Chapter Four

Australia, the Republic and the Perils of Constitutionalism[1]

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Next year, we are to vote in a referendum on the forty-third proposal to amend the Constitution. As a result of the Constitutional Convention, held in Canberra this past February, a model for a republican form of government emerged, which, the Prime Minister has promised, is to be put to the people — who will determine the issue in an exercise of the popular sovereignty which our current Constitution vests in us. If the referendum passes, the Prime Minister has said, legislation will be introduced in time for Australia to become a republic on 1 January, 2001 — the centenary of federation.

The development of the republican model through a Constitutional Convention was itself intended to be an illustration of our "people's sovereignty". Though some were critical of the fact that not all of the delegates were elected (thereby confusing majoritarianism with representative democracy), the model adopted for choosing Convention delegates was aimed at ensuring that the views of the broad diversity of the Australian population were represented in the proceedings.

In some respects, the fortnight's proceedings bore out the wisdom of the Prime Minister's decision to adopt the delegate selection model that he had: not only was he given a republican model which he can put to the people in a referendum next year, but a broad range of other issues — ranging from the rights of the Indigenous peoples to respect for the environment — were canvassed for possible inclusion in some form or another in any new Constitution. And the very close of the Convention, when the applause broke out from the floor, first raggedly, then with increased resonance, carried with it a sense of national moment that we seldom permit ourselves the luxury of experiencing today.

Yet in another respect, the Convention ended on a saddeningly hollow note. For one thing, it left *many* loose ends. As critics — both republican and monarchist — have already begun to point out, the so-called "Bipartisan Appointment" model that the Convention adopted is so defective as to make it simply unworkable in its present form. Moreover, the Convention bequeathed to us an unwieldy list of things which are sought to be included in any new constitutional preamble: a summary of our constitutional history to date, a reference to the Almighty, a recognition of our federal system of representative democracy and of responsible government, an acknowledgment of the prior occupation of Australia by the Aboriginal peoples, a recognition of our present-day cultural diversity, *etcetera, etcetera*. Indeed, if any new preamble contains all that the Convention said that it should, it will in length rival the actual Constitution itself! But more than anything else, the serious Convention-watcher is left with the deep feeling of despair that so few of the delegates seemed to be aware of the real significance of their proceedings. For when, despite all the cajoling and attempts at persuasion, the Convention was not able to adopt a republican model by even a bare majority vote, the resulting disunity spoke volumes about the social dynamic that awaits us if we press on further down the path of constitutionalism.

The spectre of constitutionalism

Now, the nature of constitutional dynamism is something that is difficult to discuss with precision. Almost by definition, the process of constitutional change — particularly in a system like ours, where the actual constitutional document is so difficult to alter — is both ephemeral and

incremental. Hedging, imprecision and conjecture must be the stock-in-trade of the Anglo-Australian constitutional scholar.

Take, for instance, the question of when it was that Australia became an independent nation. It is clear that in 1901, we were not one. It is equally clear that by 1986 (when, in its last Imperial act for Australia, the British Parliament passed the *Australia Act*), we were. But the precise point at which we transcended from sort-of "super-colony" (as the new Commonwealth was in 1901), to fully independent member of the community of nations (as we were by 1986) is one that has proven impossible to determine. The best that the Hawke-appointed 1988 Constitutional Commission, comprised of some of Australia's leading constitutional minds,[2] could do was to say that it took place some time between 1926, when the Imperial Government adopted the Balfour Declaration, and the end of the Second World War.

