

Canada in the World: Comparative Perspectives on the Canadian Constitution

Richard Albert & David R Cameron

Cambridge: Cambridge University Press, 2018

*Reviewed by Michael Adams**

The Sesquicentennial of Confederation in Canada provides an opportunity to reflect on, and perhaps even celebrate, Canada's unique constitutional heritage. In a volume intended to mark the event, the editors, Richard Albert and David Cameron, have assembled leading scholars and jurists together to do just that. At Yale Law School in 2016, these authors gathered to present their papers at a conference organized under the theme "Comparative Perspectives on the Constitution of Canada". These papers, noted to have been revised and refined, were then organized into the chapters that make up this volume.

Purposely marking the anniversary of the creation of Canada's Constitution will inevitably give rise to a type of tension familiar to constitutional law scholars. By this action, one implies that the Constitution is a finished product and is something in which Canadians should have pride. However, these conclusions seem to run contrary to reoccurring themes in the volume. In the United States, it is an idea described with allusions to the nation still being an imperfect union or, as represented by the unfinished pyramid on its seal, an unfinished nation.¹ As discussed in chapters throughout, in Canada, this same idea is captured by the metaphor of a "living tree capable of growth and expansion". The constitutional project is not one that is capable of completion and remains a work-in-progress. Further, in Canada, constitutional growth is still required to remedy its obvious deficiencies. Notably, the failure to fully integrate Indigenous groups into Canada's constitutional structure and to reconcile Quebec with the Constitution after its estrangement during the repatriation process.

*JD (Sask), LLM (Queen's). I would like to thank Professor Grégoire Webber and Faye Davis for their support. All errors are my own.

1. See e.g. Alan Brinkley, *The Unfinished Nation: A Concise History of the American People*, 8th ed (New York: McGraw-Hill Education, 2015).

Richard Albert realizes that “[t]here is a risk in a project like ours”. He notes that this same tension caused Thurgood Marshall J, of the Supreme Court of the United States, to decline an invitation to participate in celebrations of the US Constitution in its Bicentennial year. However, the editors and authors proved capable of relieving this tension. Indeed, while celebrating the praiseworthy aspects of the Constitution, they do not shy away from the challenges faced by the country and stress where its constitutional promises remain unfulfilled.

Undoubtedly, the achievements of our Constitution should be celebrated and highlighted for Canadians and non-Canadians alike. In the first chapter, Beverley McLachlin CJC (as she then was), who opened the conference, observed that Canada is a multicultural nation—a cultural mosaic. Three central tenets of Canadian constitutionalism have allowed it to manage diversity: (1) the ethic of accommodation of difference; (2) the value of comparative law; and (3) the view of the constitution as a living tree, capable of growth and expansion. These tenets are explored in her chapter but resurface in chapters throughout the volume.

Stephen Tierney, in his chapter, explores federalism as a constitutional idea, using Canada as a case study. Federalism, a feature of constitutional structures around the world, is a model often used to address territorial diversity. However, Canadian federalism is described as something exceptional. It was one of the first federal systems in the world and was modelled not just to account for territorial diversity, but also to respect and accommodate cultural and linguistic diversity. A defining feature of the new Dominion was the initial incorporation of Quebec, including the maintenance of the religion and language of the French-Catholic population, into the constitutional order. Further, resisting the trend seen in the US, the provinces actually gained power over time, which only enhanced minority protections.

A chapter on constitutional pluralism is provided by Patrick Macklem. He notes that, when compared to the Quebec example, a less familiar commitment to legal pluralism lies in the constitutional relationship between Indigenous peoples and the Canadian state. Macklem points to constitutional developments such as the enactment of section 35(1) in the *Constitution Act, 1982*² that have the possibility “to restart animating relations between Indigenous

2. s 35(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

peoples and Canada”. Indeed, beyond providing for the constitutional status of treaties, section 35(1) also caused Aboriginal title to shed its common-law status and assume the form of constitutional right.

In her chapter, Catharine MacKinnon observes that the Supreme Court of Canada has provided a pioneering jurisprudential theory of substantive equality under section 15 of the *Canadian Charter of Rights and Freedoms*.³ The Court’s first equality decision in 1989 marked the first time that the Aristotelian formal equality approach was explicitly rejected in law.⁴ Similarly, Ayelet Shachar notes that Canada provides the only example in the world where values such as multiculturalism and gender equality have been entrenched in its constitution.

