GETTING IT WRONG: HOW CANADIANS FORGOT THEIR PAST AND IMPERILLED CONFEDERATION by Paul Romney (Toronto: University of Toronto Press, 1999)

Very rarely does a book come along in Canadian constitutional and political history in which the author sets out to debunk, in such a comprehensive fashion, the orthodox interpretation of the events and personalities of Confederation. In this case, our illustrious centralist Fathers of Confederation and their legions of supporters over the past century get thrown out unceremoniously with the old constitutional bath-water! Even more rarely does an author go on to contend that, had Canadians continued to embrace the appropriate interpretation of Canada's constitutional development (essentially the Upper Canadian Reformers' highly decentralist interpretation), then Canada would have avoided the destabilizing mega-constitutional politics of the past four decades. If, according to the author, Canadians had continued to embrace the true nature of their Confederation — a dual compact of provinces and two nationalities they would have rejected Pierre-Elliott Trudeau's anti-Quebec *Constitution Act*, 1982¹ with its America-inspired *Charter of Rights and Freedoms*,² both responsible for the near-death political high drama of the 1995 referendum on Quebec's secession from Canada.

Paul Romney's Getting It Wrong: How Canadians Forgot Their Past and Imperilled Confederation³ is just such a book. (An alternative title could very well be, Lament for Canada's Forgotten Compacts!) Given the author's grandiose claim, I looked forward to the nature of historical evidence and the arguments that he would marshall to his cause. I was anxious to scrutinize his interpretation of the evidence which would substantiate, in an irrefutable fashion, his long-held view that Canada's constitution resided on two non-legal, but historically-grounded, conventional compacts: one provincial and the other racial. I hoped that Getting It Wrong would serve as a long-overdue counterpoint to the accepted interpretation of Confederation, thereby helping to enliven discussions in my graduate seminar on Canadian federalism.

Unfortunately, *Getting It Wrong* does not live up to its promise. Why? First, Romney's evidence is entirely of a circumstantial historical nature and rings true, in part, only for the 19th century. Second, because the author, in trying to restore balance to the debate about the origins, design, and implementation of the *British North America Act, 1867*,⁴ overstates his politically motivated decentralist interpretation of events and personalities. Romney is a modern Clear Grit Ontario Firster who maintains that Confederation was *classically* federal rather than "quasi-federal." So eager to slay the dragon of centralist constitutional orthodoxy — propounded by J.A. Macdonald and

¹ Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 [hereinafter Constitution Act, 1982].

² Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 [hereinafter Charter].

¹ P. Romney, *Getting it Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999) [hereinafter *Getting It Wrong*].

⁴ (U.K.), 30 & 31 Vict., c. 3. The title of the Act was changed to the Constitution Act, 1867 by the Constitution Act, 1982 and was reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter B.N.A. Act].

his legions of unthinking, ahistorical centralizers including historians like Donald G. Creighton and Ramsay Cook — Romney makes some exaggerated claims which undermine his otherwise interesting and valuable "Untold Story" of Confederation.

And what is Romney's "Untold Story" of Confederation? Essentially, it is that George Brown's Reform Party of Canada West was the dominant driving force behind the creation of a very loose confederation of British North American colonies in the 1860s. In the *B.N.A. Act*, the Reform Party achieved its goal of extracting the loyalist, populist, protestant, British community of Ontario from under the yoke of the French-Canadian, Catholic community of Quebec which had come to dominate the Assembly of the Canadas by the late 1850s. Romney sets out to demonstrate how Brown's Reform Party convinced Ontario's farmers and small-town businessmen that only a loose confederation, first of Ontario and Quebec and then incorporating Nova Scotia and New Brunswick, would finally enable Ontarians to achieve the genuine responsible government that had eluded them under the Union of the Canadas.

Ontario's populist, democratic political culture of local autonomy had its early origins in the American soil of frontier democracy. But, more importantly, given the rise of Loyalist mythology and the expansion of the British presence and influence in Ontario through immigration, Ontarians' conception of democratic governance resided in the conception of the New British Empire as a decentralized global federation of self-governing colonies. These were based upon the acceptance of a divisible, omnipresent, tolerant Crown, combined with what Romney maintains was a truly revolutionary concept: responsible government. The governance model, which permitted the emergence of a powerful, multinational, global but highly decentralized Empire, would also allow for the emergence of a Canadian federation of fully autonomous, equal, self-governing provinces; one of these (Quebec) happened to be French and Catholic for historical reasons.

