

## The Constitutional Rounds

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## The Constitutional Rounds

THE GENERAL BELIEF IS THAT Canada achieved sovereignty through patriation of the constitution in 1982. Yet Professor Peter Russell in *Constitutional Odyssey: Can Canadians Be A Sovereign People?* (Toronto, University of Toronto Press, 1992) expounds the thesis that Canadians are not a sovereign people because the basic elements of the country do not regard themselves as parts of a single sovereign people sharing a constitution that is determined by simple majority rule. No matter what one thinks of Russell's concept of genuine political sovereignty, he displays the cogent analysis, incisive style and reasoned moderation that are typical of his style. One like myself, a retired professor of political science, wishes that the book had been available for his classes on the Canadian constitution.

In his panoramic treatment of constitutional amendment Russell shows that even after the Balfour Declaration recognized Canadian autonomy in 1926, Canadian political leaders were not willing to say who in the country was constitutionally sovereign, and the Canadian public was benignly complacent as its political elites occasionally asked the British Parliament to change *seriatim* single clauses to the British North American Act. Apathy ended abruptly in 1966 when Jean Lesage's rejection of the Fulton-Favreau formula ushered in the era of mega constitutional politics which is concerned with getting agreement on the identity and fundamental principles of the body politic. Russell identifies five rounds in the constitutional odyssey since that time.

The First Round (up to the failure of the Victoria Charter in 1971) saw the beginning of the continuing clash between the Quebec nationalism which promotes the collective rights of the Québécois, and the Pierre Trudeau pan-Canadian nationalism which emphasizes the primacy of individual rights, bilingualism and multiculturalism, all defined and maintained by federal authority. The Second Round (ending with disagreement in February 1979) saw "The New Constitutionalism" at work following the victory of René Lévesque and the installation of a separatist government in Quebec. It also saw some public consultation, but not general engagement. Although success appeared closer than ever before, Russell is struck in retrospect by the naïvety of the period; the participants generally failed to appreciate the difficulty of securing a new constitution when the major players differed fundamentally on the nature of the political community.

Round Three (1980-1982) ended in patriation with a Charter of Rights and Freedoms, both facilitated by a Lévesque defeat on a sovereignty-association referendum and a Trudeau electoral victory. They permitted a highly aggressive campaign by the prime minister which was assisted by a decision of the Supreme Court which held that requests to the British Parliament to amend provincial powers

required the agreement, not of all the provinces or of Quebec specifically, but only a substantial degree of provincial consent. Since the court made no attempt to consider if Quebec had a special place in Confederation which made its approval necessary, Russell contends that it missed an opportunity to pronounce on the nature of the political community: "It was not the Supreme Court's most convincing performance. It was a political response to a political challenge dressed up in judicial clothing" (p. 129). Personally, I would go further and suggest that the decision went against a convention, never before breached, that no province have its legislative powers altered without its own consent. Nevertheless, Trudeauists now described Canada as "a society of equal rights-bearing citizens represented in provinces of equal status but expressing their collective national will primarily through the majoritarian institutions of the federal government" (pp. 125-6). Many Quebecers took the opposite view and claimed the right to self-determination through the majoritarian institutions of Quebec, particularly the National Assembly. Thus, although patriation provided legal autonomy, it did little to further political sovereignty as Russell defines it. Despite a determined effort to give the impression of public participation, patriation and the Charter of Rights and Freedoms were clearly the products of executive federalism.

Whether the Fourth Round (ending with the collapse of the Meech Lake Accord in 1988) should have occurred at all is still being debated. On the one side is the argument that the 1982 changes had reached an accommodation between Quebec and the rest of Canada which Quebec's federal MPs had approved and hence, according to Trudeau's "immodest verdict" (Russell's words), "the federation was set to last a thousand years" (p. 127). On the other hand is the equally plausible argument that Trudeau had not kept his promise to Quebec of a renewed federalism, that Quebec had been the only province in the country's history to have had its legislative powers changed without the consent of its legislature, and that its bitter feelings would not disappear without rectification. In any case, in keeping with an election promise to take action to secure Quebec's acceptance of the 1982 changes with "honour and enthusiasm", Prime Minister Brian Mulroney initiated the ill-fated Fourth Round.

Especially noteworthy during this round is that the aboriginal peoples, only heard faintly in the previous round, demanded the inherent right to self-government. More surprising is that the round came close to success. The most vociferous criticism was directed against the distinct society clause which, allegedly, threatened to balkanize the country. When failure came, it was obvious that the process being used was out of keeping with the times. Elite accommodation secured through executive federalism was clearly unacceptable in a period of "loss of faith in the representative capacity of elected legislatures" and of politicians generally (p. 153).