So in a way, one understands the inclination of constitutional observers to shy away from the unknowable. Yet, the fact is that we now sit poised at the brink of a referendum, in which we are going to be invited to commit ourselves irrevocably to a period of sustained debate over constitutional alteration. And lest there be any doubt of this, it is worthwhile to remember that the Convention recommended that, if the referendum is passed, *another* Constitutional Convention should be held, to consider a further range of constitutional amendments — which in substance would be much broader than those sought to be embodied in the shift to a republican form of government. Happily — though probably depressingly for those in favour of constitutional change — there is a useful comparator, to which we can look to see exactly what we would be letting ourselves in for before we embark on the journey along the path of constitutionalism. That is Canada.[3]

We seldom think of the link today, but Australia and Canada share more in common than almost any other two countries on earth. They share a common political root. They share a legal system. They share a federal model of government. They share a military tradition. They share an ethnography. They share an odd, yet appealing, mix of British reserve and American openness. These things alone make the Australian-Canadian comparison an apt one. But there is another, rather more contemporary, aspect of the similarity. Today, Australia and Canada are both troubled countries; countries with a grave sense of unease. Both are smallish nations (in terms of economy and population, that is) trying to grope their way through, and find a place in, the world of the "post": post-colonialism, post-industrialism and post-modernism.

In both countries, people are asking the same sorts of questions: what exactly does it mean to be an Australian or a Canadian at the cusp of the twenty-first Century? How can one maintain a national distinctiveness in an era where national borders no longer mean much? How is one to reconcile the realities of multi-ethnicity and multi-culturalism with long-held (if imperfectly realised) Anglo-European ideals of equality and the rule of law? Yet, despite all of this, one searches the pages of the Convention *Hansard* in vain for anything other than a passing reference to the recent Canadian experience with constitutional reform.

Perhaps it is a reflection of fear of the sheer enormity of questions like this, but the lack of any real comparative analysis reveals another similarity between the two countries: in each, the debate over constitutional issues has come to be phrased in curious, almost distorted, terms. On neither side of the Pacific has the focal point of the debate been the philosophical foundations according to which society is ordered. Nor has it involved a search for any sort of consensus about national values or ideals. Instead, in both Australia and Canada, the national unease has been reflected in an almost pathological obsession with the formal provisions of the Constitution. Without meaning any disrespect to the participants – for they are (for the most part, at least) a group whom I respect and admire greatly – this is made amply clear by the style and tone of the debate over various models of republicanism that has been taking place in Australia over the past six or seven years.

One might describe the way in which our debate over constitutional reform has been taking place as the "spectre of constitutionalism". By this is meant a fixation with the form, rather than the substance, of the terms of a country's constitution, and a seemingly uncontrollable compulsion to lurch towards a fundamental alteration of its form without realising that this in fact is being done, and without paying heed to the consequences which will necessarily follow on from the alteration.

This is a point that is too often overlooked by today's constitutional agitators. The most important part of a constitution is not the document itself, but rather the dynamic that exists under the constitutional order to support a country's social and political life. To put it another way, the most critical part of a constitutional debate ought to do with the small "c" constitution, rather than the capital "C" one.

One does not make this observation with any smugness or feeling of superiority. On the contrary, in a great many respects, the essence of the debate that is taking place here has a familiar ring to anyone who has studied recent Canadian history. For even though Canada does not have an organised republican movement, it has – just like Australia – been gripped of late by the spectre of constitutionalism. In fact, the Canadian experience with constitutional pathology has gone much further down the road than the Australian, and there are some valuable lessons that we in Australia could gain from looking at the Canadian experience with the overall process of formal constitutional change, and the effects that it can have upon a society's underlying cohesiveness.

Canada as a constitutional analogue

Canada, as most will know, was formed in 1867, out of a federal union of four British North American colonies: Nova Scotia, New Brunswick, Quebec and Ontario. Over the years which followed, the remainder of Britain's North American possessions joined the union, the last being Newfoundland, which became a Province of Canada in 1949. At present, Canada consists of ten Provinces and two Territories, although one of the Territories is due to be sub-divided into two separate Territories (one under Aboriginal self-government) in 1999.

Canada's head of state is Her Majesty Queen Elizabeth II. Section 9 of the Canadian Constitution[4] provides that executive authority in Canada is "declared to continue and be vested in the Queen". But quite apart from the form of the Constitution, it is clear that there is no question but that the form of government contemplated by the new nation was a monarchical one, which resembled in spirit the government of the United Kingdom. Like the *Commonwealth of Australia Constitution Act*, the Canadian Constitution was a creation of the Imperial Parliament, but also like its Australian counterpart, it had its origins in a draft prepared in Canada, by Canadians, for Canadians.[5]

The preamble to the Constitution makes plain the common understanding of the framers. "Whereas", it begins,

> "the Provinces of Canada,[6] Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom ...".