Canada’s emergence as a constitutional superpower is perhaps the most celebrated aspect of its constitutional heritage. In his chapter, Ran Hirschl explores the numerous ways that Canada has become an exporter of constitutional thought. He explains that Canada exemplifies the global spread of constitutional courts, judicial review and bills of rights: “Canada . . . entered the twentieth century embodying the deferential, British-style constitutional tradition and emerged out of it with a robust constitutional culture featuring active judicial review, an acclaimed constitutional bill of rights . . . pervasive rights discourse and one of the most frequently cited high courts in the World.”

One notable area in which Canadian constitutional thought has had a significant influence is in respect to rights of secession. The reference decision of *Reference re Secession of Quebec* is the first time in history in which a nation has pre-emptively tested the legality of unilateral secession.⁵ As Hirschl notes, undoubtedly this decision influenced the debate about regional secession in places such as Catalonia in Spain, Scotland in the United Kingdom, and even Taiwan in China. Further, as alluded to above, Canadian decisions have been cited by high courts from across the world. In an era that has seen a corresponding decline in the influence of American jurisprudence, “scholars, policy-makers, and jurists throughout the rest of the common law world and increasingly beyond it are now frequently inspired by, and sometimes emulate, Canadian constitutional rights jurisprudence”.

3. s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

4. See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.

5. [1998] 2 SCR 217, 161 DLR (4th) 385.

Alison Young submits that Canada has not only exported its jurisprudential wisdom but also particular constitutional structures. Young credits Canada with the creation of the commonwealth model of rights protection which was emulated in commonwealth countries like Australia and New Zealand. Canada's model has been viewed as innovative because it offers a middle ground between strong constitutional protection and weak political protection of rights. Indeed, the enactment of provisions like the "notwithstanding clause", found in section 33 of the *Charter*, and a general limitations clause in section 1 of the *Charter*, offered the possibility of greater interaction between the courts and the legislatures of the nation. Most will know this as "dialogue theory", also an export of Canada that has been used to critically analyze constitutional structures across the world.⁶

As noted by multiple authors, Canada had a significant influence on the development of South Africa's Constitution. The incorporation of a limitations clause is evidence of this fact. Heinz Klug purports that while Canada's influence may at times have been over-claimed, the jurisprudence of the Supreme Court of Canada has clearly been the most influential on the Constitutional Court of South Africa. Further, following in the Canadian tradition, both the interim and final Constitution formally invited and allowed the use of foreign case law. Kent Roach, too, describes that an invention of the Supreme Court of Canada, the suspended declaration of invalidity, was explicitly included as a remedy in the South African Constitution.

Despite conveying a celebratory mood, the volume also carefully records Canada's stumbles as it grew and matured. Many authors discuss perhaps the most public failure in Canada's constitutional history: its inability to reconcile Quebec to the Constitution. As discussed by Tierney, the influence of French Canada was the greatest cause of Canada's turn to federalism in 1867. With its special rights and prerogatives, Quebec viewed itself as having a unique provincial status. Accordingly, Quebec had the reasonable expectation that it would play a central role in the constitutional amendment process of the 1980s, especially where provincial autonomy would be affected. However, Tierney outlines that despite its protests to the central government and appeals to the courts, Quebec's unique status would not be officially recognized either by the

6. For a discussion of "dialogue theory", see Alison L Young, "Exporting Dialogue: Critical Reflections on Canada's 'Commonwealth' Model of Human Rights Protections" in Richard Albert & David R Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge, UK: Cambridge University Press, 2018) 324 at 326, n 8.

Supreme Court of Canada or in the new constitutional document. When the final deal was sent to London for enactment as the *Canada Act 1982*, Quebec had still not provided its consent.

In his chapter about constitutional amendments, James Cameron notes that Quebec's exclusion largely robbed patriation of legitimacy in that province and "set off a chain reaction that further imperiled the fragile status of constitutional reform and threatened Canada's durability as a nation". Additionally, given that "[n]egotiating a textual [amendment] formula after independence was essentially an exercise in defining the nation's sovereignty", denying Quebec a veto in the new amending procedures was a profound grievance in the province. Cameron explains that the Constitution's legitimacy sorrows only deepened after 1982 as, despite some attempted heroics, two accords failed to reconcile Quebec to the Constitution.