The Fifth Round (1991-1992) deserves the title Canada Round, if for no other reason than that public participation was greater than ever before. In the negotiations the leaders of the aboriginal peoples acquired a status close to that of the first ministers. Russell's analysis of the last two rounds demonstrates to the full

his knack of telling things as they are. He sees three stages of the distinct society clause as “a little fudge”, “a big piece of fudge” and “fudge on fudge”; the Beaudoin-Dobbie Report is “a dog’s breakfast”; it is also (and this might apply equally to the Charlottetown Accord) just “another instalment in the constitutional soap opera that left Canadians still struck [sic] between a rock and a hard place” (p. 188). To this reviewer the most disappointing thing about the book is that it ends with this report. But it is still left to him to examine Russell’s basic points.

None would deny Russell’s thesis that Canadians have moved from the organic constitutionalism of Edmund Burke to the democratic constitutionalism of John Locke. Recently Thomas Courchene wrote that “the Constitution of Canada now belongs to the people of Canada and it can never be amended without our direct consent”,<sup>1</sup> though under the constitution as it is the political elites must take the final steps. Admittedly the public has soured on its elected representatives, but even with a change in its attitude, no future constitutional change of substance is likely to be made without broad public assent in advance.

Full public participation, however, has made constitutional change more difficult to secure. Provinces and provincial interests will continue to press their demands unabated, while an ever-widening array of individuals and groups, especially the Charter Canadians spawned by the Charter of Rights and Freedoms, will marshal every conceivable argument pro and con on any proposal. Three recent episodes illustrate the complexities. Alberta Premier Don Getty’s insistence on something like a Triple-E Senate necessitated the counterbalancing provision that Quebec never have fewer than 25 per cent of the Commons seats, a trade-off that provoked widespread criticism and probably made a strong “No” vote in British Columbia inevitable. Although the Charlottetown Accord recognized the rights of the aboriginal peoples to a degree not even imaginable a few years earlier, native women disapproved, fearing that the rights to be accorded traditional native governments would impair their own rights. In opposing the accord, Judy Rebick of the National Action Committee on the Status of Women became a constitutional lawyer of sorts, arguing that the hierarchy of rights created by the distinct society clause would diminish rights conferred by the Charter of Rights and Freedoms, especially those relating to sexual equality. Detractors of the political elites seldom recognized that often they were simply fashioning compromises between the demands of a host of vigorous political activists. If Canadians want these political elites to be deprived of even this function, their recourse must be to an elected constituent assembly; at present that possibility seems remote.

Has Canada also made progress towards realizing Russell’s concept of genuine political sovereignty? Does greater agreement exist on the fundamental principles of the political community? Perhaps, a little surprisingly, the Fifth Round gave broad recognition to a third founding people — the aboriginal peoples — and offered a positive indication that so profound a change would not stand in the way

1 *Globe and Mail* (Toronto), 27 October 1992.

of Russell's political sovereignty. But Canada's intractable problem seemingly remains. Because of Quebec's undiminished insistence on the self-determination of its collective rights through its own majoritarian institutions, it seems surprising that Premier Robert Bourassa eventually accepted a distinct society clause that was seriously diluted and changes in the division of powers that were minuscule in character; it would have been even more surprising if the Québécois had believed that the proposals did much to ensure their cultural protection.

In contrast, many people in the rest of Canada wanted nothing less than Trudeau's pan-Canadian nationalism. Trudeau himself acted as their spokesman declaring that the proposals would create a "hierarchy" of citizens, reduce federal politicians to "eunuchs", and leave the federal government "stark naked".<sup>2</sup> Available evidence suggests that the four western provinces reacted strongly against the alleged unequal treatment of citizens and the conferment of special status. Charter Canadians objected to the possible creation of a hierarchy of rights and the placing of governmental powers above individual rights. One poll indicates that 27 per cent of Canadians opposed the accord because it gave Quebec too much and an additional 22 per cent because it conferred additional powers upon the provinces.<sup>3</sup>

So Canada seems no closer to becoming a single political community capable of making constitutional decisions by a simple majority. In a world changing in many respects the "two solitudes" remain as they always were. A critic might suggest that Russell's conceptual framework has simply dressed up the country's English-French problem in new garb. To me, however, he has let his readers examine the problem with new clarity, in greater depth, and with a deeper appreciation of the difficulties it presents. In any case, Russell is adamant that five rounds of constitutional debate are enough. "This inward navel-gazing has drained the creative energy of the leaders...frustrated, demoralized, and, yes, even bored the people...undermined Canada's ability to deal with pressing practical problems" (p. 193). He is right, but is it at all likely that the constitutional debate will not be resurrected during the next Quebec election? For the time being Canadians may have to rely primarily for what amounts to constitutional change upon the tried and trusted devices of convention and political decisions.

