

## BOOK REVIEWS

*CANADA . . . NOTWITHSTANDING*, by Roy Romanow, John Whyte, and Howard Leeson. Carswell/Methuen, Toronto, 1984, pp. xxi and 286.

*Canada . . . Notwithstanding*<sup>1</sup> describes the process of constitutional reform which began in 1976 and culminated in the patriation of the Constitution in 1982.<sup>2</sup> It is authored by three individuals who played important roles in the process on behalf of the Province of Saskatchewan. Roy Romanow was the Attorney General of Saskatchewan from 1971 to 1982. As such he was responsible for intergovernmental affairs and communications policy. During the period from 1976 to 1982, he twice served as the provincial co-chairman of the Federal/Provincial negotiations to patriate the Constitution. Although no longer a member of the Legislative Assembly, he continues to be actively involved in Saskatchewan politics. John Whyte has been a member of the Faculty of Law at Queen's University since 1969. However, from 1979 to 1982 he was Director of Constitutional Law in the Department of the Attorney General for the Province of Saskatchewan. He is a well-recognized legal scholar in the area of constitutional law.<sup>3</sup> Howard Leeson was Deputy Minister of Intergovernmental Affairs for the Province of Saskatchewan from 1979 to 1982. In 1982, he joined the Political Science Department at the University of Regina. This unique collaboration of a politician, a law professor, and a civil servant, it could be assumed, would produce an equally unique text covering all bases — the political considerations, the legal content, and the backroom manouevering — involved in the making of our Constitution.

However, the true scope of the book is clearly set out by the authors themselves in the Preface. They state:<sup>4</sup>

Belief in the importance to the country of a constitution produced in us an overriding ambition: we wished to describe as fully as possible, recognizing the limitations imposed on us by our experience, *the process by which the new constitution came into being* so that, in the endlessly repeated process of national self-discovery, this account, along with others, will make out our journey. [Emphasis added.]

*Canada . . . Notwithstanding*, then, is a book, first and foremost, about the "process" of constitution-making which took place from 1976 to 1982. It is, to much less of a degree, a book about the content of the constitution and even less, an analysis of the merit of that content. Finally, there is little discussion regarding the personalities which shaped the constitutional agenda and debate. That *Canada . . . Notwithstanding* focuses little upon the contents of the Constitution and the personalities that shaped it, is an unfortunate failing of the book. The authors, nonetheless, do fulfill their goal of documenting the "process" that took place.

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1. Romanow, Whyte, & Leeson, *Canada . . . Notwithstanding*, Carswell/Methuen (1984).

2. *Canada Act 1982*, U.K. 1982, c. 11.

3. See for example, his highly regarded casebook Whyte and Lederman (eds.), *Canadian Constitutional Law* (2nd ed.), Butterworths (1977).

4. *Supra*: note 1, at xiii.

The authors take up the story of constitutional reform in March of 1976. The Victoria Constitutional Conference of 1971 had ended without agreement on patriation of the constitution and no further attempt to resurrect constitutional discussions had been undertaken until Prime Minister Trudeau wrote to the Premiers on March 31, 1976, enclosing a draft proclamation of a constitutional accord. This initiative and other events such as the Economic Conference in Ottawa in February of 1978 set the stage for a serious renewal of constitutional discussions. These discussions began on October 31 and November 1 of 1978 at the First Ministers' Conference in Ottawa. Hoping for a quick solution to the country's constitutional dilemma, the Prime Minister proposed an "Agenda for Change". The authors state that the Prime Minister's speech "marked a significant moment in the history of constitutional reform" because he "agreed to negotiate changes of legislative powers" and to "contemplate some diminution of federal authority".<sup>5</sup>

The method used to pursue agreement on the constitution was a committee of federal and provincial ministers subsequently known as the Continuing Committee of Ministers on the Constitution (styled as CCMC). The activities of the CCMC are described in the second chapter of the book.<sup>6</sup> A number of the issues considered by the CCMC are detailed in this chapter. The chapter contains discussions regarding legislative powers over natural resources including offshore resources, communications, and fisheries. Institutions such as the Senate, the Supreme Court, and the Monarchy are examined. Further, a charter of rights, the declaratory power, patriation and an amending formula are discussed. The various positions held by the participants are detailed, differences are explored, and any consensus that was achieved is noted. Unfortunately, once again, there is no analysis of the merits of these positions except in so far as they effected the process of constitutional reform. This part of the work is, undoubtedly, the most lifeless with few anecdotes to enliven the material.

