CANADA AND THE CONSTITUTION 1979-1982, by Edward McWhinney, University of Toronto Press, Toronto, 1982, pp. xii and 227, $29.50 cloth, $10.95 paper.

Canada and the Constitution 1979-1982 represents the third book in a constitutional trilogy written by Professor McWhinney. This latest volume is more than a sequel to *Quebec and the Constitution 1960-1978* and includes some of the ideas expressed in *Constitution-making (1981). Canada and the Constitution* is not a legal textbook; it is more akin to a political science text that, in some chapters, assumes a rudimentary understanding of constitutional law. The book takes a 'splendid players and events' approach to three of the most significant years in Canadian constitutional activity. Professor McWhinney's easy-to-read writing style lends itself to a wide audience.

Throughout his latest volume, Professor McWhinney maintains the theme that the trend in the new Canadian constitution-making process is towards decentralization and devolution of the decision-making process from the federal to the provincial governments. Professor McWhinney adopts the nomenclature used in the Pepin-Robarts Commission Report to describe the shift from a 'dualist' (two nation) to a 'regionalist' (ten nation) approach to Canadian federalism. The significance of the three-part constitutional conception involving an interaction between federalism, dualism, and regionalism is discussed in terms of its effects on Quebec. The strength of Quebec's traditional claims for special status in recognition of the two founding nationalities (and the distinct French culture and language) would be weakened. The aforesaid is the inherent risk to Quebec, and its leaders, in espousing regionalism. With this in mind, the author comments on what he calls the "unholy alliance" (p. 92) between René Levesque and the seven English-speaking premiers who comprised the "gang of eight" (p. 92). The alliance was a regionalists' forum which superceded Quebec's demands for national self-determination and transcended Quebec's claims for special status. The regionalist approach to federalism took over with its regionally based interests and claims. Professor McWhinney suggests (at p. 40) that the English-speaking premiers' myopism, which set in after the Quebec referendum, allowed a rare opportunity for timely constitutional change with respect to Quebec to fade away.

The following is an overview of the successive chapters and primary topics dealt with in the book:

1. the constitutional interlude between 1979-1980;
2. some constitutional parameters, the Senate reform ruling, and the Supreme Court holdings on the appeals in the Manitoba and Quebec language cases;
3. the Quebec referendum from a 'players and events' approach;
4. post-referendum federal-provincial diplomacy with comments upon the first ministers' conflicting personalities and competing claims;
5. the unilateral federal initiative;
6. the patriation package (i.e., Charter of Rights and Freedoms, amending procedure, *etc.*) in terms of its successive drafting stages;

7. the amending formula, the traditional British route, the preposterous and varied legal claims of the British Parliament over its Canadian counterpart as advanced by the dubious and unofficial Kershaw committee, and the strict (legally and diplomatically) proper approach taken by the Thatcher government towards the Canadian government *vis-à-vis* the provinces and the delegations of lobbyists (e.g., treaty Indian groups);
8. the rulings delivered by the Manitoba, Newfoundland, and Quebec Courts of Appeal on the unilateral federal initiative;
9. the Supreme Court of Canada's ruling on the legality/conventionality issues and the increasingly activist role of this court;
10. the Guy Fawkes Day compromise (otherwise known as the November 5, 1981 accord), the personalities, the political *quid pro quo*, the double dealing, and the key changes to the Charter and to the amending formula;
11. the post-accord public reaction with particular emphasis on the deletions to the Charter that infuriated women's rights activists and Indian leaders;
12. the constitution and the future, some extrapolations from "the main historical trends in democratic constitutionalism throughout the world" (p. 121), and a recognition of some positive developments; and
13. a miscellany of interesting constitutional postscripts.

Clearly, *Canada and the Constitution* contains a wealth of information on all points of interest relating to the flurry of constitutional activity between 1979 and April, 1982.