To turn to *The Constitutional Future of the Prairie and Atlantic Regions of Canada* (Regina, Canadian Plains Research Centre, University of Regina, 1992), edited by James N. McCrorie and Martha L. MacDonald, is to turn from macro to micro politics. In his Introduction James McCrorie states that its purpose is to inquire if the constitutional proposals under discussion, viz., the federal government's *Shaping Canada's Future Together* of September 1991, will "address and serve, or threaten and compromise, the regional needs and interests" of the seven provinces in question. Actually few of the articles do anything like this; rather, the book presents a motley of views on the economic, social, and

2 *Globe and Mail*, 17 October 1992.

3 *Chronicle-Herald* (Halifax), 28 October 1992.

constitutional condition, prospects, and stances of the two regions. Thus the article by William E. Schrank, Noel Roy, Rosemary Ommer, and Blanca Skoda, a worrisome one, forecasts something close to the elimination of the Newfoundland inshore fishery. Will Canadians have to face the prospect of revamping so much of a province's productive capacity?

The emphasis here, however, will be on the constitution and although the questions at issue may sometimes provoke entirely emotional debate, they clearly do not meet the first characteristic of Peter Russell's mega politics: none relate to "the very nature of the political community on which the constitution is based". Of the constitutional articles the only one which appears to adopt a static position is that of J. Peter Meekison. Principally he argues that "provincial equality is now — and should continue to be — one of the cornerstones of any new constitutional arrangement" (p. 218). Its merit is that it enhances the political clout of the Prairie and Atlantic Provinces in making constitutional changes and any other decisions arrived at through executive federalism. Meekison is certain that equality does not force the provinces into identical moulds since flexibility is ensured through constitutional amendment sec. 94a or the notwithstanding clause of the Charter of Rights and Freedoms. But critics would point out that such flexibility is very limited, that the use of the notwithstanding clause means the deprivation of fundamental rights, and that executive federalism will not be the crucial factor in major constitutional changes of the future.

Two academics to the left, both from western Canada, lament the feebleness of Canada's social programmes. From the experience of other countries Alvin Finkel argues that the additional taxation needed for enhanced programmes would not scare away private investors nor would larger welfare payments inhibit the desire to earn income. His "modest proposal" is a constitutional amendment which would "guarantee all households an income no less than half the average gross Canadian household income, with size of household factored into the equation" (p. 175). Jim Silver portrays a bleak picture for fiscal federalism and the redistributive state if they are allowed to become more and more dependent upon purely market forces. He finds it sad that the neo-conservative ideologies of the Mulroney government, reinforced by the forces of globalization, have provided a clear road map for the erosion of the redistributive state. Equally sad is the utter confusion of the Liberal and New Democratic parties. As a result, "there is no longer an intellectual road map" (p. 263). Although Silver is totally pessimistic, Finkel hopes to get the welfare state he wants through a strong people's momentum provided by the working classes and other non-elite forces. Some critics might wonder if the redistributive state built up during the prosperous 1960s and 1970s could be sustained in a long recessionary period and if the alleged neo-conservative actions have been designed primarily to reduce deficits.

Progressivism of another kind is central in the thinking of Howard Leeson, another Prairie academic. Fearing federal dominance in constitutional amendment, he wants "the basic founding groups...to refashion the federation free from the undue influence of the present federal government" (p. 306). Because executive

federalism has utterly failed in handling the constitution, the process must be an open one in which normally powerless groups can exercise influence. Although Leeson agrees that any new deal must ensure a significant role for Ottawa in aiding the economically subordinate regions, he is insistent that the best of decentralist proposals be wed with the centralist ones. Venting a specific western grievance, he also wants the new order to guarantee that existing natural resources remain under regional control and not be bartered away. Leeson can at least take comfort that the referendum results appear to have put executive federalism in the discard as the main agent in constitutional change.