Not discussing the place of Aboriginal groups in Canada's political and legal structure would be a significant oversight in a volume purporting to reflect on the challenges facing the nation. However, the chapter contributed by Macklem, discussed above, does a wonderful job in this regard. Macklem's overview of the interactions between Indigenous peoples and the Canadian state reveals that courts and governments have failed to grasp the legal significance of this relationship. While recent developments have started to ameliorate this failure, further work needs to be done to integrate Indigenous peoples into the Canadian state. As Macklem explains, it will require "constitutional recognition of Indigenous governments sovereign within their spheres of authority, capable of exercising exclusive and concurrent lawmaking powers formally equivalent to their federal and provincial counterparts".

The volume, through Hirschl's chapter, also identifies significant structural problems in Canada's Constitution. The constitutional definitions of Canada's executive branch are imprecise. The Senate, filled with political appointees rather than elected officials, has become a superfluous institution. Canada's first-past-the-post election system has also faced withering criticism as of late. In contrast to newer constitutions, the powers of major cities in Canada are delineated by a constitutional order that was created when most of the population was not concentrated in dense urban centres. Despite its national importance and the scale of its obligations, "the metropolis is not recognized as an autonomous constitutional entity, it often lacks independent bargaining power" and has limited taxation and legislative authority.

Many other criticisms are noteworthy, and I will set them out relatively

briefly. Canada's constitutional amending formula is also identified as being one of the most rigid in the world. The process is so complex and loaded with potential veto points that it is unlikely that significant changes can be realized. Democratic legitimacy has been a point of concern, especially with respect to Quebec, and Canada missed a potentially defining "democratic moment" when it declined to put repatriation to the public in a national referendum. Finally, while the Supreme Court of Canada's progress under section 15 of the *Charter* is praiseworthy, it has always struggled to identify equality's single principle and corresponding analytical framework. This failure likely led to the Court's controversial decision in *Gosselin v Quebec (Attorney General)*⁷ and will continue to be an obstacle for claimants who wish to assert their rights under section 15.

The volume is also a celebration of comparative constitutional law just as much as it is of the Canadian Constitution. Returning to the first chapter, McLachlin CJC asserted that "Canadian lawyers are comparative lawyers; Canadian judges are comparative judges. . . . [I]t's simply the way we are, the way our history has made us." The richness of Canada's history is another common theme found throughout the volume. Indeed, Canada inherited its law from England, its constitution the creation of English lawyers, and an English committee remained its final court of appeal until 1949. However, Canada underwent a constitutional transformation, embracing active judicial review that departed from the British deferential constitutional tradition. Equipped with a modern constitution, the Canadian courts turned their eye to the rest of the world. A dynamic global dialogue emerged around a new "worldwide rights culture" among the high courts of the world. The development of online databases have only made it easier for courts to consult each other and produce even better decisions.

As Hirschl observes, there has been a corresponding "comparative constitutional renaissance" in legal discourse. He, among others, would put Canada at the centre of this rebirth: "Canada has since become known to a younger generation of productive scholars as a setting conducive for the comparative study of constitutional law and courts. As well, a disproportionately large number of comparative constitutional law scholars work in Canada or have Canadian roots." As explained by David Cameron, there are many reasons to conclude that comparative constitutional law will retain its significance. Indeed, since

7. 2002 SCC 84.

1990 “more than ninety new constitutions or constitutional-type instruments for states and other polities have come into force . . . [and] 151 of the 191 constitutional systems now” provide for judicial review. Further, the emergence of international governmental bodies necessitated a rise in the number of complex treaties and legal systems that call out for comparative analysis. Currently, the world is watching the UK as it prepares to withdraw from the European Union. According to Hirschl and Cameron, it is relying on a procedure that was undoubtedly influenced by Canada’s *Secession Reference*.

As suggested by the title of the volume, many of the authors utilize the approaches and methodologies that encompass comparative constitutional law. While most demonstrate the strengths of the field, a few also reveal its weaknesses. Like a child, the comparative constitutional scholar never knows what they will find once they overturn a rock. In the case of foreign citations in select Asian high courts, the answer is not much. Wen-Chen Chang’s study uncovered, in comparison to references to other foreign jurisdictions, only a few Canadian references in the jurisprudence of high courts in Hong Kong and Taiwan. Those few references were “insignificant”, the reasons for which remain a mystery. A few chapters come to similarly underwhelming conclusions. To some extent, this is expected. Because nations have different histories, social contexts and jurisprudential histories, only the most sophisticated analysis can yield valuable data in some instances. However, the use of comparison generated some interesting discussions in other chapters. For example, Young’s chapter about dialogue theory and the commonwealth model cautions the reader against labelling both as a failed export when only comparing the experiences of Canada and the UK. Similarly, Jeffrey Goldsworthy and the Honourable Grant Huscroft’s comparison of constitutional interpretation in Australia and Canada suggests that the Canadian courts have been too quick in rejecting the value of the American approach, especially in its most recent expression.