As in Australia, a Governor-General is appointed to act on the Crown's behalf, and to carry out public functions in the Queen's stead.[7] As the Earl of Dufferin, one of the first holders of the office, once put it, the Governor-General of Canada is "the head of a constitutional State, engaged in the administration of a Parliamentary government".[8]

In contrast to Australia, however, the formal position of the Crown in Canada seems quite secure. Section 41 of the *Constitution Act 1982* provides that, in order for there to be a future constitutional amendment which would affect the position of the Crown, there must be unanimous agreement among the federal government and the Provinces[9] — something which, given the

fractious nature of Canadian federalism, is difficult to imagine ever occurring. Nevertheless, Canada has been embroiled in a round of near-steady constitutionalism since the 1970s — since the Prime Minister of the day, Pierre Elliott Trudeau, made it his ambition to alter the Canadian Constitution.

As has been noted, the Canadian Constitution, like the Australian, was a statute of the Imperial Parliament. Unfortunately, however, unlike the framers of the Australian Constitution, the Canadian "Fathers of Confederation", as they are known, could not agree on a formula with which to amend the Constitution. This being the case, after confederation constitutional amendments still had to be passed by the Imperial Parliament on Canada's behalf.

This was a theoretically anomalous situation, to be sure, but in the pragmatic Canadian way (another characteristic which Australia and Canada share, many might claim) a convention was developed whereby, if the federal government wished to amend the Constitution in a way which would affect provincial competence, it would first seek the support of a substantial number of the Provinces. Following this, a request would be made of the British Parliament, which would pass the amendment without question.[10]

Canada and out-of-control constitutionalism

From a theoretical perspective, this *was* rather anomalous, but it permitted the Canadian Constitution to develop to make provision for things which could not have been contemplated by the Fathers of Confederation in the 1860s. Nevertheless, Mr Trudeau made it his life's mission to rectify the theoretical deficiency. He was to be the one who succeeded in "bringing the Constitution home" (as the rhetoric of the day had it) where everyone else had failed. Accordingly, he came up with a plan which would accomplish two things: first, the British would surrender all remaining rights they had to legislate for Canada (much as was done in the *Australia Acts*). A necessary precondition to this, of course, was developing an acceptable amending formula, so that Canadians could formally amend the Constitution themselves. Secondly, the Trudeau plan called for the entrenchment in the Constitution of a Bill of Rights (known in Canada as the *Charter of Rights and Freedoms*).

Without going into the detail of the story (though it does make for interesting reading), the bottom line was that in political terms, Mr Trudeau succeeded in his goal through the sheer force of will. Initially, he was opposed by a number of Provinces, but he managed to win them over. If they did not agree, he said, he would go to London unilaterally (as, by virtue of the *Statute of Westminster* 1931, he could do).[11] In the end, the province of Quebec was the sole holdout. Trudeau's chosen solution in the circumstances was to reach a deal with the other nine Provinces and simply to ignore Quebec's opposition.

Now one might have different views about the nature of the relationship between the French and English speaking populations in Canada, but the fact that Canada's sole francophone Province did not participate in the patriation process was of tremendous symbolic importance. While the fact is that one doubts that the Quebec government would have agreed to *anything* which was acceptable to the rest of Canada, it is no exaggeration to say that most adult Quebeckers — even Quebeckers who had no sympathy for the separatist cause — felt betrayed by the actions of the federal government.

It is that feeling of betrayal that has been responsible for the repeated failed attempts since patriation in 1982 to bring Quebec back into the constitutional fold. The first attempt began shortly after the election of a Conservative government in 1984. Brian Mulroney, the new Prime Minister, immediately began to seek amendments to the Constitution which would be acceptable to Quebec. This set of constitutional proposals came to be known as the "Meech Lake Accord", after the location of the Prime Minister's summer residence, where the proposed terms had been agreed upon.

