

CHARLOTTETOWN: THE ANATOMY OF MEGA-CONSTITUTIONAL POLITICS

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The Charlottetown Accord was so heavily burdened with competing interests that the odds of its rejection in the October 1992 referendum were extremely high. More controversially, Behiels contends that Charlottetown set the stage for the 1995 Quebec referendum, whose narrow victory for the federalist forces paradoxically provoked the Supreme Court reference of 1998 and later the Clarity Act, which have contributed to the slow and irreversible decline of the Quebec sovereignty movement.

L'Entente de Charlottetown était le fruit d'intérêts si divergents que son rejet au référendum d'octobre 1992 était on ne peut plus prévisible. Au risque de susciter la controverse, l'auteur affirme que cet accord a préparé le terrain au référendum québécois de 1995, et que la courte victoire qu'y a remportée les forces fédéraliste a paradoxalement suscité le renvoi à la Cour suprême de 1998, puis la Loi sur la clarté référendaire. Laquelle aura enclenché au Québec le lent et irrésistible déclin du mouvement souverainiste.

The tenth anniversary of the defeated Charlottetown Consensus Report, rejected in a landmark constitutional referendum on October 26, 1992, reopened the debate on the complex reasons for its failure and its unintended impact. Many of Charlottetown's proponents maintain that Canadians have experienced "ten lost years" of political and constitutional development.

Such an idealistic lament can only be meaningful if one ignores the complex, controversial and incomplete nature of the deal along with the multifaceted reasons why Canadians turned it down. After all, it was rejected by a majority of Quebec's Francophone community and by significant elements of the Aboriginal communities, both of which stood to gain the most from its provisions. Fortunately, given what has transpired over the past decade, the failure of the "Canada round" of mega-constitutional amendments can be interpreted in a far more positive manner. There is little to lament and much to warrant modest celebration: Canadians have come of age as a sovereign people.

My first argument is that the Charlottetown Accord was so heavily burdened with innately incommensurate, com-

peting interests—provincial and territorial governments, four national Aboriginal organizations, and Charter Canadians—that the odds of its rejection were extremely high.

My second argument is considerably more controversial. It is based on a positive interpretation of what transpired following Charlottetown's defeat. During phase one, the defeat set in motion a conjuncture of political developments which precipitated a second Quebec referendum on secession. During phase two, the very narrowness of the defeat of the *Yes* option in the 1995 Quebec referendum set the stage for a series of very significant political and constitutional developments including parliamentary activity, the Supreme Court reference and finally the *Clarity Act*. These, in tandem with an evolving socio-economic climate, set in motion the seemingly irreversible decline of the Québécois secessionist movement and the Parti Québécois which carried its banner. As a caveat, one must not equate Québécois secessionism with Québécois nationalism which, no doubt, will continue to thrive as a recurrent force in Quebec and Canadian politics.

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Prime Minister Mulroney and Premier Bourassa gambled big time with Canada's future when they initiated a second controversial and destabilizing round of mega-constitutional negotiations dubbed the Canada round. Bourassa decided that he would not play by the rules of constitutional amendments which had led to the death of the Meech Lake Accord. The Bourassa government challenged the integrity of Canada with an ultimatum, that is, legislation mandating a referendum by October 26, 1992. The question would reflect one of two options: acceptable constitutional proposals—basically Meech Lake Accord plus add-ons—from the rest of Canada; or Quebec's accession to sovereignty.

The beleaguered Mulroney government created a damaging populist side show called the Citizen's Forum on Canada's Future. Keith Spicer, the forum's chair, encouraged frustrated, angry Canadians to vent their spleens and then blamed the PM for the crisis in his June 1991 report. The PM created two parliamentary committees, one co-chaired by Senator Gérard Beaudoin and MP Jim Edwards, to ascertain if and how the three-year delay in the amending formula for ratification could be circumvented. It could not be done. Instead, the committee recommended adopting an amending formula based on four regions, an impossible challenge. Mulroney created a second committee, co-chaired by Senator Beaudoin and MP Dorothy Dobbie, to sell Canadians on his government's constitutional package entitled *Shaping Canada's Future Together*. The committee was ignored by Canadians and only managed to rescue itself from total humiliation thanks to a series of highly elitist, orchestrated regional meetings.

Oblivious to the impending hurricane, Mulroney pushed on. His constitutional point man was Joe Clark who, in March 1992, set in motion a complex process of multilateral negotiations involving nine premiers and/or their ministers and representatives from four national Aboriginal organizations.

