

Constitutional Odyssey: Can Canada become a Sovereign People?

by Professor Peter Russell

‘Mega-constitutional politics’ is a phrase I coined, and I admit that it is an ugly phrase. But it is appropriately ugly, for I use it to describe a very ugly kind of politics. This is the politics of trying not just to change a constitution but to change it at one time in a large wholesale way by formal amendment, and in a context where the effort absorbs , and exhausts , the political energies of the country’s leaders and its citizens. It is ‘big bang’ constitutional politics. That is what mega-constitutional politics is and that, unfortunately, is the politics in which my country, Canada, has been embroiled almost non-stop for an entire generation.

To understand the truly pathological nature of this particular method of attempting constitutional change, it is worth considering the normal, healthy process of constitutional change. In well-established constitutional democracies, the normal process of constitutional change is incremental and evolutionary. Normal change comes about through a combination of political practice, ordinary statutes, judicial interpretation and the occasional — and I underline the word ‘occasional’ — formal amendment of the constitutional text.

Consider the constitutional development of your own country, Australia, after its founding nearly a century ago, and you will recognise how all the various instruments that I have listed combined over time to bring about major changes in the operation of Australia’s Constitution. In the realm of political practice, consider how much Australia’s acquisition of national autonomy, the working of cabinet government, bicameral legislatures and your monarchical institutions and the coordination of government activities in your federation — most recently, the establishment of the Council of Australian Governments — have been based on changing customs and conventions and new political practices.

Consider how ordinary legislation has transformed your electoral systems and introduced the protection of human rights. Your High Court too has been a veritable engine of constitutional development, licensing vast new areas of central legislative power — for instance, in the realm of foreign affairs. Recently it corrected an error of constitutional proportions in your common law heritage that denied the occupation of land by the Aborigines and Torres Strait Islanders before the arrival of the Europeans. The formal constitutional amendments, although never easy to achieve, have won the necessary level of popular approval eight times, bringing about significant changes such as the creation of a loan council and additional Commonwealth jurisdiction in social policy and in relation to indigenous peoples.

I could take you through a survey of Canada's constitutional development, accomplished through the same combination of instruments. Until we got into the big bang stuff, these were the instruments which we too primarily relied upon to develop our Constitution.

Whether or not you like the change effected through what I have called the normal process of constitutional development is not the point. The point I wish to make is to insist that great change in a country's constitutional system can and does take place without massive constitutional overhauls by formal amendment. Yet, in the past there have been those in your midst, among the chattering classes and within your political leadership, who have tried to persuade Australians otherwise. These proponents of wholesale constitutional restructuring have contended that without such major overhauls Australia, constitutionally speaking, would be a frozen continent.

Dare I remind you of one prominent enthusiast of constitutional revision, a recent prime minister at that, who suggested that Australia, like a little boy growing out of his short pants, must don a new constitutional suit befitting a grown man. All of which, I say with respect but also with conviction, is patent nonsense.

On five different occasions in Australian history, politicians and constitutional experts have launched projects designed to achieve major wholesale restructuring of the Australian Constitution. The first of these was the Peden Royal Commission on the Constitution. From 1927 to 1929 it pondered the question of whether Australia should continue to be a federal rather than a unitary state — a hardy perennial of would-be constitutional renovators on the left side of politics.

A second effort took the form of a series of intergovernmental meetings in the Depression and early war years exploring a wide agenda of constitutional reconstruction. That was followed from 1956 to 1959 by a joint committee of this Parliament which Prime Minister Menzies — somewhat mysteriously — permitted to wrestle with a vast program of constitutional change.

After that there was the Australian Constitutional Convention — do you remember it? — meeting from 1973 to 1985 once in each of the state capitals. It worked on changes to practically everything under the constitutional sun, including a codification of constitutional conventions — a veritable orgy for constitutional junkies. Then most recently — and this might be your least favourite to recall — the Constitution Commission in tandem with Attorney-General Bowen's People's Convention. This fifth effort produced two thick, well-researched volumes of constitutional ruminations that adorn academic law libraries around the world but, as you well know, produce not an iota of actual constitutional change.

These five abortive efforts at constitutional change by wholesale amendment were all based on the mistaken assumption that constitutions are like suits of clothes or interior decorating schemes that should be discarded and replaced according to the reigning fashion of the day. In a society that practices constitutionalism, constitutions are not like that. In constitutional societies, the constitution provides a set of rules and principles on how legitimate governmental power is acquired and exercised. The constitution defines the rules of the political game. When players in that game, particularly very powerful players who have just won a temporary majority, find that these rules get in their way, they should not find it easy to change such rules.

