

An Insider, Insightful Look at Canada's Constitutional History

Author shows why confusion reigns, even among experts

BY GARY LEVY
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Every student of Canadian politics remembers June 1990. The Meech Lake Accord was set to expire having been adopted by Ottawa and eight provinces but blocked for procedural reasons in Manitoba and with a vote pending in Newfoundland. A last desperate federal strategy was devised which consisted of telling Newfoundland premier Clyde Wells that if his province "demonstrated its political will by adopting the amendment before the deadline, a reference could be made to the Supreme Court on whether the second resolution assenting the amendment — by Saskatchewan on Sept. 23, 1987 [rather than the first passed by Quebec on June 23, 1987] — could be deemed the resolution that initiated the Meech Lake ratification process. If so Manitoba would have up to three months to resolve its procedural problems and, of course, Quebec would have to adopt the resolution again," (p. 113). Mr. Wells declined.

Such juicy stories are atypical of this essentially factual book on the process of constitutional change by one who has witnessed the slings and arrows of constitutional fortunes during a 20-year career with the Privy Council Office, most recently as director of constitutional affairs. This book, written while on leave from his regular duties and published with assistance from the PCO, does not necessarily reflect the views of the Government of Canada.

Hurley begins with a brief description of how the Constitution was amended from 1867 to 1982. He then describes 14 futile attempts to patriate the Constitution between 1927 and 1982. One may quibble with the numbers but his main point is well-taken. A tremendous

amount of time and energy went into trying to find an acceptable amending formula before the federal government and nine provinces (except Quebec) agreed on one.

Another chapter explains our multi-dimensional amending formula with its seven different levels of consent for different classes of amendments. Hurley shows why confusion reigns, even among experts, by looking at several hypothetical amendments and showing that a good case can be made for two, or even three different procedures for the simplest change. His mastery of constitutional minutiae leaves us in temporary wonderment that our politicians (and officials) have managed to accomplish anything under the present rules!

However, having demonstrated the problems with the present formula Hurley declines to offer any solutions except to say we must live with it until something better can be devised. One cannot help but fear that his laissez-faire attitude is indicative of advice given to First Ministers when they cobbled together our seven-headed amending formula. Was it so difficult for people with intelligence who supposedly reside in the PCO to anticipate the problems that Hurley now describes after the fact? Either our brightest and best did not do their jobs very well or the First Ministers obstinately rejected their advice. The truth is probably somewhere in between. The correspondence between Pierre Trudeau and René Lévesque published in the Appendix shed some light on this issue but we will probably have to wait until Hurley or others write their memoirs to know for sure how we ended up with the present formula.

What is disappointing, although understandable from his perspective, is the

book's defence of executive federalism as the appropriate instrument for negotiating constitutional change. Hurley analyses all previous successful (and unsuccessful) amendment attempts since 1982 and (with a logic that comes from the same school that dreamed up the offer to Clyde Wells) comes to the conclusion that the only successful amendments proclaimed since 1982 "resulted from executive level discussions — executive federalism in the case of the bilateral amendments and extended executive federalism in the case of the Aboriginal rights amendment," (p. 97). Since four of the five successful amendments involved only Ottawa and one province, perhaps executive federalism only works when all the players could fit into a phonebooth! Certainly, the full-blown quasi-diplomatic sessions with 11 (or more) governments plus Aboriginal groups have produced very little in the way of constitutional change.

To his credit, Hurley does acknowledge there were a few problems with those two well-known of executive federalism — the Meech Lake Accord and the Charlottetown Accord. He also tosses out a less well-known but imaginative idea that could temper executive federalism by giving a greater role to Parliamentarians by creating a National Joint Committee consisting of legislators "from all jurisdictions."

Amending Canada's Constitution: History, Processes, Problems and Prospects, by James Ross Hurley, Minister of Supply and Services. \$19.95. 297 pages.

Gary Levy is editor of the *Canadian Parliamentary Review*. In 1990, he was an adviser to the *Special House of Commons Committee on the New Brunswick Companion Resolution to the Meech Lake Accord*.

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