The work of the CCMC led to the First Ministers' Conference of February, 1979. Once again, no agreement was reached on constitutional reform. Why was this attempt unsuccessful? The authors point to two factors which made it inevitable that the Conference would be unable to reach agreement: first, the referendum on sovereignty-association to which the Parti Québécois government was committed; and second, the upcoming general federal election.

In regard to the Quebec referendum the authors note that the Parti Québécois "could not negotiate the constitutional issues until its electorate had answered the fundamental question about its relationship to the rest of Canada".<sup>7</sup>

On the question of the upcoming federal election, the authors state that "with the general federal election only weeks away and the defeat of the Trudeau government looming as an increasingly important political

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5. *Id.* at 21.

6. *Id.* at 21-59.

7. *Id.* at 53.

event, the policy of non-partisanship evaporated".<sup>8</sup> The provincial premiers, representing political parties other than the Liberals, were not going to give Trudeau a victory on the Constitution that he might turn into a victory at the polls.

The search for constitutional reform began again in June of 1980. A new enthusiasm for the task seemed to have developed. This was due, largely, to the victory of the "No" forces in the Quebec referendum and the return to power, after a short interregnum, of the Liberal party still headed by Prime Minister Trudeau. Although the enthusiasm for reform was shared by all sides (with the possible exception of Quebec), it was not "accompanied by a shared conception of what was to be done".<sup>9</sup>

Chapter 3<sup>10</sup> details the events up to and including the First Ministers' Conference in September of 1980. Much of it is taken up with the workings of the revived Continuing Committee of Ministers on the Constitution. In spite of apparent success in the CCMC, attempts to reach a constitutional accord failed once again. In the concluding part of the chapter, the authors place blame for this failure upon the shoulders of the federal government. Reasons given for the failure include reversal by the federal government of its earlier constitutional policy and the linkage of a new subject, "powers over the economy", to matters such as resources, offshore resources, and fisheries. Further, stalled negotiations on energy pricing and a new federal interventionist energy policy contributed to the failure to reach a constitutional agreement. Finally, the division of issues into those that were of interest to the "people" and those that concerned "government", and the ongoing dispute over the meaning to be attached to the results of the Quebec referendum were counter productive.<sup>11</sup>

On October 2, 1980 the federal government unveiled its joint resolution for the patriation and reform of the constitution. For the next year, the battle over the constitution raged on three separate fronts: in the political arenas of the country,<sup>12</sup> in the political environs of Britain,<sup>13</sup> and in the courts.<sup>14</sup> The chapters which tell the story of the events which followed the federal government's initiative to unilaterally patriate the constitution are easily the most interesting in the book. Here the story flows, unencumbered by the details of various proposals for constitutional reform. Here the authors are at their best in describing the process of constitutional reform with all its nuances and implications.

The decision of the Supreme Court of Canada, concerning the federal government's attempt to unilaterally patriate the constitution<sup>15</sup> provided the impetus for one last round of negotiations for constitutional reform.

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8. *Id.* at 54.

9. *Id.* at 60.

10. *Id.* at 60-105.

11. *Id.* at 98-103.

12. See chapter 4, *id.* at 106-133.

13. See chapter 5, *id.* at 134-154.

14. See chapter 6, *id.* at 155-187.

15. *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2, and 3)* [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1.

Further, the success of the most recent round of energy negotiations pressured the governments to duplicate their co-operative federalism in regard to the Constitution. Chapter 7 describes the First Ministers' Conference of November of 1981. If anybody had any doubt that the Canadian Constitution was the product of the negotiating and bargaining skills of the participants, the authors completely dispel such notions. They state:<sup>16</sup>

The sole hurdle to an accord was the extension of the legislative override to fundamental freedoms. In a classic example of raw bargaining, Trudeau was persuaded to accept the override on fundamental freedoms on the condition that the entire override mechanism be limited to a five year period, if exercised, after which a new legislative resolution would be enacted. After some debate on this suggestion, the premiers agreed.