In what proved to be major strategic mistake, Mulroney and Bourassa interjected themselves in the negotiations only at the last stage to ensure that the Meech Lake Accord's central elements remained largely intact. They realized, too late to change the results, that an overly eager and naïve Joe Clark had outwitted himself, his boss, and Premier Bourassa. The Meech Lake Accord's distinct society clause was deftly circumscribed by the omnibus Canada clause, while the hobbled Triple-E Senate and a totally impractical third order of government for Canada's Aboriginal peoples surreptitiously undermined both the national and provincial governments' powers.

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comments captured in a cell phone conversation between Diane Wilhelmy, Bourassa's deputy minister of intergovernmental affairs, and Andre Tremblay, his outside constitutional counsel. The deal's rejection by Western Canadians was also a foregone conclusion. They gained an ineffective Senate but only at the price of granting Quebec a permanent twenty-five percent lock on representation in the House of Commons.

Virtually every dimension of the Charlottetown deal had its staunch defenders and its vociferous critics. As with the Meech Lake Accord, there was no end of controversy and debate on the issue of process. Clark's fateful decision to include only Aboriginal representatives while excluding all other Charter Canadians backfired. It ignited a firestorm of opposition to the entire deal and eventually aroused anger towards the deal makers, especially Mulroney. No matter how Canadians viewed the contents of the Charlottetown deal, most of them felt deeply that the deal was illegitimate because of the elitist, exclusionary nature of the



Prime Minister Brian Mulroney and Quebec Premier Robert Bourassa share a lighter moment in 1991. Architects of the failed Meech Lake Accord, their subsequent constitutional initiative ended with the defeat of the Charlottetown Accord in the referendum of October 1992. (*The Montreal Gazette*)

entire process, one all-too-reminiscent of the Meech Lake Accord.

Pressured particularly by Western premiers, Mulroney was forced to hold a national referendum on a highly complex, incomplete deal. Holding a referendum on constitutional change sparked considerable debate.

This form of constitutional populism, procedural liberals argue, is unproductive and highly destructive of national unity because it undermines the concept of the neutral state. And yet, procedural liberal theorists fail to acknowledge that the political context of 1992 made the holding of a referendum inevitable. Bourassa had precipitated the Canada round with referendum legislation attacking the integrity of the Canadian nation-state.

A second dimension of Charlottetown which generated considerable discussion and profound disagreement involved amendments to Canada's federal institutions. Ron Watt of Queen's University, Mulroney's closest advisor throughout the process, and others address this crucial debate in *The Charlottetown Accord, the Referendum, and the Future of Canada*. Watts rejects the critique that the agreement was merely a confusing grab-bag of sixty items. The reform of federal institutions, he maintains, was an attempt to provide an overarching framework integrating the Charter of Rights and Freedoms and federalism. This widespread interpretation is based on the assumption that federalism and the Charter are inherently incompatible. Canada's Charter, the people's package, had to take a back seat to a much more decentralist federation, one which could accommodate the special needs of Quebec's Francophone majority and Canada's beleaguered Aboriginal communities. James Kelly, in a recent issue of the *Canadian Journal of Political Science* (June 2001) refutes brilliantly this claim of incompatibility between the Charter and federalism by arguing that both can thrive together.

Peter Hogg, of Osgoode Law School, was a qualified supporter of the deal. Yet, he was drawn to conclude that the deal was rejected primarily because public opinion outside Quebec was opposed to any significant weakening of the federal government. Hogg considered that the very modest reforms to the division of powers—delegation to the provinces—especially to Quebec, restrictions on federal spending power, the constitutionalizing of intergovernmental agreements, transfer to the provinces of some residual powers and the termination of the federal

declaratory power were far too complex and cumbersome to be workable. "Indeed," he wrote, "the Draft Legal Text looked more like an amendment to the *Income Tax Act* than an amendment to the constitution."

Francophone Quebecers rejected reforms to the division of powers for opposite reasons. The changes, Jacques Frémont, professor of law at l'Université de Montréal, argues, were insufficient and dangerous for Quebec. Charlottetown legitimized and constitutionalized Ottawa's spending power by doing away with the principle of the exclusiveness of provincial powers. It would be far more productive for the Quebec government to "insist on being able to exercise effectively, and without any interference, as fully and completely as possible, the jurisdictions recognized by the Constitution Act, 1867 and its subsequent judicial interpretations."