Unfortunately, thanks to the centralizing ambitions of John A. Macdonald and his merry band of nation-state builders, Confederation did not live up to its brave promise of responsible government for Ontarians. Canada's Anglo-Scottish political, commercial, and industrial elites, under J.A. Macdonald's guidance, conspired in the creation of a powerful, centralist nation-state which subverted the autonomous governance rights of Ontario's democracy-loving, law abiding British citizens. Riding to the Ontario Reformers' rescue was the brilliant visionary, Premier Oliver Mowat, who so cleverly, tenaciously, and successfully used the provincial compact theory to convince the British Judicial Committee of the Privy Council to make responsible government (that is, local self-government by Ontarians for Ontarians) very real in the 1880s and 1890s. By the time he joined Prime Minister Laurier's cabinet in 1896, Mowat had more than fulfilled the self-governance dreams of Ontario's Reformers by putting the "Con" back into Confederation.

Romney proceeds on the questionable assumption that the experience of Confederation (the creation and consolidation of a grand country stretching *A Mari* usque ad Mare which greatly benefited the citizens of Ontario) had little impact on their early- to mid-19th century sense of local identity and the political culture and

practices which reflected that local identity. He assumes that the political culture of the province remained that of the mid-19th century, whereby ideal governance was best epitomized by municipal government controlled by highly localized but interconnected new reform-minded family compacts. He fails to appreciate that Ontarians were wise enough to realize they could become Canadians while still remaining Ontarians. After all, the prospect of embracing multiple identities was the inherent brilliance of federalism and of Macdonald's and Cartier's new political nationality. In the half century after Confederation, Ontario's rapidly expanding British-Canadian population developed a strong a sense of identity as citizens of a prosperous and dominant Ontario but also as citizens of an expanding, prospering Canada, and an ebullient British Empire. A consolidated nation-state promised even more prosperity for Ontarians if only narrow-minded, parochial politicians stepped aside for a new generation of politicians with, as Carl Berger makes so clear in his book, The Sense of Power,⁵ a vision of grandeur. Laurier and his Liberal party promised just such leadership and gained the support and respect of a majority of Ontario voters as well as the participation of Mowat in his government. Canada the nation-state had emerged as an entity greater than the sum of its parts (the provinces and territories).

Romney contends that a number of things went terribly awry during the interwar years in order to explain the demise of the provincial compact theory of Confederation which undermined his cherished decentralized Dominion of self-governing provinces by a minimalist. non-intrusive central government. overseen Urbanization, industrialization, and the First World War created the conditions necessary for the development of new ideologies which quickly swamped the Reform ideology of responsible government, the foundation of autonomous, self-governing provinces and dominions within the Empire. Goldwin Smith's pro-American continentalism which put into question Canada's geo-political survival, George Parkin's anti-American, anti-French-Canadian Imperial Federation which fuelled the British-Canadian nationalists' quest for Canada's independence within a revamped British Empire, and John S. Ewart's North-American Liberal Canadian nationalism which pursued Canada's independence within an informal British Commonwealth, all contributed to focus attention on a more powerful Canadian nation-state with a presence in international affairs.

The spread of Ewart's Liberal nationalism during the 1920s and the Great Depression and the left-of-centre nationalism fuelled by World War Two turned a new generation of Canadian intellectuals (including Frank Scott, Frank Underhill, D. G. Creighton, and Norman Rogers) into vocal propagandists for a strong central government willing and able to intervene in the economy and to implement long-overdue national social programs. Even the Tory premier of Ontario, Howard Ferguson, forgot or ignored the complex historical context of the provincial and racial compact theories and relied increasingly on the legal decisions of the Judicial Committee of the Privy Council to fight Ottawa's centralizing schemes. Again, Romney appears to lament the fact that Canadian society had been drastically transformed since 1900. The historical context

⁵ C. Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism*, 1867-1914 (Toronto: University of Toronto Press, 1970).

was vastly different from that of mid-19th century Ontario Reformers. Canadians from all regions of the country, including those in Quebec, began to fashion and support new ideologies, new nationalisms, and new political cultures to fit the emerging demographic and socio-economic realities. Increased segments of Canadian society were no less democratic or populist than earlier Ontario Reformers as evidenced by the Progressive Movement, the Social Credit party, the CCF, the Union Nationale, and the Bloc Populaire Canadien. Canadians drew upon different historical realities and fashioned quite different theories to buttress their claim to a more democratic system that would give them far greater input into the policy decision-making process at both levels of government. The role of the state evolved as power moved outward from local communities, to provinces, to Ottawa, and then to international organizations.