Constitutions in liberal democracies exist to qualify simple majority rule. A society that operated by simple majority rule would need no constitution. Its only rule would be: win an election and you can do as you please. It should never be easy for the players in any game, particularly those who have a temporary advantage, to change the rules of the game. This is all the more so when the constitutional rules and principles have a deep democratic root in the society, which I believe to be the case — with one major qualification — in Australia. In settled constitutional democracies, absent dire straits such as impending break-up or civil war or a euphoric new consensus, new social contracts should be left to the philosophy books.

In Australia the efforts at wholesale constitutional change that I have recounted differ in one major respect from our Canadian efforts. Your Australian efforts have been macro but not mega. They have been macro in that they have aimed at large packages of formal amendments. But they have not been mega because they have not attracted any great amount of public interest. In my writings on these Australian efforts, I have called them the ‘politics of frustration’. But it is the relatively small group of politicians, lawyers and academics involved in launching these projects who have been frustrated — not the Australian people. For most Australians, these projects of constitutional reform have been a big yawn. My efforts on arriving here to chat up taxi drivers on the latest constitutional project have attracted some pretty peculiar glances — ‘Who is this weirdo?’ We get on to the footie very quickly.

In Canada our efforts at macro-constitutional change, whether we like it or not, have been mega. When a round of constitutional politics is on in Canada, the Constitution dwarfs all other issues in public life. These mega-constitutional tussles have the two basic characteristics of soap operas: they are very boring because the old issues are hashed and rehashed but they are also very gripping — we are all on the edge of our seats because we care deeply about the outcome. Will we stay together or come apart? Will the marriage survive or will one partner finally leave? This *is* an attention grabbing question. If you want a little taste of what it is like to live through a round of mega-constitutional politics, think back to 1993 in Australia — your year of Mabo, culminating with the December cliff-hanger right in this Senate. That is mega stuff!

Our mega-constitutional politics did not really get under way until the 1960s. It began when Quebec’s provincial leaders began to press for major constitutional changes to go along with patriation of the Canadian Constitution.

Let me explain a little about our patriation problem. Starting off thirty years and a bit ahead of you, we Canadians were much more colonial in our founding. Canada’s Constitution, originally known as the British North America Act (now renamed the Constitution Act 1867), took the form of a British Act of Parliament. As such, it could only be formally changed by the British Parliament. Unlike Australia’s Constitution, the Constitution of Canada, though it was

negotiated and drafted by local politicians, was never ratified by the people. After confederation, when our politicians got together and agreed on an amendment, the British Parliament would pretty well do their bidding and enact the amendment at Westminster.

By 1926, when the imperial conference of that year declared Canada, along with Australia, Eire, New Zealand and South Africa, to be 'autonomous communities' within the Commonwealth, Great Britain was more than ready to surrender legal custody of Canada's Constitution to the Canadians. But, at that time, Canada was unable to relieve Great Britain of this burden and patriate its Constitution. Patriation would take another fifty-six years to accomplish. Even then, in 1982, it would be done without the consent of Quebec — a move which may yet lead to the break-up of our federation.

And why could not the Canadians patriate their Constitution in 1926? Because their leaders, and probably the people themselves had they been asked, could not agree on who or what should be constitutionally sovereign in Canada: what majority of people or legislatures should have the power to alter the Constitution.

Some who favoured flexibility and a strong central government wanted control of the Constitution vested in the Canadian Parliament and a majority of provincial legislatures. But others, led at that time by Ontario, viewed confederation as a compact among the provinces that could be changed only by unanimous consent of the provinces. Quebecers who conceived of Canada as a compact between two founding peoples insisted that Quebec retain a veto over all matters vital to its distinctive culture.

Failure to agree on this question of how Canada should take custody of its Constitution was disturbing evidence that Canadians had not constituted themselves a sovereign people. They could not agree on where constitutional sovereignty should be lodged in their 'autonomous community' because they could not agree on what kind of community they were.

For about forty years, federal and provincial negotiators quietly beavered away trying to work out a constitution amending formula. In 1964 it looked as though a breakthrough had occurred. 'Constitution coming home', exclaimed newspaper headlines in October 1964. A rather rigid formula for amending the Constitution in Canada, certainly one that protected Quebec's jurisdiction, was the so-called Fulton-Favreau formula which had been agreed to by all the provinces and Ottawa. But then the Quebec government — a Liberal government at that — changed its mind. This government was responding to Quebec's so-called 'quiet revolution' which, since the 1920s, had been converting French speaking Quebec from a rural, Catholic people to a modern, secular society distinguished almost solely by its language. Quebec's provincial leaders had become constitutional radicals. Instead of seeking simply to preserve the powers secured by Quebec at confederation, they now sought new powers that would enable the Quebecois to enjoy the status of a nation within or without Canada.