The Accord would have given Quebec special rights in the Constitution which no other Province had. These included a formalised role in the regulation of immigration, a constitutionally entrenched role in appointments to the Supreme Court of Canada, and a right of veto over future constitutional amendments. The Accord also included a formal, but undefined, statement that Quebec constituted a "distinct society" within Canada. While the Accord had been agreed to by each of the provincial Premiers, in order for it to come into force, it had to be ratified by resolutions of each provincial legislature by 23 June,1990.

The inclusion of a "distinct society" clause, in particular, rankled with many Canadians, and in the end, the Meech Lake Accord failed. Two provincial legislatures failed to ratify it in time. In Newfoundland, the Premier did not want to put it to a vote in the Legislative Assembly, because he knew that it would be resoundingly defeated, and he did not want a formal political message of rejection to be sent to Quebec. In the western Province of Manitoba, the sole Aboriginal member of the provincial legislature, in a protest over what many considered to be the short shrift given to Aboriginal concerns in the Meech Lake Accord, successfully used stalling tactics (which were entirely lawful) to delay the vote until after the deadline had expired.

As one might expect, this led to bitter resentment in Quebec. So the provincial government — which at the time was pro-Canadian in orientation — issued a set of "minimum demands", which of course included the "distinct society" clause. But by then, other groups — Aboriginal peoples, women, other cultural societies — began to say that, if the Constitution were to be amended to address the concerns of Quebec, then the opportunity should be taken to right other perceived constitutional wrongs. So this time, the federal government was forced to put together a very complex package which tried to reconcile all of these competing goals.

Not surprisingly, in trying to come up with a package which could please everyone, the government ended up in pleasing no one. Many French-speaking Canadians were unhappy because they felt that their historical status as one of the two founding peoples of Canada was being forgotten. Most native groups were unhappy because they felt that their long-standing grievances were not being given sufficient consideration. And some women's groups were unhappy because they felt that the argument was over a document prepared by a bunch of dead white males.

Nevertheless, in the end, the Government managed to cobble together a deal — this time called the "Charlottetown Accord". But what made the Charlottetown proposals different from the Meech Lake Accord was that they provided that the Accord be put to a referendum. This was somewhat unique, for unlike in Australia, referenda are not part of the Canadian political tradition.

In the campaign leading up to the referendum, which was held in 1993, Canadians were subjected to a media blitz. Voting "Yes", they were told, was the only way to save the country.[12] Moreover, most of what P P McGuiness would call the "chattering classes" were urging a "Yes" vote. The leaders of all three of the (then) major political parties, a number of university academics, retired members of the judiciary — all were telling Canadians that, even if they did not like the deal, they had to vote "Yes" in order to keep Canada together.

Yet, despite this extreme pressure (in what is in my personal opinion one of the defining chapters in Canadian democracy), the Canadian people said "No".

They said "No" to a deal that had been arranged by people who did not really have a sense for what ordinary Canadians — the Canadian "battlers", so to speak — felt and believed. They said "No" to having a deal forced upon them by the social elites, and being told that they then only had one way in which to exercise their franchise. And they said "No" in a huge majority. But as fine a thing as this assertion of what North Americans call "grass-roots" democracy may have been in principled terms, Quebec's feeling of bitterness and betrayal thereafter became even more profound. So a separatist government was elected in Quebec and, as most will remember, the provincial government in 1995 held a referendum on separation which only lost by about one per cent – less than fifty thousand votes!

Australia, the Republic and the perils of constitutionalism

So what does this say about Canada today? And, more importantly, what lessons does the Canadian story hold for the Australian constitutional debate?

To be blunt, in social terms, the Canada of today is in many ways not a pretty sight. Many will remember the 1993 federal election, when the Canadian Conservative party was virtually wiped out. It was reduced from 250-odd seats in the Parliament to just two. In truth, however, the *real* story is not in the garish headlines that accompanied the Conservatives' fall in fortunes, but rather in the social aftermath that the electoral pattern reflected. Simply put, Canada is today in a Balkanised state. Region has been pitted against region, and group against group.