The fact that the book was written (in part or in whole) and published a short three months after the events it reports may partially account for a few of the book's stylistic faults. The indiscriminate use of the term 'patriation' on one line and 'repatriation' on another deserves mention due to the frequency with which these words were incorrectly interchanged. The principal written part of the Canadian constitution, the British North America Act of 1867 (and its amendments), was never brought to Canada before 1982 (now styled the Constitution Act). There was, therefore, nothing to repatriate and the term should not be used at all, let alone indiscriminately interchanged. Further, in his excellent chapter on the Supreme Court ruling, Professor McWhinney includes many relevant excerpts from the text of the judgment only to omit the page of the opinion from which the excerpt was taken. The judgment is over one hundred fifty pages long. Without complete citation, the reader's task is arduous should there be a reason to seek further detail or examine the context from which the excerpts were drawn.

Chapter 12, "The Constitution and the Future", lacks the strength and cohesion most of the other chapters possess. In one part, Professor McWhinney presents eight points (at pages 121 to 123) and suggests they are the "main implications for constitutional process and substance" based upon an "extrapolation of the main historical trends in democratic constitutionalsim throughout the world" (p. 121). Of the eight, one extrapolation is directly commented upon. The extrapolation is drawn from international examples (which are never specifically cited) of how other federal systems have attempted to

> correct such imbalances [e.g., social and economic opportunity, population, and wealth] by readjusting provincial boundaries, or amalgamating or abolishing some existing provinces, or creating new ones, ... (p. 121)

Referring specifically to Canada, Professor McWhinney writes:

> Save for Quebec which should be preserved as an entity, existing provincial frontiers and the notion of a federal system of ten provinces need to be re-examined. The larger cities might become provinces. Or the federal system could be conceived and restructured in terms of three levels of government — federal, provincial, and municipal — each with its own lawmaking and taxation powers . . . . (p. 121, 122)

The Professor seems to have omitted from his calculations the effect the amending formula would have on the above extrapolation. According to subsections 38(1), 42(1)(e), and 42(1)(f) of the Charter of Rights and Freedoms, amendments such as the extension of existing provinces into the territories or the establishment of new provinces would require, *inter alia*, resolutions from at least seven of the ten provinces that have, in the aggregate, at least fifty per cent of the Canadian populous according to the latest census. Professor McWhinney discusses (at pages 54, 55 and 94, 95) the technical complexities of the amending formula, as well as the deletion of the provision for a general referendum to break a future deadlock, in terms of the rigidity of the constitution. However, Professor McWhinney is silent as to what effect the complex and technical amending formula would have on the accuracy of his extrapolations. A very careful examination of the other seven extrapolations will show a few others fall prey to similar criticisms.

Professor McWhinney's basic conclusion is that the "constitution-making [of] 1979-1982 was a flawed exercise, yielding only limited and imperfect results" (p. 115). Prime Minister Trudeau is described as having sacrificed any chance of an authentic made-in-Canada constitution by insisting upon following the traditional British amending route one last time. The author suggests that if Trudeau had enlisted direct participation and support of the Canadian public (as was done in the United States and France), which is the ultimate source of constitutional power and legitimacy, then the constitution would have been patriated and the Charter would have been more potent. At the same time, the Professor acknowledges the difficulty in choosing between the alternatives and recognizes that "[i]t is perhaps too harsh to dismiss the decision to make a last approach to London as essentially timid and conservative." (p. 115). Although hindsight is 20/20, the Professor makes a valid point when he suggests the federal Liberal party gave away too much on the Charter for the accord. Despite having a clear majority in both Houses of Parliament, the Liberal party "perhaps gave away too much to the objective of unity" (p. 121) in an effort to placate British M.P.'s and thereby expedite ratification of the Canadian patriation project. The result is a diluted Charter of Rights and Freedoms.