At this point in our story, another Quebecker appears on the scene — Pierre Elliott Trudeau. He went to Ottawa, took over the leadership of the federal Liberal Party and, in 1968, became Prime Minister of Canada. Trudeau had never subscribed to the ethnic nationalism of the Quebecois, which he regarded as irrational and illiberal tribalism. As Prime Minister, he decided to challenge Quebec nationalism with a Canadian civic nationalism based on strengthening federal institutions and the rights of individual citizens. The fat was now in the fire and we entered our first round of mega-constitutional politics.

Trudeau orchestrated a series of constitutional conferences with federal and provincial leaders, much of which were televised. In 1971 these culminated with a cliff-hanger at Victoria, British Columbia. For a moment, we all held our breath as the first minister seemed to be reaching agreement on the Victoria Charter. At the centre of the charter was Trudeau's *pièce de résistance*: a mini charter of rights, a patriation of the Constitution but — and herein lay the rub — no significant new powers for Quebec. So the Quebec Premier, Robert Bourassa, — who will appear again in our drama — said no. At that time Trudeau did not feel strong or impatient enough to impose a constitutional settlement on Quebec. The Victoria Charter was abandoned. So ended round one.

But our respite from constitutional wars was very brief. Although it was again Quebec that was the primary cause of our constitutional turbulence in the 1970s, it is important to understand that Quebec's demands could by no means monopolise the constitutional agenda. In 1976 René Lévesque's Parti Québécois came to power in Quebec City. Its constitutional objective was to make Quebec a sovereign state economically associated with Canada. This event — the election of a separatist government in Quebec — had a riveting effect on the constitutional attention of Canadians. But by now, in the 1970s, all the talk about constitutional change had unleashed a torrent of constitutional discontents and competing visions of how to restructure the country.

Bear in mind that the most rapidly growing section of the Canadian population is of neither British nor French extraction. This part of the population, dominant in western Canada, bitterly resents the French-English bilingual preoccupations of central Canada and has zero tolerance for any special status for Quebec. By the 70s, premiers of the western provinces were pressing both to increase the economic powers of their own governments and for a stronger regional voice in federal affairs through a restructured Senate in Ottawa.

Further, Quebec's ethnic nationalism was having a demonstration effect on Canada's Aboriginal peoples. Organisations representing these peoples — Indian, Inuit and Metis; nearly a million in all — now pressed for the same right to self-determination as that claimed by the Quebecois. And Trudeau's pan-Canadian nationalism was by no means dead in the water. Much of English-speaking Canada had been won over to the Trudeau vision of a Canada bound together more effectively by a citizenship based on individual rights rather than ethnic diversity.

Now the constitutional project was to work towards an entirely new constitution as the only alternative to the break-up of the country. This era of new constitutionalism concluded with a crashing thud at the end of the 70s with the defeat of Trudeau in the 1979 federal election and the defeat of the Parti Quebecois's sovereignty-association option in the Quebec referendum of 1980. Round two was over.

But — you guessed it, folks! — within days of the Quebec referendum round three of our mega-constitutional derby was under way. Trudeau, who had miraculously risen from the political dead to win the 1980 election, had secured victory for Team Canada in the Quebec referendum by promising to overhaul the Canadian Constitution — in some conveniently unspecified ways — if Quebecers would vote down the separatists' option. This he proceeded to do. But now, as a much more seasoned constitutional player approaching what he knew would be his last hurrah, Trudeau adopted the lyrics of Paul Anka's great song and determined, 'I'll do it my way.' He adopted that as his slogan and determined to change the Constitution his way. And his way meant that constitutional reform would focus on what he called 'the people's package' — patriation of the Constitution with a charter of rights. With or without the provinces' agreement, he told the Canadian people — in Gaullist tones — that he would ask the British Parliament to make these changes.

In the end, governments of nine of Canada's ten provinces, after forcing a few concessions, accepted Trudeau's package of reforms. The one province that did not was Quebec. Its National Assembly, in a nearly unanimous vote that included the Liberal opposition as well as Levesque's Parti Quebecois government party, rejected the changes. But we went ahead with them anyway. The British Parliament, ignoring Quebec's protests, performed its last act as our constitutional custodian and enacted the amendments. The Queen came to Canada to declare them in force on 17 April 1982. Canada's Constitution was now patriated: meaning it could be amended entirely in Canada. It had a new Charter of Rights and Freedoms and it recognised and affirmed 'the existing rights' of Canada's Aboriginal peoples.

'Well,' you might sigh, 'thank God that's over.' Three rounds of that heavy Canadian constitutional stuff is enough. But, of course, it was not over. Trudeau thought it was. He retired modestly into private life with the advice that he had left us a constitution 'set to last a thousand years'. But his successors and, indeed, the leaders of all our national parties remained uncomfortable with a constitutional settlement repudiated by a province representing a quarter of the population and one of the country's founding peoples.

