WESTERN REPORT

CONSTITUTIONAL UNREST IN OZ

by Roger Gibbins

Over the past few years, an interest in Australian politics has provided me with a refreshing respite from the morass of Canadian constitutional politics, a morass within which constitutional aficionados have pursued increasingly stale ideas with flagging enthusiasm. Although I must confess that this antipodal interest was also a source of ideas for the Canadian constitutional debate — including Australian models for Senate reform — it was for me more a distraction from than an extension of the Canadian debate.

This is not to say that Australians were completely untouched by the "Canadian disease." A constitutional commission was established to while away some of the time between the 1988 bicentennial of the arrival of the First Fleet and the upcoming Centennial of Federation in 2001. However, no one expected that anything much would change and the commission has failed to find a significant political or public audience. In the meantime, Australian constitutional scholars looked on the more grandiose schemes of their Canadian counterparts with a mixture of bemusement and incredulity.

It was a shock, therefore, to travel south this spring from the relatively tranquil Canadian constitutional scene and find that Australians are now engaged in a wide-ranging constitutional debate that may significantly alter the country's institutional and federal fabric. The Canadian disease has spread.

Republicanism Rears Its Head

The focal point for this debate is the proposal by Prime Minister Paul Keating to cut Australia's ties with the monarchy and to establish a republican form of government, one that will enable Australians to "find their vision" in the 21st century. Although Mr. Keating's initial commitment to republicanism seemed tepid, the issue has suddenly "found legs" across the country. It has also badly split the Liberal opposition and Mr. Keating's enthusiasm has been growing in step with the Liberals' disarray. There is now a reasonable chance that Australia will be a republic by as early as 1996.

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Support for republicanism is deeply rooted in the aggressively egalitarian Australian political culture and there is little doubt that Mr. Keating's campaign has struck a very responsive chord. The campaign is also linked to a concerted effort to find Australia's place within the South Pacific community, to move away from a British connection that has become increasingly remote to Australia's multicultural population and contemporary economy. And, of course, this is hardly a time when people are prepared to come to the defence of a royal family whose domestic turmoils continue to be splashed across the media.

Republicanism Defined

To this point, the republican debate has not settled on a clear alternative to the present constitutional order. Mr. Keating has suggested that the change might be minimal and could entail little more than a change in terminology and the purely Australian appointment of a governor general who would continue to exercise the same ceremonial functions and very limited discretionary powers now in place. However, the Canadian experience suggests that it will be difficult to keep the constitutional debate, and package, from expanding.

There is already considerable confusion whether an appointed head of state would be acceptable within Australia's democratic political culture and to what extent the Senate and states should be involved in the appointment process. The involvement of the Senate and the states would loosen the government's control of the appointment process, whereas the exclusion of either, and particularly the states, could significantly weaken the federal sinews of the Australian state. In short, the operation of republicanism is likely to be both contentious and complex and is also likely to engage fundamental principles of the constitutional order.

Other Issues Loom

Although the debate over republicanism is the dominant issue on the Australian constitutional landscape, it is becoming entangled with a variety of other, potentially potent issues. The recent *Mabo* decision by the Australian High Court, which recognized a pre-existing aboriginal title, is rippling throughout the political community and will inevitably become linked to a comprehensive package of constitutional

reform. Talk of secession is once again occurring in Western Australia and there is some interest in the alteration of state boundaries in northern New South Wales.

More important, state governments, particularly those of Victoria and South Australia, are in the midst of an acute fiscal crisis, one that threatens to transform the fiscal arrangements between the commonwealth and the states in a manner that could significantly strengthen Canberra's future role within the Australian federal state. Regional disparities have emerged as a major political issue and Australians are beginning to consider the types of regional equalization programs that are under threat in Canada.

The interesting thing to consider is whether the Australian constitutional debate will have any impact on the inevitable return to constitutional negotiations in Canada. Will republicanism in Australia put the issue onto the Canadian political agenda and thus further broaden and confuse the Canadian debate? Will Australian efforts to transform the fiscal relations between the federal and state governments be picked up as a model in Canada?

Although Canadians to this point have been relatively immune to Australian constitutional influence, those days may be over as the Australian constitutional debate broadens and intensifies.

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QUEBEC REPORT

EXIT THE NOTWITHSTANDING CLAUSE

by Guy Laforest

The Liberal government of Robert Bourassa is in the process of changing its approach toward language policy. It seems to me that, indirectly, this shift is signalling the advent of a new attitude with regard to the constitution. The new direction looks like an unconditional surrender, a lucid and unmediated acceptance of the 1982 Constitution Act amendments that every Quebec government since that time has considered illegitimate.

Bill 86 was introduced in early May of this year in the National Assembly by the government and by Claude Ryan, the minister responsible for the language file. Its first objective is to bring Quebec legislation in line with the 1988 Supreme Court judgment that declared null and void the dispositions of Bill 101 prohibiting the use of languages other than French on commercial signs. The court had ruled that these sections and their regulations offended the guarantee of freedom of expression in section 2 of the 1982 *Canadian Charter of Rights and Freedoms*. Back in 1988, instead of bowing to the opinion of the court, the Bourassa government chose to adopt Bill 178, maintaining the French-only rule for external signs while allowing some forms of linguistic pluralism inside businesses. To make sure that policy would work, the government used the notwithstanding clause in section 33 of the Charter, shielding legislation from sections 2 and 7 to 15 of the Charter, for a period of five years, renewable through an express declaration.

The government appears to have decided that it simply does not want to use the notwithstanding clause again. This is hardly surprising. Conceded at the last minute in the 1982 constitutional negotiations by Mr. Trudeau to get provincial support for his patriation project, the notwithstanding clause is the thorn in the side of the people's package of Charter patriotism. As Alan Cairns and many others have repeatedly taught us in the past few years, citizens and groups alike, through the granting of rights, have developed a new sense of dignity, an aggressive constitutional self-consciousness. They want their rights to be limited as little as possible by governments.

With the political culture of the Charter penetrating daily more deeply in the hearts and minds of Canadian citizens, the use of the notwithstanding clause is rendered all the more difficult. In the best of times, in post-1982 Canada, the use of the notwithstanding clause is a tricky matter. When you employ it, as is the case with Quebec, to prohibit public signs in the *lingua franca of the modern world* that is also the idiom of the United States of America, things become even tougher. If you add to this a report of a United Nations Committee on Human Rights supporting the philosophy of the 1988 Supreme Court judgment concerning freedom of expression, the whole matter becomes impossible.

If Bill 86 comes out of the legislative process pretty much intact, as it should, the prohibition for languages other than French on public signs will be lifted. Although many observers, including government officials, talk about a return to bilingualism, this expression is not used in the legislation. The new direction