What Is a Canadian?

Forty-Three Thought-Provoking Responses

EDITED BY

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A DOUGLAS GIBSON BOOK

McCLELLAND & STEWART

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Janet McNaughton was born in Toronto, Ontario in 1953. She completed a BA at York University in 1978 and moved to St. John's, Newfoundland, where she did a master's degree and a doctorate in folklore. She has written five young adult novels, ranging from historical fiction to science fiction and fantasy; one junior novel; and one picture book. Her books have won ten awards to date, and have been translated into Dutch, Danish, French, German and Portuguese. She currently serves on the board of the Canadian Children's Book Centre, and is an active member of the Writers' Alliance of Newfoundland and Labrador.

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A CANADIAN IS . . . a participant in an ongoing constitutional conversation. Our constitutional conversation is rooted in Canada's past. Our past structures and makes intelligible our governing institutions and political practices. It furnishes the symbols and language that equip us to speak to each other about the kind of country we should be. But although the past constrains us, we are not imprisoned by it. Canadians, both old and new, have the right to be the authors of their constitutional future. The changing makeup of our country – our growing ethnic and cultural diversity, increasingly concentrated in our polyglot urban centres – is giving rise to a new constitutional narrative. And this new Canadian constitutional identity may profoundly challenge our prevailing sense of self as a multinational, federal political community in ways we have only just begun to comprehend.

I

The past exerts a powerful hold over Canadian constitutional thought, in two distinct but related ways. The first is the familiar idea that the framers of the Canadian Constitution agreed to a federal constitution for Canada in 1867 in order to further a set of widely understood and shared political objectives. Canada, we teach our children in school from the time they are small, was a union between two founding peoples, English and French. Federalism was a deliberate institutional choice to protect Canada's French-speaking minority from assimilation. Our Constitution recognizes and protects the French fact by creating a province, Quebec, in which French speakers constitute a majority, and by assigning jurisdiction to the provinces over matters integral to the survival of Quebec's

"distinct society," such as education, culture, and language. Modern champions of this view of the country, such as Alan Cairns and Will Kymlicka, refer to Canada as a multinational federation. The particular genius of Canadian federalism is the idea that the territorial boundaries and powers of Canada's internal political communities track, accommodate and institutionalize ethnocultural and linguistic differences in order to reconcile unity and diversity within a single nation-state.

The second and somewhat less familiar idea is that court judgments handed down in the late nineteenth and early twentieth centuries define the legal terrain within which governments today exercise their powers under Canada's Constitution. For the first eighty years of Canada's history, our final court of appeal was the Judicial Committee of the Privy Council, which sat in London, England. As with most other constitutional documents, Canada's bracketed disagreement over the respective scope of federal and provincial powers through adopting open-ended constitutional language is open to competing interpretations. It soon fell to the Privy Council to settle disagreements among governments over constitutional meaning. The Privy Council quickly set out a vision of Canada in which the scope of provincial powers was large, the scope of federal powers small, and each level of government was confined to its respective "watertight compartments" of jurisdiction, with no overlap allowed. These interpretive choices were permitted, but not required, by the constitutional text. They therefore reflected the Privy Council's vision of Canada – a country with strong provinces and a weak federal government, in which the provinces had jurisdiction over the major aspects of social and economic policy.

These stories of Canada's constitutional origins and development are often understood as having etched the grooves of our constitutional law and politics, and having preordained the future paths that Canada can take. They are frequently strategically deployed as baselines or benchmarks against which political and legal change is measured. For example, during our recurrent cycles of constitutional introspection, reform proposals such as the Meech Lake and Charlottetown accords were often criticized or supported for departing from or honouring the legal and political architecture of the federation as laid down in the past by politicians and judges.

II

As a constitutional scholar, I have chafed against the hold of the past on our constitutional fate. In doing so, I have drawn upon an established scholarly tradition within the English-Canadian legal academy. The apogee of the Privy Council's decentralist vision of Canada was a series of decisions handed down in the late 1930s, which struck down our version of the New Deal – laws designed to alleviate the social and economic upheaval of the Depression by regulating markets and creating the beginnings of the Canadian welfare state. The academic reaction to these decisions in English Canada was fiercely emotional. Frank Scott, Vince MacDonald, William Kennedy – the giants of Canadian constitutional law in their day – publicly attacked the Privy Council for robbing Canada of the ability to deal effectively and quickly with its pressing social and economic needs. The needed solution was a new court of final appeal, the amendment of the Canadian Constitution, or both. Without these changes, it was thought, Canada could not be a true nation, and would be incapable of controlling its destiny.

As a student reading these articles over a decade ago, I was deeply and profoundly moved. When I teach these materials to my students, I still feel the sense of uncomprehending anger, the bitter disappointment, the rage that jumps off these pages. In anchoring social concern to constitutional analysis, these articles are exemplars of engaged legal scholarship. I often understand my work as a continuation of the constitutional project they launched. The 1930s gave us a new court, but not a new constitution. As a scholar, I've therefore argued for expansive interpretations of the federal government's powers over economic and social policy, in furtherance of a vision of a strong, united Canada – a "community of fate" – of the kind of which the Privy Council deprived Canada during the Depression.

But I have not just taken on the Privy Council's niggardly views on the scope of federal power. I am an ethnic immigrant to Canada, and

cannot trace my ancestry to any of Canada's founding nations. Grounding the legitimacy of Canada's constitutional arrangements in a set of historical agreements, compacts and legal texts among ethnic communities to which immigrants cannot trace their ancestry suggests that immigrants enjoy a less than equal status in the Canada of today. These challenges have been raised in a variety of arenas. The mobilization of so-called Third Force Canadians against the Royal Commission on Bilingualism and Biculturalism is a famous example. Another is the debate over the "distinct society" clause in the Meech Lake Accord, and its replacement with the Canada clause in the Charlottetown Accord. And so I have argued that the Canadian Constitution, working from the liberal values of equal dignity and non-discrimination, should not discriminate among different ethnocultural groups on the basis historical priority.