Quebec was not the only serious source of constitutional discontent. The Aboriginal peoples sought explicit assurance in the constitutional text that their existing rights included the inherent right to self-government — a right they had never surrendered to British, French or Canadian sovereigns.

So round three, the only round of our mega-constitutional politics that had produced any concrete results, was not the end. Round four began with four constitutional conferences from 1983 to 1987 with representatives of the Aboriginal peoples. The aim was to secure federal and provincial agreement to explicit constitution recognition of the Aboriginal peoples' inherent right to self-government. We failed. With the exception of a few extremists, Aboriginal leaders who press for this right intend that it be exercised within Canada; that it involve a sharing of Canadian sovereignty on mutually acceptable terms rather than a separation from Canada. But, after four tries, agreement on this issue could still not be reached.

So then, federal and provincial governments returned to the Quebec constitutional agenda. They were persuaded to do so by the victory of the Quebec Liberal Party, now led by Robert Bourassa, over the Parti Quebecois in the 1985 Quebec election. Bourassa presented Quebec's minimal constitutional demands. 'Recognise Quebec as a "distinct society" and make a few other modest constitutional changes and we'll bury the separatists', he said. In April 1987, at a conference hosted by Prime Minister Mulroney at the government's conference centre on Meech Lake just outside of Ottawa, the federal and provincial first ministers agreed to the Meech Lake Accord fashioned around the Bourassa program.

The Meech Lake Accord plunged us into our hottest bout of mega-constitutional politics. This was the first attempt to use our all-Canadian amending formula to make major constitutional changes. And, boy, did we louse it up!

Under the new amending process, constitutional amendments are to be ratified by the federal parliament and provincial legislatures. Most amendments require the approval of the House of Commons, the elected house of the Canadian Parliament, plus the legislatures of seven provinces representing at least 50 per cent of the people. A few amendments — principally changes to the monarchy, the composition of the Supreme Court or the amending formula itself — require unanimous approval of the Parliament and all ten provincial legislatures.

Because the Meech Lake Accord included two of these latter items — provincial nomination of Supreme Court Justices and a restoration of Quebec's veto in the amending process — and because the first ministers insisted that the Accord was 'a seamless web' that could not be taken apart, the unanimity rule applied to the whole package. Thus each provincial legislature had a veto.

To make matters even more difficult, when the first ministers emerged from their closed sessions and unveiled their Accord to an ungrateful nation, they said it was a 'done deal' which legislatures could debate all they wished so long as, in the end, they did not change a word. Well, the legislative assemblies and the delegations of citizens invited to appear

before legislative committees did not appreciate this treatment. There was as much objection to the undemocratic nature of the Meech process as to the contents of the Meech Lake Accord itself.

But the contents certainly did not help. The centrepiece of the Accord was recognition of Quebec as a 'distinct society'. You might well ask what this phrase means. We did — and got some very bewildering answers. On the one hand, it was supposed to give Quebec enough 'oomph' within the federation to enable Premier Bourassa to satisfy Quebec's quest for special powers and status. On the other hand, it was sufficiently vague to enable premiers of other provinces to tell their folks not to worry; that Quebec has not got any extra powers — the distinct society clause had only symbolic significance. The prospects of this exercise in symbolic engineering healing our country's divisions were dim indeed.

The three-year time limit for ratifying constitutional proposals under our new amending formula ran out in June 1990. At that time, two provinces — Manitoba and Newfoundland — had not ratified the Meech Lake Accord so it dropped like a stone to the bottom of the lake, dead as a dodo. So endeth round four.

But, hold onto your hats, round five was soon under way. Premier Bourassa, miffed at the rejection of Quebec's minimal demands, combined with the Parti Quebecois leader, Jacques Parizeau, to organise a Quebec 'Estates General'. This process concluded in May 1991 with a commitment to have a referendum on Quebec sovereignty or the 'best offer' from the rest of Canada, not later than October 1992. This went over like a lead balloon in the rest of Canada, which was in no mood to make any offers to Quebec. Nonetheless, the federal, provincial and territorial governments, together this time with Aboriginal organisations, proceeded with the so-called Canada Round — an attempt to come up with a comprehensive set of proposals aimed at solving all the country's constitutional issues. This produced an accord, containing sixty constitutional proposals, agreed to at Charlottetown in August 1992 by all governments, including the Quebec government, and by Aboriginal representatives.

Although there was no legal requirement to submit this Charlottetown Accord to the Canadian people in a referendum, political pressure to have a Canada-wide referendum, prior to seeking legislative ratification, was irresistible. Quebec, Alberta and British Columbia were already committed to having referendums. There was no way the Mulroney government, at what we thought then was the absolute nadir of its unpopularity, could deny this opportunity to other Canadians.

