BOOK REVIEWS

CANADA . . . NOTWITHSTANDING. By Roy Romanow, John Whyte, Howard Leeson. Carswell/Methuen, 1984. Pp. xxi, 286. ($38.00)

This is another account of the constitutional developments that occurred in the late 1970's and early 1980's, including the final settlement of November 1981 that provided the contents of the *Constitution Act, 1982*.[1] It is essentially a description and analysis of events as perceived by the then Government of Saskatchewan. The authors were acting on behalf of that government during the period in question: Roy Romanow as Attorney General and Minister of Intergovernmental Affairs, John Whyte as Director of Constitutional Law in the Department of the Attorney General, and Howard Leeson as Deputy Minister of Intergovernmental Affairs.

As a long-time participant in federal-provincial constitutional negotiations, I read the book with great interest. I shall attempt to comment on it as a piece of history as it is now inappropriate for me to express any views on events occurring since the 1981 settlement.

The narrative essentially begins in 1976, with occasional fleeting glances at a few earlier events. It gives a detailed description of the process and of many of the proposals brought forward by both the federal and provincial governments during that period.

The book does not attempt to be titillating to constitutional "groupies" who wish to know personal details; such as, what a particular First Minister had for breakfast on November 5, 1981 or what colour of necktie some influential official wore. At times, however, it does give interesting insights into the personal relationships among the premiers, especially in the tense days leading up to and during the November 1981 constitutional conference. Probably because the book is a joint product, its style tends to be uneven. It is more tendentious in some places than others and contains a certain amount of repetition. This results in part from the inclusion of a special chapter[2] on the *Canadian Charter of Rights and Freedoms*,[3] the only substantive subject dealt with in this manner. There is a considerable overlap between the history of the *Charter* and the description of the constitutional process contained in the other chapters of the book.

The book will be of considerable value to constitutional scholars who wish to trace the origins of particular ideas and provisions found in the *Constitution Act, 1982*. As such, it may tend to have lasting value

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[1] *Constitution Act, 1982 enacted by* the *Canada Act, 1982*, U.K. 1982, c. 11.

[2] Pp. 216-62.

[3] *Constitution Act, 1982*, Part I, *enacted by* the *Canada Act, 1982*, U.K. 1982, c. 11.

more as a reference work than as general-interest reading. It clearly demonstrates that in the evolution of the *Charter*, particularly during federal-provincial discussions, terminology was sometimes rejected not because of any real probability of an ambiguous or undesired interpretation, but because of a vaguely perceived possibility of such an interpretation. For example, it is noted that "due process" was not used because of the interpretations applied by the United States Supreme Court fifty years ago, but since abandoned. The narrative also demonstrates that because the developing *Charter* was changed frequently in response to pressures from interest groups, the final product contains latent inconsistencies and ambiguities which were not part of the original concept.

The book preserves for scholars of history and politics a fairly comprehensive account of the particular role played by the Government of Saskatchewan during this period. It reminds us that, in the difficult winter of 1980-81, Saskatchewan made numerous efforts to find some middle ground between the federal government and the six provinces that were then opposing the federal initiative for patriation and amendment of the Constitution. It was only after several such efforts that Saskatchewan became the last adherent to what became the "Gang of Eight" which was opposed to both the federal government and the other two provincial governments, Ontario and New Brunswick.

The book also treats fully the unique position asserted by Saskatchewan with respect to the existing requirement for making constitutional amendments affecting the provinces, namely, that such amendments required substantial but not unanimous agreement of the provincial governments. In this it differed from the other members of the "Gang of Eight" in arguments before the Supreme Court of Canada, the others insisting that unanimity was the requirement. Ably presented by Dean Kenneth Lysyk as counsel, Saskatchewan's approach anticipated in an important way the conclusions which the Court ultimately reached. While the Court did not accept that there was any legal requirement for the consent of the provinces, it did find that convention required some unspecified kind of provincial support that could fall short of unanimity. I think that most of us who were present in the court room at that time recognized that the Saskatchewan argument could have an important impact on the results: it seems to have done so.

I have little patience for reviewers who lament that the author did not write a different book. However, I think it is fair to observe some of the limitations of the authors' approach so that the reader will have some idea what has not been included.