III

Taken together, these commitments sketch a modern stance toward Canada and its constitutional order that treats the past as undeserving of respect simply because of its "pastness." To be legitimate and relevant, Canada's fundamental law should reflect our nation's contemporary needs and sense of self. I am quite confident that I am not alone in holding these views, and that outside of the rarefied confines of the academy, where I spend most of my time, an increasing number of Canadians of my demographic – young, urban, ethnic, immigrant – share them.

But I have also come to appreciate that these positions cut deeply against the grain of much of our way of constitutional thinking, and stand in the way of comprehending and articulating the logic inherent in our constitutional arrangements and political practices.

As is so often the case, I had to leave Canada to grasp this point. My moment of constitutional revelation occurred in Sri Lanka, which I recently visited to participate as a foreign constitutional expert in a series of public presentations on the characteristics of federal forms of government. My suggestion was that the Canadian system of ethnocultural accommodation was a potential model for Sri Lanka to deal with its own ethnic conflict among the Tamils, Sinhalese and Muslims. A common

theme in our presentations was the potential desirability of some form of territorial autonomy for the Tamil minority in the northeast of the island, within a united Sri Lanka, analogous to Quebec's position in Canada. In the process of explaining why federalism was a potential solution to Sri Lanka's problems, we were often met with the challenge that federalism in Sri Lanka would set the stage for secession, much as almost occurred in Quebec in 1995, and may yet take place.

As someone who has challenged the according of preferential constitutional treatment for territorially concentrated minorities such as French Canadians, I could have been receptive to these claims. But to my amazement, I found myself making the case for Canadian federalism with gusto, through simultaneous translation into Sinhalese. I argued that Quebec had been created because of the failure of Canada's first experiment in unitary government, the united Province of Canada. For twenty-five years, predominantly French-speaking Lower Canada and English-speaking Upper Canada attempted to live together in a legislative union which ultimately proved unworkable. Indeed, dividing Canada into Ontario and Quebec was the solution to keeping the country together. Far from Quebec posing a threat to Canada's viability, had Quebec not been created in 1867, there would likely be no Canada today.

Over the course of my visit to Sri Lanka, I found myself repeating this argument time and time again. This was one of the most astonishing experiences of my academic career. My own experience tells us something in microcosm about constitutional culture writ large. When citizens live under a constitutional order, we are engaged in highly complex and elaborate social practice. That practice emerges from the concrete political history of a society, a history that explains the origins of our governing institutions, why we have them, and how they operate. In liberal democracies like Canada, when we make constitutions work, we engage in a conversation that uses our shared constitutional culture as a common basis for communication. Engaging in the practice of constitutionalism reinforces these dominant accounts of the purpose and rationale of a constitutional order in the minds of its citizens, even among sceptics like myself. And to depart too far from settled constitutional meanings would

be more than just suggesting constitutional change. It would be to step outside the constitutional conversation itself, and be unrecognizable by others as an acceptable constitutional argument.

IV

So are Canadians forever doomed to move along the paths charted by our constitutional past? Can we exercise collective choice about the kind of country we want Canada to become? I think that the answer is yes. Let me first speculate on what the emerging Canadian constitutional narrative might be.

Despite our self-description as a country spread thinly across the vast Canadian expanse, Canada is increasingly becoming a country of city dwellers, due to migration from rural areas and immigration. And the increasing importance of cities has given rise to the "cities agenda." Cities now argue that they require the finances and legal powers to deal with their particular challenges and needs, ranging from social housing and public transportation, to immigrant settlement. We do not understand the implications of the emergence of cities for Canadian federalism. But underlying the cities agenda is a message that strikes at the very heart of Canada's self-understanding. Since Confederation, the national project has been understood to include the building of strong regional communities through the buttressing of provincial capacity. The cities agenda suggests that this interpretation of the nation-building enterprise should be drawn to a close, replaced by a new national project which holds that Canada's prospects in the twenty-first century depend largely on the growth and vibrancy of its principal urban centres. On the legal terrain, this points to a massive redistribution of legal powers, with newly empowered municipalities partnering with a stronger national government, squeezing out provinces in the middle.

The second piece of the new national narrative is Canada's growing ethnic diversity. The impact on federalism of Canada's increasing ethnic diversity and the concentration of that diversity in Canada's urban centres is a question that has largely remained unexplored. My sense is that federalism is in for a bit of a shock, because many recent immigrants do not identify with Canada's self-description as a federal political community.

They have not taken to federalism in the same way that they have embraced other aspects of our constitutional identity, such as rights and the rule of law. The difficulty here is that federalism offers up a conception of the Canadian political community with which immigrants find it difficult to identify. Conventional accounts of which communities Canadian federalism is about – founding nations to which immigrants, for the most part, do not belong – make it difficult for ethnic immigrants to feel that this institutional, constitutional and political project is about them.

The constitutional vision of the New Canada – and the New Canadian – remains incomplete. But in making the case for the New Canada, its proponents must reckon with the dominance and durability of the conventional constitutional perspective, and its entrenchment in our institutions and political practices. The challenge will be to persuade Canadians that the new constitutional narrative is better than the old. And it is the right of all Canadians, both old and new, to engage actively in that national conversation.

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