And so, on 26 October we had a national referendum on the Charlottetown Accord. It was rejected by 54 per cent of the voters overall and by majorities in a majority of provinces. Lest you think that a 54 per cent no vote represents some kind of consensus on the Constitution, let me assure you it did not. The largest majorities against the Accord were in Quebec and western Canada and were based on exactly the opposite points of view: for Quebecers, the Charlottetown Accord did not give Quebec nearly enough; for western Canadians, it gave Quebec far too much.

So we emerged from round five more divided than we were at the beginning of round one. A measure of just how divided we have become came exactly a year after the referendum in the federal election of October 1993. The election virtually wiped out the Progressive Conservatives whose leaders had spearheaded the Canada Round, reducing them from 168 to two seats. A similar fate befell the New Democratic Party on the Left which had strongly

supported the Accord. The opposition benches in the House of Commons are now dominated by the two parties that opposed the Charlottetown Accord: the Bloc Québécois committed to Quebec's independence and the western based Reform Party, so unsympathetic to Quebec it did not even run candidates in that province. The federal Liberals who managed to win a majority and form a government with slight support from Quebec are now the only effective national party. But, for now at least, they cannot touch the Constitution. Their leader, Jean Chrétien, ran on the promise that he would leave the Constitution alone and concentrate on economic problems.

You may understand now, why Prime Minister Chrétien takes that view. Whether he and millions of other Canadians will have their way on this depends entirely on Quebec. If the Parti Québécois wins the Quebec election, scheduled, I believe, now for September, and also wins the referendum it promises to hold on 'Quebec Sovereignty' some eight to ten months later, then, and only then, will we have a sixth round of mega-constitutional politics. My personal prediction is that, even if the Parti Québécois wins the Quebec election (they now have a lead in the polls), they will not win the referendum that follows.

But if I am wrong, I can promise you that our sixth round of mega-constitutional politics will be the stormiest yet. I say this because negotiating the terms of Quebec's secession will be much more difficult than is generally recognised. Not only are there thorny, practical questions such as the division of our enormous national debt burden and the avoidance of new trade barriers, but there is a much more emotive question of the Quebec territory that would be able to secede. The Aboriginal peoples whose lands are in part or completely within the provincial borders of Quebec will not agree to be yanked out of Canada against their will. The lands occupied by these Aboriginal peoples comprise not only much of Quebec's northern frontier but also urban locations in the south of the province, such as the Mohawk reserves around Montreal. The Aboriginal peoples' claims to self-determination are as well founded in law and morality as those of the Québécois. Rejection of these claims by Quebec *sovereignistes* would, for the first time in our constitutional wrangling, raise the threat of communal violence. In round six, if it occurs, we are more likely to be scared to death than bored to death!

Now you know why I am so anxious that we Canadians return to the sunnier, smoother, normal process of constitutional development. Already we are showing that this does not mean a constitutional deep-freeze. Since the end of our last mega-round, by means of a formal constitutional amendment, we have consolidated New Brunswick's status as a bicultural province; through a regional referendum and an act of parliament we have established Nunavut (85 per cent of whose population is Inuit) as a self-governing region in our north-east Arctic; elsewhere across the country we are launched on a process of implementing our Aboriginal peoples' inherent right to self-government on a people by people basis; and our federal and provincial governments have signed an agreement dismantling some of the barriers that impede the flow of trade within our federation. Not bad for twenty-one months since we aborted the last big bang effort.

How about Australia? Are you prepared to do your constitutional reform retail rather than wholesale? I know you have a Constitutional Centenary Foundation and that it was launched in 1991 with a very large agenda of prospective change. As a member of that foundation, I have been following its activities with great interest. Thus far, under the able leadership of former Governor-General Sir Ninian Stephen and Deputy Chair, Professor Cheryl Saunders, the foundation has wisely, in my view, concentrated its energies on a broad based educational

program about the Constitution. In a constitutional democracy, there is much to be said for ensuring that the people know something about that over which they have the final custody.

There is also, in my view, much to be said for letting the centenary of your founding serve as a beacon for renewal and growth of your constitutional democracy rather than an occasion for its reconstruction. One constitutional amendment that would level the playing field for an incremental process of constitutional renewal is an amendment to section 128 that breaks the Commonwealth government's monopoly position in the initiation of constitutional amendments. This monopoly means that most of the proposals that reach the referendum stage, and which are submitted to the Australian people, are designed to strengthen the Commonwealth government's powers vis-à-vis the states or the Senate, whereas polling data show that the public is most opposed to strengthening the central government — more opposed to strengthening its powers than any other level of government. An amendment to section 128 that permitted four state legislatures to initiate referendums, and perhaps also removed the Governor-General's power to block Senate initiated proposals, might produce proposals that have a better chance of passing. But, knowing the enlightened statesmanship required for a Commonwealth government to support such a change, we will not hold our breath waiting for this one.