The book pays little attention to what had transpired before 1976 in constitutional negotiations concerning patriation and amendment of the Constitution. In choosing to ignore this background, the authors do not put the latter stages of the process into their full context. I suggest that the inclusion of those negotiations might have explained and provided a fairer means to evaluate some of the events of the early 80's. The authors do not refer to the long series of unsuccessful attempts, starting in 1927,

to achieve unanimous agreement on patriation and on certain amendments. Nor do they refer to the series of federal proposals for the limitation or devolution of the powers of the Parliament and the Government of Canada that were put forward unsuccessfully during the Constitutional Review process of 1968 to 1971.

This lack of historical perspective is reflected in the chapter on the 1980-81 court cases[4] over the federal patriation and amendment scheme. This chapter devotes very limited space to describing and explaining the federal position, even for the purpose of dismissing it. Nowhere do the authors really come to terms with the concern that constitutional conventions, being rules of political conduct, might not be appropriate subject matter for adjudication by courts. Having ignored the earlier history of constitutional reform, they do not therefore find it necessary to consider whether this history might have had a bearing on the continuing validity of the convention for which Saskatchewan argued. They also fail to consider the distinction between domestic constitutional conventions that do not create law and conventions based on practice as between two nations (in this case between Canada and the United Kingdom) that can create obligations in international law.

The authors' perspective is also limited in their analysis of negotiations on the distribution of powers. They tend, as the Saskatchewan delegation did at the time, to see the resources issue as a sudden challenge to provincial power. Accordingly, they view constitutional changes as being necessary because the Supreme Court of Canada had arrived at very surprising conclusions favouring the Parliament of Canada in *Canadian Industrial Gas & Oil v. A.G. Sask.*[5] (*CIGOL*) and *Central Canada Potash Co. v. A.G. Sask.*[6] What they fail to acknowledge is that there had been a long-standing latent conflict between the provincial and federal positions, unresolved because the conflict seemed unimportant. The provincial position held that non-renewable resources, in any form, are a matter for provincial ownership, control and taxation. The federal position, however, maintained that resource products, once separated from the ground and sold as commodities, are governed by the constitutional principles relating to the regulation and taxation of transactions involving goods. Given the state of the rather limited constitutional jurisprudence on non-renewable resources, the results in *CIGOL* and *Central Canada Potash* were fully predictable, though not inevitable. The Saskatchewan delegation, however, chose to treat these decisions as aberrations which cried out for correction. The book reflects this approach.

Equally strained is the authors' treatment of the only federal proposal, in over twelve years of constitutional negotiations, for an

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[4] Pp. 155-87.
[5] [1978] 2 S.C.R. 545, 80 D.L.R. (3d) 449 (1977).
[6] [1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609 (1978).

enhancement of Parliament's authority. This involved the clarification of Parliament's jurisdiction with respect to the preservation of competition in the marketplace and the establishment of national product standards for the protection of the public. The surprisingly strident response of the Saskatchewan delegation to this proposal is loudly echoed in the book. Equally strident is the authors' criticism of a modest federal proposal in 1980 for constitutional guarantees of free movement of persons, goods and capital throughout Canada.

The authors provide some interesting views of the "might have beens", and some long term assessments of the actual outcome. As a participant in the negotiations, I gained impressions which not surprisingly varied somewhat from theirs. For example, we were all involved, on behalf of different interests, in discussions with British politicians, officials and journalists. I think the authors overstate the degree of serious interest there would have been at Westminster in defeating a "Canada Act" requested by Ottawa without compliance with past conventions. Nor do they consider what the reaction of Canadians might have been had Westminster rejected a legally correct, if unconventional, address by both Houses of the Canadian Parliament. Yet the authors emphasize, and I think most of us associated with the governments which signed the final agreement would agree, that it was far better for Canada that the issue was finally settled here rather than abroad. I recall the sense of embarrassment I felt when participating in a seminar on the great Canadian constitutional issue at All Soul's College, Oxford, in May 1981. Our domestic problems had become the subject of such well-meaning but often ill-informed attention in a distant land that was still not devoid of imperial condescension. How much worse it would have been to have had a contentious debate at Westminster on the issue!

Indeed, I think the book reveals, without really articulating it, that by the time of the conference of First Ministers in November 1981, public pressure was on all the signatories to the final agreement to reach a settlement. The delays in the process, caused primarily by the court actions, had in fact heightened the public's expectations of its political leaders. The book amply discloses the determination with which most governments, at both levels, strove to find some common ground upon which an agreement could be based. It appears that this imperative, more than any particular secret meeting or conference intervention of the sort which has now become part of our mythology, produced the agreement that paved the way for patriation, the *Charter* and the rest of the *Constitution Act, 1982*.

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