Romney argues that the Tory historian D.G. Creighton rightly denounced the continentalist thrust of Prime Minister Mackenzie King's Liberal government. But Creighton's ignorance of the true nature of Confederation and his idolatry for J.A. Macdonald's centralist vision made it impossible for him to understand the crisis emerging in the federation. Ottawa's centralist ambitions and machinations undermined the autonomy of the province of Quebec and the ability of the Québécois people to govern their own affairs, a right that was inherent in the two nations conception of Confederation. In forgetting, ignoring, and finally deliberately rejecting the two nations compact theory of Confederation, Romney reminds us, Canadians were sucked into the centre of a volatile political hurricane in the form of Quebec's Quiet Revolution of the 1960s and the rise of René Lévesque's separatist movement, the Parti Québécois.

Prime Minister Trudeau, a protegé of Frank Scott and like him an opponent of both compact theories and a strong centralist, then came along to add to this political hurricane by "conspiring" with certain provinces to patriate and Canadianize the *B.N.A. Act.* The *Constitution Act, 1982* included an American-style *Charter* which undermined Quebec's jurisdiction over language and education and a 7/50 amending formula which denied Quebec its "historical" veto over important constitutional reforms. In Romney's view, "patriation was a blunder if not a betrayal, an offence against the rule of law if not a dissolution of government. It was a breach of the Confederation compact as I find it illustrated in history."⁶

The second villain in this high drama was the Supreme Court. In the *Patriation* case,⁷ misguided and ill-informed Supreme Court justices allowed Trudeau to proceed without Quebec's approval because they "reasoned without historical insight"⁸ as all but two rejected or ignored the compact theory of Confederation. In Romney's view, the veto is at the heart of any genuine Confederation since a province's right to veto any constitutional change it deems unacceptable is based on the principle of a compact arrangement. The logical end to Romney's support of the provincial veto is that every province has an inherent right to withdraw unilaterally from the Confederation if its current leaders claim that the structure no longer serves the interests of its citizens. For

[&]quot; Getting it Wrong, supra note 3 at 285.

⁷ Reference Re Amendment of Constitution of Canada, [1981] I S.C.R. 753.

^{*} Getting It Wrong, supra note 3 at 269.

Romney, Canadians have two citizenships. They are first citizens of their respective provinces and second, if one follows his logic, they are citizens of Canada (the creature of the provinces).

It would be interesting to know if Romney's rather harsh and unfounded criticism of the Supreme Court has changed since the Court's 1998 opinion on the *Reference Re* the Secession of Quebec,⁹ an opinion which is grounded in large measure on the Justices' largely unacknowledged and unexplained acceptance of the dual compact theories of Confederation! Any Canadian province can now extricate itself from the Confederal compact if it follows certain referendum procedures, acquires a clear majority however defined, and respects in the negotiated secession deal what the Supreme Court perceives as the four fundamental principles of Canadian federalism. The Court even allows that if negotiations fail or if a deal on secession cannot be ratified under the amending formula of the Constitution Act, 1982, then a province could proceed with a manifestly illegal unilateral declaration of independence fully aware of all the risks that a revolutionary act would entail.

Despite his reluctant acceptance of the *Constitution Act, 1982*, I suspect that Romney is now smiling. Nevertheless, he will have to recant his charge that Canadians, especially our political, academic and judicial elites, remain largely ignorant of the divergent interpretations of Canada's constitutional history. His rather simplistic notion that Canadians of a certain generation got it all wrong and that those of a future generation will put it all right belies the inordinate complexity of the issues and interests at stake. His misguided desire to have the compact theories entrenched once and for all as the central dogmas of our Constitution will, I maintain, destroy the inherent flexibility of our dynamic federal system, a flexibility which ensures its continued success.

Our mid-19th century ancestors, in all parts of Canada, wanted to preserve and enhance their established identities while participating in the construction of a shared Canadian political identity. Even a superficial examination of the evidence would suffice to prove that Canadians have succeeded beyond their wildest dreams. Yet, even this success is no guarantee of Canada's survival well into the new century. If the politicians and intellectuals who advocate a new bi-national Quebec/Canada compact win the day with the help of narrow-minded provincialist politicians and an overly meddling and politicized Supreme Court, Canada will cease to exist. If, on the other hand, Canadians come to understand that sovereignty resides with the people and can be delegated to both provincial and national politicians to serve the needs of the citizenry, Canada will become a beacon of hope for other troubled nation-states. Romney's study has opened our eyes to all these possibilities and he should be commended for that.

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Reference Re Secession of Quebec, [1998] 2 S.C.R. 217.