One formal constitutional change for which the time may be ripe is the adoption of a constitutional bill of rights. I am not overwhelmed by the real gains in freedom and equality that have resulted from our Canadian Charter of Rights. However a constitutional codification approved by the people of Australia may be a more appropriate way of protecting fundamental civil liberties than leaving this matter, as you are now doing, to the Commonwealth Government's discretion in using its foreign affairs power and the High Court's ingenuity in extracting implied rights from the Constitution.

As with Canada, you still have some way to go in working out a mutually acceptable political relationship with indigenous peoples. Their lack of participation in the establishment of the Australian Commonwealth is the one major departure in Australia's founding from the democratic principle of government based on consent of the people. I am doubtful whether an amendment to the Constitution is the best way of remedying this situation in my country or in yours. More fundamental, I believe, there is a change of attitude in both our countries such that the relationship can be based on mutual respect and a genuine sharing of sovereign political authority rather than its imposition by the dominant society on indigenous minorities.

In conclusion, I am going to utter the 'r' word — republicanism. I realise that for some time republicanism has been the biggest constitutional game in town. When I was here earlier in the year, I worked my way through an advisory committee report, seven paperback books and countless scholarly and newspaper articles on the subject. Without a doubt, Australians, among all the democracies in the world including Great Britain, have most thoroughly explored the alternatives to constitutional monarchy.

One point that is evident from this vast literature is that the rationale for shifting from a monarchical to a republican head of state is essentially symbolic. In other words, Australian republicanism would be an exercise in symbolic engineering. As a veteran of Canadian wars about the symbols of nationhood, the one thing I can tell you is that these symbolic constitutional battles are usually more divisive and diverting than their proponents ever expect.

To avoid an exhausting and frustrating round of mega-constitutional politics, you might well wait until there is a wide political consensus on this change. Do not worry republicans, if the new generation of royals continue their raunchy ways, you might not have long to wait. The British might even make the change for you!

Questioner — Could you make some comment on the place of the Royal Commission on Aboriginal peoples and the constitutional changes that may occur as a result of the sixth round? It looks as though the numbers are up.

Professor Russell — The Royal Commission will report next year. Its terms of reference are about as inclusive and broad as they could possibly be. They include the constitutional position of Aboriginal people, self-government, the right to self-determination and all of that. They also include all the practical policy life condition questions that are of such vital concern to our Aboriginal peoples — health, welfare, employment and education. The Commission will make recommendations on all those issues, including the constitutional issue.

I do not know what it is going to say. I am not a commissioner. I chair a research committee for the Commission and we feed in research. What the commissioners will do with it will be up to them. They are now sitting in Ottawa thinking through all these issues. From what I have seen of the Commission and its general orientation, and what you now appreciate about constitutional change in Canada, I doubt whether it will put all its eggs in the constitutional basket. It would be a pretty madcap idea to say, 'Everything we are recommending here depends on some constitutional change.'

I think there will be extensive recommendations on such things as health. One of our most recent problems is a tremendously high suicide rate among teenage Aboriginals. I know a special report on that will come out even before the main Commission report. Employment levels are very low; unemployment levels are staggeringly high. Many of the conditions are parallel conditions to the Torres Strait Islanders and the Aborigines in Australia.

I think the Royal Commission will be concerned with saying to all the governments involved, and indeed the private sector and non-government organisation sector, 'Here are our ideas about these practical problems.' So the recommendations will not be simply with regard to the Constitution. The Commission will not duck the Constitution. It will deal with it and it will be interesting to see what it has to say on that.

Questioner — I have two questions. The first concerns an amendment to section 128, which the voters are inclined not to amend. Would you consider citizen initiated referenda for changing the Constitution as an amendment to section 128? The second concerns the symbolic nature of the republican debate, which, in many ways, you seem to me to describe quite accurately. The question concerns one article of the Constitution which is, or certainly has become for most of this century, symbolic and which could be changed by amendment and which is one of the few amendments to the Constitution that I think might get through. That is section 59 of the Constitution, which gives the monarch twelve months after the Governor-General has consented to legislation by the Commonwealth Parliament to simply disallow that law. This has never been used.

I believe that in 1926 there was a British-Commonwealth convention or proposal that it should not be used in regard to any of the venues, as they were called in the dominions. It

would be simple, I should think, for the Liberal Party to propose only a repeal of section 59 as a way of dealing with the constitutional parts of the republican debate.