Turning specifically to the collection’s composition, it consists of seventeen articles separated into three parts. The first part, titled “Federalism and Pluralism in Canadian Constitutionalism” contains an eclectic assortment of articles about the roles of Quebec and Aboriginal groups in Canadian federalism and the balancing of competing rights under the *Charter*. Articles that speak specifically to the role of the courts and Supreme Court of Canada jurisprudence can be found in the next part, “The Court in Canadian Constitutionalism”. Finally, “The Global Impact of Canadian Constitutionalism”, unsurprisingly, features chapters about the impact of Canada on the structure of other constitution-like

instruments and the jurisprudence of constitutional courts. However, given the breadth of subject matter dealt with in these chapters, it is not really possible to divide them into truly discrete parts. In fact, the best chapters seem to incorporate all three themes. Specifically, the chapters by Roach and Hirschl each deal with constitutional structure, Supreme Court of Canada jurisprudence and the Court's influence in other jurisdictions, and are the most memorable of the collection.

This collection is also deserving of praise for having broad appeal and being accessible to a great number of readers. Unlike many other volumes, the one assembled by Albert and Cameron is likely to be of general interest. Being tied to the Sesquicentennial, the publisher may be able to take advantage of a temporary swelling of national pride. More importantly, however, the various topics covered by the chapters represent a good cross-section of constitutional law. It may fairly be said that the volume contains a chapter on federalism, Aboriginal law, constitutional amendment, constitutional interpretation, equality rights, freedom of expression, enforcement and remedies, legislative override, and Canada's international influence. Someone only interested in gaining a greater understanding of Canada's Constitution or constitutional law could do worse than this volume.

Further, many of the authors provide a helpful overview of the chapter's historical or legal underpinnings that make them accessible to those that are not historians or legal experts. By way of example, Tierney provides a helpful discussion of French-Canadian history and purports to provide an essentialist explanation of federalism. Macklem's chapter offers a concise overview of the historical and legal relationship between Indigenous groups and the Crown; the same can be said of Cameron's chapter on constitutional amendment. Finally, MacKinnon is able to offer a helpful summary of the Supreme Court of Canada's section 15 jurisprudence. On the whole, the authors' writing is also clear and easy to understand. A conscious effort appears to have been made to jettison the use of language that one would find only in topical journals, which also aids in the accessibility of the volume. However, being a composition of academic writing, there are bound to be exceptions. One author in particular is a notorious offender and his chapter serves as proof that academics too are capable of using many words—many longer on average—to express simple ideas.

Collectively, there is enough depth to the volume to keep legal experts interested. I foresee that the students or lawyers that read this collection will find that it has piqued their interest in the field of comparative constitutionalism.

Constitutional law scholars will likely find at least one article, but definitely not all, to be relevant to their own research.

The successes of this volume are all the more impressive given that it takes the form of a collection of essays. These volumes fall somewhere in the middle of a spectrum between textbooks and loose-leaves, and issues of academic journals. A collection of essays can often be an awkward mix of these other formats. They usually consist of articles that are academic in nature and have a narrow focus. Accordingly, they are often not the best resources for laypersons or for general information. In this way, volumes resemble issues of topical journals; however, with the advent of online legal databases, journal articles are much easier to discover and access. Collections are also less likely to be found in print than their more famous textbook relatives. As with legal books, they often cover a niche topic and thus may not be carried by libraries or bookstores. Arguably, volumes too are less valuable to academics than books on the same subject because the issues addressed by each individual article can still be quite diverse. This is likely the reason that academics typically cite to only one, perhaps two, articles in a collection. The concluding chapters of such volumes can sometimes read like a comedy as editors will struggle valiantly to weave the contents into a coherent narrative. However, David Cameron succeeds in this endeavor.

Overall, *Canada in the World* represents a major achievement in both its accessibility and contribution to the field of comparative constitutional law. If I were tasked with selecting a volume to mark Canada's Sesquicentennial, I would not hesitate to put this one on the top of my list. A critical factor to consider is whether it strikes the appropriate note between celebration and sober reflection. In the words of David Cameron, it is a time to celebrate the Constitution, "[b]ut it is also an appropriate time to reflect on the challenges that face the country – and to realize that there is still much unfinished business, constitutionally speaking, and that as with any constitution, the one Canada received in 1867 remains, 150 years later, a work-in-progress."