Republicans have from time to time argued that the Canadian scenario could not take place in Australia, for here, there is no single group like the French in Canada to act as a focus of division.[13] But I am not so sure. For one thing, were, say, Western Australia or Tasmania — or both — to vote "No" in a republican referendum,[14] it seems to me that the damage to the Australian federation could be nearly as great as that which resulted from the exclusion of Quebec from the constitutional agreement in 1982.

Moreover, in a post-*Mabo* and post-*Wik* Australia, one could imagine that a failure to secure formal Aboriginal support for whatever constitutional change is attempted could, in symbolic terms, actually surpass the damage caused by the perceived slight to Quebec. And lest there be any doubt at all about the fragile nature of Australian social unity, one need only consider the frightening level of disharmony revealed by the extent of the One Nation party's electoral success in the recent Queensland election.

Furthermore, there is here in Australia a burgeoning "rights culture" which could easily fuel the same sorts of fighting over pieces of constitutional pie that has taken place in Canada of late. Many will remember, for instance, Dr Carmen Lawrence's statement at the 1995 Labor Party conference in Hobart, that Australian women are "hungry for the exercise of power". So, too, are many other groups in society, one imagines.

The lesson that the Canadian experience with constitutional dynamics holds is surely that constitutionalism is like a Genie: once let out of the bottle, it can never be put back again. In Canada, the past twenty years have represented a level of infatuation with the terms of the Constitution that is still alien in this country. Probably the closest we have come to a similar episode was during the referendum over the banning of the Communist Party in 1951 (which, many now forget, was in fact carried in three of the six States). But there are now many here who, like the Canadians, believe that reform of the Constitution is the key to national rejuvenation — that, unless all of the ills facing society are specifically addressed in the Constitution, nothing constructive can be done about them.

Constitutionalism is a form of "feelgood-ism". If we accept that the Constitution, including its preamble, ought to represent an affirmation of our national values — of what it means to be Australian — then it follows naturally that the Constitution should contain reference to the things we hold dear. It makes us feel good about ourselves to talk about making the Constitution "more relevant" or "more inclusive". *Per se*, there is nothing wrong with this. But the problem is that people who view the relationship between the Constitution and the national spirit this way have the equation backwards. As American legal scholar Alpheus Thomas Mason once put it, "a nation may make a Constitution, but a Constitution cannot make a nation."[15]

Moreover, in today's multicultural, post-modernist society, it is virtually impossible to reach any real consensus about a statement of national values, except if it is stated at such a level of generality as to be meaningless.[16] As the Canadian experience makes clear, the inevitable end-result of trying to please everyone through constitutional inclusion is that no one is pleased. The natural consequence of constitutional bloatedness is an environment of antagonism; of competing feelings of entitlement between different groups within society that can only be destructive of

social cohesiveness. To put it in language that I used earlier, by expanding the terms of the capital "C" Constitution, we are inexorably moving towards an upset of the more critical small "c" constitutional dynamic.

(There is another aspect to the question of inclusion within the Constitution of an enunciation of "national values", as well. That is that by placing matters within the provisions of the constitutional text, we are rendering successive generations prisoner to our prejudices. Had this view of the role of a Constitution been taken by the framers of the current document, for instance, the very first "national value" to have been stated would have been White Australia.)

Now, republicans — particularly the so-called "McGarvie-ites" and members of the Australian Republican Movement – can argue that the sort of constitutional alterations they had in question were of the minimalist kind, and that it is unfair to compare their version of the republican project with the Canadian experience. To a point, this is a fair criticism. But as we also saw during the Convention, the fact is that here, the debate about "minimalist" change is rapidly becoming moot. The capitulation of the ARM group at the Convention to the forces of short-term populism, and even then, their failure to secure a majority in favour of the adopted republican model, speaks of a constitutional petulance that is far beyond the power of a Malcolm Turnbull or a Neville Wran to control. To use a hackneyed expression, the "real" republicans, as they called themselves, punched far, far above their weight throughout the Convention — something which they could not do had they not been riding a genuine crest of public support.