I believe it would be very difficult for the government to say, 'No, we won't look at such a referendum at all.' I would have thought that the present government, with its ostensible republicanism, would have found it very difficult to refuse a simple referendum of this kind. Indeed, that is one way of bringing out the symbolic or non-symbolic aspects of the constitutional debate.

Professor Russell — Let me take your first question. Citizen initiated referenda, CIR, seemed to be the flavour of last week. It was discussed at a conference in Melbourne. Professor Cheryl Saunders in this morning's *Australian* — if it is accurate — is now favouring this. I have a great regard for her; nonetheless, it is not a proposal I support. I am terribly afraid of single issue interest groups getting up whatever number of signatures it takes, 50,000 or whatever, and taking every issue — vegetarianism or whatever — that they are interested in and trying to put it in the Constitution.

I am a minimalist on the Constitution: you should hardly ever touch it. It should not deal with whatever bee every little interest group has in its bonnet. If you told me that it was going to take much more than 50,000 — it was going to take something like half the Australian electorate — then I would say it might as well go with the four state legislatures that I suggested. If any causes caught on to the extent that something like half the Australian people would sign a petition, I think you can be sure that legislatures, either Commonwealth or state, would pick up the proposal. So I do not favour it. I do not like these single issue interest groups trying to manipulate the Constitution. They would not get anywhere and they waste a lot of money too.

With regard to the second question, we have the same sort of clause in our Constitution, although it is a little more devastating. For two years the Governor-General can reserve a piece of Canadian legislation for the British cabinet to look at. It is still in our Constitution, and we find it an anachronism. We live with it and, if it were easy to control the constitutional agenda and, just as you suggest, put that one in front of the people, I might be sympathetic to it. But our experience is that it is almost impossible to control the constitutional agenda once you get a ball rolling. I would be very surprised if the republican movement in Australia would be content with that. They would want to roll a lot into a big mega-constitutional bash.

Questioner — Did you think any of the rounds of Canadian constitutional reform were going to succeed?

Professor Russell — I am scarred. I am a founding member, along with seventeen other Canadians, of the Friends of Meech Lake. We got clobbered. We thought we had a fighting chance and we were convinced that if we could win we would not have what the Canada Round turned out to be and we would not have to take the chance we are taking in the next few months in this possible sixth round. The Victoria Charter I thought might go through. Bourassa was very weak. If Trudeau had been a little stronger, I think he might have been able to carry the Victoria Charter through.

There was not any chance in the second round. The whole new Constitution was just foolishness. That was like saying that you will eliminate the states in Australia. It is just out of

touch with reality. That was not going to happen, any more than you are going to get rid of your states. So that was just nonsense. Meech had a hope. It got pretty close in the end. In the last few days, it really depended on who said what to whom. The Premier of Newfoundland, Mr Mulroney, and his colleagues had a sort of falling out at literally the eleventh hour. If they had got Newfoundland, they might well have settled the Manitoba problem. Meech was very close.

Once we were into the referendum, the Charlottetown Accord had no way of succeeding. Indeed, I would go even further. It is going to be very difficult, under our current amending system, to accomplish what I call a macro-constitutional reform once we factor in the referendum, because we have to get popular majorities in every province. For a big package it is tough. I just do not see that on the cards for a long time.

Questioner — You would be aware that the Canadian Constitution appears a much more centralist document than the Australian Constitution and that judicial interpretation in Australia has led to a very centralised system. I have often wondered why the Supreme Court of Canada has been so reluctant to take a similar course.

Professor Russell — Two reasons: the precedence on constitutional interpretation was set first by an English imperial court. The judicial committee of the Privy Council was our final court up until 1949, and in a much bigger way than it ever was for Australia. It really believed in classical federalism and in a very balanced federal structure. It set that into our constitutional law.

The Supreme Court came to be the final court in the 1950s. The judges were very sensitive to the fact that they were living in a highly federal society. Despite the Constitution, Canada is a highly federal society. You do not easily centralise power. If any Canadian politician in Ottawa stood up and said, 'I think it is time we got rid of the provinces', they would put him in a madhouse; they would lock him up.

While the judges in the Supreme Court have nudged interpretation of our division of powers in a centralist direction, they have done it very gradually — not very dramatically and not in a very big way. They are looking over their shoulders. To keep their credibility in our country, they cannot be brutally centralist. For instance, they could never do with our foreign affairs powers what the High Court has done with yours.

Questioner — Do you think that if Quebec does not win the referendum it will try to secede? Can it secede and what stance, if any, would the United States take on such an issue?

