a central part of multiculturalism. Its aims are different from those of Indigenous peoples who instead seek self-determination and jurisdictional autonomy. When accommodation is applied to Indigenous practices, the risk is that reconciling cultural differences will become the focus of attention and debate and that the consequences of colonial dispossession and assimilation will be ignored. Ironically, in an age and place where culture has been acknowledged as an important source of respect and empowerment, Indigenous people may be less inclined to frame their claims in terms of cultural arguments and less likely to argue for cultural rights today than they have been in the past.

There are good reasons for a state to recognize cultural distinctiveness and for a diverse country to strive to be as inclusive as possible when identifying a founding moment and a set of founding peoples. But, as recent history shows, state responses to diversity exist against a complicated background of accomplishments, political strategies, failed policies and broken promises which have not been forgotten or rectified. From this vantage, it makes better sense to resist a politics that treats the question of who is a founding people as settled or celebrates an episode in the past as a founding moment. A better option is to recognize the unsettled-ness of Canada and treats founding-ness as a matter that perhaps lies in the future rather than the past.