Despite Quebec's cries of "betrayal", Canada had a new constitution. An integral part of that constitution was the Charter of Rights and Freedoms. In the penultimate chapter,<sup>17</sup> the authors discuss the Charter. It is in the discussion of the Charter that the central role of Pierre Trudeau becomes apparent for it was Trudeau who tied "constitutional renewal, a subject of public indifference, to the appealing idea of protecting individuals from government oppression".<sup>18</sup>

This chapter contains much on the content of the Charter. Yet two-thirds of the Chapter deals with the process of putting rights into the constitution. It is in the conclusion to the discussion of the Charter that the authors put forward one of their most insightful comments on the process of constitutional reform:<sup>19</sup>

Canada has not, therefore, carried the idea of entrenchment to its logical conclusion. . . . It would not be consistent with the Canadian experience for Canada's constitution to be based on the wholehearted adoption of a single political idea. What is truly Canadian is to tamper, to modify, to dilute, and to reflect the ambivalence that exists about the nature of the nation. . . . The charter may, however, produce such a strong national political identity that the tension between the idea of nation and the idea of community will gradually lose its force and, in the end Canada, because of the Charter of Rights and Freedoms, will become something different.

Besides the overriding theme of "Process" which pervades the book, two other themes consistently run through the treatise. First, Quebec provides a regional/ethnic impetus for constitutional change in one area. Second, the emerging wealth and power of the Western provinces provides a regional/economic impetus for change in another area. "The immediate cause of the federal-provincial struggle to produce a new constitution was the conjoining of regional/economic and regional/ethnic forces".<sup>20</sup> Therefore, it is ironic that Quebec was not part of the final accord since "Quebec's needs . . . have always been a significant impetus for reform".<sup>21</sup> In the area of natural resources, section 92A of the *Constitution Act, 1982* went some way to satisfy the demands of the provincial governments. Yet here, as well, a compromise was achieved with the provincial governments settling for much less than they initially wanted. The irony in this area is that the "question of the jurisdiction to

16. *Supra* note 1 at 211.

17. See chapter 8, *id.* at 216-263.

18. *Id.* at 216.

19. *Id.* at 259.

20. *Id.* at xvii.

21. *Id.* at 263.

regulate non-renewable resources received little attention at the November 1981 First Ministers' Conference".<sup>22</sup>

For lawyers this book provides at least one special interest. It documents the effect of court decisions on our political processes and in particular on the process of constitutional decision making. This is not only true of the cases involving the patriation of the constitution,<sup>23</sup> but is also true of other cases as well.<sup>24</sup> Cases in the trade and commerce area<sup>25</sup> and communications<sup>26</sup> are referred to so as to place them in their historical context.

In conclusion, the major disappointment of the book is its failure to examine in depth the substantive issues involved in constitutional reform. As was pointed out earlier, this is particularly unfortunate, given the diverse nature of the tri-authorship of the work. Further, the book is very uneven. This is likely attributable to the fact that it was written by three persons. Nonetheless, *Canada . . . Notwithstanding* provides a useful compendium of the events leading up to the patriation of the Constitution. Though at times tedious, on the whole it provides an interesting, if non-controversial, chronicle of the making of the constitution from 1976-82.

*Canada . . . Notwithstanding* will not provide lawyers with ammunition for courtroom battles over the Constitution. It will, however, serve the important function of pointing out to the reader that the Constitution, in general, and the Charter, in particular, are the products of compromise. This casts serious doubt upon the usefulness of attempting to discern one single legislative intent. This realization places more responsibility in the hands of the Judiciary to interpret constitutional and charter provisions.

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22. *Id.* at 273.

23. *Supra* note 15.

24. For example, *Reference Re Legislative Authority of Parliament in Relation to the Upper House* [1980] 1 S.C.R. 54, 102 D.L.R. (3d) 1; *Duke v. The Queen* [1972] S.C.R. 917, 28 D.L.R. (3d) 129; *Lavell v. Attorney-General of Canada* [1974] S.C.R. 1349, 38 D.L.R. (3d) 481; *Bliss v. Attorney-General of Canada* [1979] 1 S.C.R. 183 among others.

25. For example, *Canadian Industrial Gas and Oil Ltd. v. Attorney General of Saskatchewan* [1979] 1 S.C.R. 37, 80 D.L.R. (3d) 449; *Central Canada Potash Co. v. Attorney General of Saskatchewan* [1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada* [1980] 1 S.C.R. 914, 110 D.L.R. (3d) 594 and so forth.

26. For example, *Capital Cities Communications v. C.R.T.C.* [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609; *Dionne v. Public Service Board (Quebec)* [1978] 2 S.C.R. 191, 83 D.L.R. (3d) 178 and others.

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