Professor Russell — If they lost the referendum, I think Quebec would not try to secede. Indeed, one of the questions is: what if they only got 51 or 52 per cent? How big a majority do you need to justify a big change like that? Even with 50.1 per cent, they might hesitate. But, if they get a majority in the referendum, one they can say is legitimate, they will press ahead with secession and we will negotiate it. The United States will not be a party. Quebec is very keen on retaining its participation in the North American free trade arrangement and would love to get an absolute promise from Washington that if Quebec separated it would still have all the benefits of participating in that agreement. Ottawa has neither confirmed nor denied what it would do — and I think that is entirely proper. It is staying out of that.

In the negotiations, I think the tough question will be the position of the Aboriginal peoples because it deals with territory — with turf. With territorial disputes, we have only to think about Bosnia and the break-up of the Yugoslav federation to have a sense of what happens when ethnic groups fight over territory. Whose territory really is it — Cree, Mohawk, Algonquian, Inuit or Quebec law? We know those are very tough issues. If they are not resolved in a mutually agreeable way — agreeable to the Quebec secessionist government, the government which won the referendum, and agreeable to the rest of Canada, including Aboriginal people — I do not think Quebec would say, ‘To hell with you, we are doing it anyway.’ If they did, it would in effect be an attempted coup. I hope my government would put a coup down — which is an ugly way to speak about it.

We have many economic and legal responsibilities to Quebec citizens. There will be at least 40 to 45 per cent who do not vote for secession. You cannot just change the Constitution by force. I hope the rule of law prevails. If a government of any of our provinces ignores the constitutional rule, I hope my government has enough guts to back up with force the maintenance of our Constitution and all the laws under it. I am hoping my government would not permit a de facto separation that was unconstitutional and illegal.

Questioner — There seemed to be a contradiction in your speech. On the one hand, you said that you are very much opposed to mega-constitutional reform, yet on the other hand you suggested that the process of constitutional amendment should be left to what you called the normal processes, which included changes in custom and convention and judicial interpretation by the High Court. It seems to me that the extension of the external affairs power in recent years by the High Court is verging on mega-constitutional reform in itself. It is certainly very substantial constitutional change.

There are other concerns that many Australians hold about the High Court taking upon itself the role of an unelected third chamber of the Australian Parliament. It seems to me that it is contradictory to say, ‘Leave it to these normal processes.’ I do not regard them as normal processes at all; I would regard them as undemocratic and potentially authoritarian processes. The fact that section 128 does not result in every proposal that is being talked about getting through does not seem to me to be an argument to say that we should not talk about them.

Section 128 is the ultimate safeguard. My philosophy would be to let everyone put forward in public debate whatever proposals for constitutional reform they wish. Let these proposals be winnowed out, because in the end section 128 means that nothing will get through unless the Australian people want it. Let us not try to dampen down the constitutional debate that is going on in Australia. I think it is a healthy debate. That should be the way we amend our Constitution in the future: public debate and then, if the proposal passes that test, a referendum as provided for under section 128. To hand the whole process over to what you called ‘normal processes’ would, I think, be very dangerous.

Professor Russell — If I can clarify my position, my normal processes include the occasional amendment to the Constitution. It is not only High Court decisions; it is also political practices. Those that really stick, particularly the conventions of responsible government, for example, really have a highly democratic root. So do a lot of the statutes that are, in my view, part of the constitutional fabric. So I would not put all this normal process on the High Court’s shoulders.

Like you, I am alarmed at how far the foreign affairs power has gone, particularly in relation to fundamental rights and freedoms. I think Australia now has a kind of ragtag, unsatisfactory way of handling the constitutional definition of citizens' fundamental rights. You are doing it primarily through the implicit rights that the High Court is carving out in a very inventive way under the Constitution and actually legislating; also through the Commonwealth government using its foreign affairs power, which is solely at its discretion, and deciding which elements of which foreign treaties will be given a fundamental status in Australia.

I do not think fundamental rights in a constitution should be treated in that ragtag fashion. I think it is time Australia got serious about a constitutional bill of rights. I am not a great charter fan. The Charter of Rights in Canada is okay — it has done some good and it has also done some bad — but I think it is the right way to go. Most of the Western democracies have done that. I support a constitutional amendment or at least a constitutional bill of rights. I think strategically that is the only way a Commonwealth government might back away from its foreign affairs power.

I have no optimism that under your current amending system the Commonwealth government would reduce, by an amendment, its foreign affairs power. I do not see governments that I have known in Australia in the last few years having any interest in reducing their power, but they might support a bill of rights. Just two days ago, I heard a member of the cabinet say that it was something that interested him. Your Minister for Foreign Affairs, Senator Gareth Evans, has been on record for a long time. He chaired a committee of your Parliament.

So there is a lot of support in the governing party here for a bill of rights. Maybe its time has come by a discrete amendment — an occasional amendment. I am not against the people talking about changes. What I am against is the politicians getting together in some sort of elaborate way and trying to do these big package deals.