The November 5 accord resulted in two major changes to the Charter. First, a loop-hole was constructed and attached to the mobility rights clause. Provinces are thus able to undertake affirmative action programs for certain categories of persons if the province can demonstrate that it falls under the economically depressed category. In other words, provinces would be able "to give preferential treatment to its own residents in regard to employment and contracts within the province, . . . " (p. 96) notwithstanding* the Charter's mobility rights clause. Second, a *non*

* The use of the term 'notwithstanding' in this context is *not* meant to suggest the *non obstante* clause applies to mobility rights.

obstante clause (section 33) was expressly inserted to enable any province to make its legislation operative notwithstanding section 2 or sections 7 to 15 of the Charter (i.e., fundamental freedoms, legal rights, and equality rights). Any province could opt out of the aforesaid categories of rights with one proviso: the validity of the opting out must be continually maintained via five year re-enactments by the provincial legislature. But as the author points out, the obvious dangers inherent in the use of the *non obstante* clause appear to be "more notional than real" (p. 97). It would be political suicide for any premier to be seen opting out of the Charter's fundamental freedoms, legal rights, and equality rights categories. If a government did manage to opt out of parts of the Charter, the mandatory five year re-enactments required to maintain the validity of any opting out, and the political pressures that would surely ensue would no doubt convince succeeding governments to eschew re-enactment.

The chapter on the Supreme Court ruling is unquestionably one of the best commentaries in *Canada and the Constitution.* Professor McWhinney makes a valid point when he writes:

> One might normally have expected the majority to rule that the issue of conventionality was not a legal issue and therefore not one on which the Supreme Court could, or should, deign to rule. (p. 84)

Conventions are not law and, accordingly, will not be enforced by the courts. The question is then raised as to why judicial restraint was not followed and the conventionality issue not ignored. The Professor explains the decision to rule on the conventionality issue, and thus create a parallel ruling, solely in terms of the unarticulated major premise, that:

> To reach this result it [the Supreme Court] had to get into high political, policy questions transcending the strict legalism on which it has normally insisted. (pp. 88, 89)

The key argument of the majority opinion on the conventionality issue is also criticized; that is, the precedents requiring the consultation and consent of the provinces prior to any federal initiative to approach Westminister must be considered selectively. Five amendments were selected from the litany cited as being distinguishable. The six-man majority differentiated the amendments of 1930, 1940, 1951, and 1964 as well as the Statute of Westminster (1931) on the ground that these amendments affected the legislative power of the provinces and agreement by the provinces so affected was required. The selected constitutional amendments were all from the last half-century of Confederation. At page 87, these questions were raised:

> [W]hat of the first sixty-three years? Would the five be enough to constitute that continuing and unbroken practice necessary for the formation of a convention?

The majority is silent on the first point, and gave only an implicitly positive answer to the second. Professor McWhinney saves his strongest criticisms for the four justices (Justices Dickson, Beez, Chouinard, and Lamer) who comprised part of the majority judgments on both the legality and the conventionality issues.

> The absence of a formal opinion of court that would bridge the two separate and parallel majority opinions on legality and conventionality is the most serious gap .... The four judges who crossed back and forth between the seven-man and the six-man majority opinions had some obligations to their judicial colleagues, to the legal profession, and to the general public to set out publicly how, if at all, they felt able to reconcile their positions. (p. 88)

These criticisms may be too harsh. Although the Supreme Court succumbed to policy considerations in deigning to rule on the conventionality issue, it is submitted that the legality/conventionality issues are not mutually exclusive. The unilateral federal initiative could be constitu-

tional (i.e., legal) without necessarily conforming to convention (i.e., to custom). A particular practice may be the political custom of the land for selectively considered amendments, but only the law will be enforced by the courts. However, a formal opinion of court bridging the two majority opinions would have been appreciated by all.

This reviewer anticipates Professor McWhinney's book will be as popular as his others in the trilogy are to political science professors and students alike. Indeed, *Canada and the Constitution 1979-1982* is worth adding to the syllabus of constitutional law courses, but only as interesting supplementary reading to give the law student some background and insight into the process of actual constitution-making in Canada. The eight appendices comprising seventy-four pages of excerpts from successive draft versions of the Charter as well as the Supreme Court ruling, the Guy Fawkes Day accord, are presented in an abridged form. These extensive excerpts comprise the legislative history of a most significant constitutional event. The extensive appendices will no doubt prove to be the most useful material in the volume to students of constitutional law. The one hundred thirty-eight pages preceeding the appendices are quick and easy reading and can be absorbed in one or two sittings. In a few hours reading, the book delivers considerable information on a flurry of pertinent Canadian constitutional activity. This alone justifies acquiring the book.

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