The point — a point which the minimalist republicans have completely overlooked – is that it is impossible in this day and age to consider constitutional amendment in isolation. People in favour of change may suggest that it can be done quickly – and cleanly. Well, the simple fact is that it cannot. The experience of Canada, whose unhappiness should serve as our natural constitutional laboratory, must surely teach us that once a Constitution is opened up, *especially in a rights conscious society*, as ours is rapidly becoming, it becomes a Pandora's box.

Endnotes:

1. An earlier (much briefer) version of this paper was published in the April, 1998 issue of *The Adelaide Review*.

2. Specifically, the Hon Gough Whitlam QC, the Hon Sir Rupert Hamer, Sir Maurice Byers QC, Professor Leslie Zines and Professor Enid Campbell.

3. The writer, though now an Australian citizen, is originally from Canada.

4. Originally known, and still known to many, as the *British North America Act 1867*. In 1982, as part of a broad package of constitutional amendments which will be discussed in more detail below, the name was changed to the *Constitution Act 1867*.

5. There were a series of constitutional conferences, held in Charlottetown, Prince Edward Island (1864), Quebec (1864) and London (1867).

6. *I.e.*, the present-day Ontario and Quebec.

7. *Constitution Act 1867*, s.11. In the Canadian Provinces, the Queen's representatives are known as "Lieutenant Governors" rather than Governors. The office of Lieutenant Governor is provided for by s.58 of the *Constitution Act 1867*.

8. Speech in Halifax, Nova Scotia, August, 1873 (quoted in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at p.700).

9. It provides:

> "An amendment to the Constitution of Canada in relation to the following matters may be made ... only where authorized by resolutions of the Senate and the House of Commons and of the legislative assembly of each province:
> (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;...".

10. For a discussion of this convention, see P W Hogg, *Constitutional Law of Canada* (3rd ed., 1992), at pp. 62 - 64.

11. At the opening of a meeting of Federal-Provincial governments in 1980, for example, Mr Trudeau offered the following response to an expression of disagreement made by one of the Provincial Premiers:

> "... I'm telling you gentlemen, I've been warning you since 1976 that we could introduce a resolution in the [Canadian] House of Commons patriating the Constitution, and if necessary we'll do this unilaterally. So I'm telling you now, we're going to do it alone. We're going to introduce a resolution, and we'll go to London, and we won't even bother asking a Premier to come with us". (quoted in P E Trudeau, *Memoirs* (1993), at p.306)

12. As an aside, this is something I predict will happen here if a plebiscite is held. There will be a campaign to make people feel disloyal to Australia if they vote to uphold the present Constitution.

13. See, e.g., Malcolm Turnbull's attack on my views in *The Australian Financial Review* of 13 February, 1997.

14. Assuming, for the sake of argument, that unanimity would not be required to effect the change in a constitutionally valid way.

15. A judicial version of this view, which might be of special interest in Australia today, was once offered by Harlan J of the Supreme Court of the United States in *Reynolds v. Sims* (1964) 377 US 533. Speaking in dissent, he said:

> "[The judgments of the 'Warren Court'] give support to a current mistaken view of the Constitution and the constitutional function of this court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle' and that this Court should 'take the lead' in promoting reform when other branches of the government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process".

16. On the place and role of a constitutional statement of values, Sir Anthony Mason has recently said:

> "[J]udges look for an authoritative source of values on which to base rules of law, whether they take the form of constitutional interpretation, statutory interpretation or common law principles. A constitutional recital of values would be an extremely authoritative statement of values which could inform the formulation of constitutional principles. The problem, it seems to me, is that we do not know what would come of it in the hands of judges. I do not say this by way of criticism of the judges. On the contrary, my criticism is that you would be giving the judges a statement of values without telling them what they are to do with it. To include a provision that the [constitutional] preamble cannot be resorted to for the purposes already mentioned is simply to convert it to a Clayton's preamble. But I would have no strong objection to a statement of values simply to inform the formulation of common law principles and the setting of legal standards so long as we could agree on the relevant values to be included. That agreement would be very hard to achieve". (*The Republic and Australian Constitutional Development*, unpublished seminar paper, Australian National University, 11 May, 1998).