Wade MacLauchlan, an easterner equally critical of the overweening power of Ottawa, asks the question: How are we to survive on the margins? Because he regards that survival as a natural good, he hopes to have it treated as a constitutional value, not as a mere grab. In its promotion he has no trust in the present parliamentary institutions in which the most prosperous and most populous regions possess the voting strength; loyalty to the party exceeds that to province and region; and excessive power is vested in the Prime Minister's Office and the Department of Finance. Instead he wants "new institutions at the centre that fully reflect the interests of provincial and regional constituencies" (p. 163). He also hopes for changes in the present shared-cost programmes which cast the federal government as bully/banker. To avoid *ad hocery* and paternalism, he wants them replaced by block funding which matches accountability with spending decisions and in which a constitutional provision guarantees unconditional funding sufficient to bring the public-sector resources in each province to a stipulated percentage of a national norm. In a nutshell he advocates "a centralized revenue source with decentralized responsibility for policy making and administration" (p. 163). But perhaps he himself would agree that the present state of the public finances makes his proposal a mere will-o'-the-wisp.

In a sense James Bickerton deals in part with mega politics although not in the same way as Peter Russell. For him three alternatives emerged during the recent constitutional debate. The outcome he prefers would require Quebec to accept a limited rebalancing of powers within Canadian federalism. At the same time these changes would ensure protection of the federal constitutional responsibilities and national institutions that are essential to the Atlantic region's well-being, especially national social programmes, equalization, general oversight of regional development, and the Charter of Rights strengthened by a social charter. The second alternative, asymmetrical federalism, he considers fraught with danger; if Quebec were granted additional powers, other provinces might demand the same and the result could be undue weakening of the national government. The third alternative is Quebec independence, an even greater danger since it might lead to the break-up of Canada. But Bickerton disagrees with those who hold that Canada means nothing without Quebec; in fact, its separation might even have some benefits for the four eastern provinces if it led to a more politically integrated and united country, closer Atlantic cooperation, and even union. In contrast, many

observers — and I am one of them — fear that Quebec separation means absolute disaster for the region.

Finally, two easterners in this collection deal with a type of comparative politics. Thérèse Arseneau finds striking similarities in the constitutional positions of Atlantic and Prairie Canada. Both picture the federal government being used by “powerful central Canadian economic interests to drain wealth from the weak peripheral or hinterland regions”. Lacking in population and forced to function in a majoritarian system, they do not have counterbalancing mechanisms to affect central decision-making. Hence fairly general agreement exists for institutional reform to counter the dominance of the centre. Six of the seven provinces, resource-rich Alberta the exception, support “a strong, but reformed, regionally sensitive government”. This would mean an enhanced federal ability to combat disparities, combined with additional provincial authority to promote economic development. Arseneau also suggests that remedies to strengthen the hinterlands are “increasingly centred on Senate reform in both regions” (p. 339). But while most readers would accept the general tenor of the article, many would not agree that Senate reform is of equal concern in both regions. Although Clyde Wells favoured a Triple-E Senate no less strongly than Don Getty, the question was of secondary interest, at best, to Donald Cameron and Joe Ghiz.

In a highly original article entitled “Challenging Constitutional Dependency: A Revisionist View of Atlantic Canada” David Milne seeks to demolish the “now venerable tradition” begun by George Rawlyk which treats Atlantic politics with “undisguised contempt”. Contrasted with the rest of Canada, Atlantic Canada is pictured as status quo, centralist, sycophantic, and “protective of federal powers that feed their dependency”. But Milne casts doubts upon their stereotyped portrait of political life using evidence contained in an article by Robert Finbow and his own experience since the mid-1970s. To him “obvious modernization” is apparent in the recent aggressiveness of the four provinces in pressing their constitutional concerns (pp. 314-5). Certainly the conduct of Clyde Wells and Frank McKenna on the Meech Lake Accord was hardly that of leaders or mere satraps. On balance, although Rawlyk’s caricature was an undoubted exaggeration, only time will tell if modernization is as extensive as Milne suggests.

Not a few articles in the McCrorie-MacDonald book have very considerable merit, although few display much originality. That is not surprising since many of the themes are altogether hackneyed. In hindsight, exploration along two lines might have been particularly useful in a book examining the constitutional future of the Prairie and Atlantic provinces. An economist, or perhaps an economist and a political scientist, might have presented a carefully considered opinion of the likely effect upon the Atlantic Provinces of Quebec separation; a political scientist might have done the same for asymmetrical federalism. The latter study would have been all the more valuable after the Halifax conference on the division of powers in January 1992 came out for asymmetry without examining some of the difficulties. Only an optimist can believe that debate on the constitution will remain quiescent. Only an optimist can be confident that the Québécois will not continue to demand



additional powers which the Atlantic and other provinces are unwilling to concede. Whatever the problems of asymmetrical federalism they may be preferable to the evils of constitutional debate *ad infinitum*.

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