On Senate reform, several contributors to the Charlottetown post-mortem, including the outspoken president of the Canada West Foundation, David Elton, argued that Charlottetown's proposals "would create a partially elected Senate, with formally equal provincial representation but de facto special powers for Quebec senators, and an effectively emasculated Senate." A majority of Western Canadians rejected the hobbled Triple-E Senate while a majority of Francophone Quebecers believed that a guarantee of 25 percent of the seats in the House of Commons in perpetuity was not worth exchanging for an equal and appointed Senate.

The Aboriginal package was the real sleeper. Given that the Draft Legal Text appeared only two weeks before the referendum, Canadians had very little time to consider the ramifications of the "third order of government." Representatives for the four national Aboriginal organizations, status and non-status Indians, Métis, and Inuit, were the only ones allowed to operate as insiders at the negotiating table. Logically, the final deal reflected their constitutional wish lists. Political analysts later revealed the fundamental contradictions in Canada's political culture. Canadians rejected Québécois neo-nationalists' demand for "special status" for Quebec while inadvertently supporting a far more extensive special status for Aboriginal Canadians.

My second argument advances a positive interpretation of the paradoxical unintended consequences of Charlottetown's defeat. During phase one, the deal's decisive demise set in motion a predictable conjuncture of political

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developments leading to the election of the Parti Québécois, thanks in part to Jacques Parizeau's promise of a quick referendum on outright secession. This transpired in the climate of destabilizing economic and ideological shifts, involving implementation of NAFTA, neo-conservative economic and social policies, and Ottawa's financial incapacity to shore up the social service state.

This turmoil made it much easier for Parizeau and Bloc Québécois leader Lucien Bouchard to outmaneuver a distracted and disoriented Chrétien government and to sway indecisive Québécois francophone voters to vote *Yes* in the historic 1995 referendum. But, the secessionists had overreached. A near victory set in motion a long overdue series of political and judicial developments which, in time, undermined the legitimacy of the secessionist movement and contributed to the slow decline of the Parti Québécois. During this second phase, the Chrétien government's determined response to the very narrow *No* victory successfully challenged the Parti Québécois' dogma of unilateralism. This constitutional breakthrough occurred, in part, thanks to an evolving socio-economic climate in Quebec and throughout Canada. Finance Minister Paul Martin put the government's financial house in order. Furthermore, Québécois Francophones turned their attention and energies to other, more pressing matters, and along with most Canadians demonstrated a refreshing willingness to rethink and redefine the role of the state.

It was inevitable that Charlottetown's defeat would generate serious political upheaval. Many analysts, including Patrick Monahan and Jeffrey Simpson writing in *The Charlottetown Accord*, argued that it was foolhardy to attempt another comprehensive renewal of the Canadian Constitution. Canadians unhappy with the constitutional status quo had only two options, play by the existing rules or find a way to "jump outside" the constitutional process. It was a forgone conclusion that Parizeau and Bouchard would play political hardball. Why? "The rest of Canada, having rebuffed Meech Lake and Charlottetown," Simpson warned, "is insisting that Quebec take the current constitutional arrangements and put them to the test in the confrontation with secession."

Parizeau promised a referendum on secession within twelve months of the election of the Parti Québécois in September 1994. He revealed later in his candid memoirs, *Pour un Québec souverain*, that he had long been convinced that a UDI within weeks of a *Yes* vote would succeed.

Surprise and speed, involving quick international recognition, first from France and then from the United States, were the keys to Quebec achieving independence.

Parizeau's role of the dice failed. This failure—the importance of which Parizeau realized immediately and resigned on the spot—set in motion a series of political and judicial developments which accelerated the slow, irreversible decline of the Québécois secessionist movement and the Parti Québécois. In due course, Lucien Bouchard and Bernard Landry realized they had no choice but to function primarily, if not exclusively, as provincial premiers addressing many unresolved social and economic problems facing Quebecers. Mario Dumont's disgruntled Liberals, functioning under the banner of the Action démocratique du Québec, quickly distanced themselves from the sovereignist project, focusing instead on downsizing of the Quebec state.

Given this new context, Chrétien grabbed the opportunity to challenge head-on the Parti Québécois government's claim of secessionist unilateralism. Referendum night, Canadians and their political leaders experienced a massive seismic shock prompting Chrétien to state that Canada would not disintegrate under his watch. The narrow victory forced his government to fulfill its constitutional obligations to defend the integrity of the Canadian nation-state. The PM was pressured by a strong majority of Canadians insisting that he challenge the legal assumptions underlying Parti Québécois secessionist dogma.

Before the referendum, "Thinking the 'Unthinkable'" had become a fashionable imperative. Academics churned out studies analyzing if and how the Rest of Canada (ROC) would or could survive following Quebec's secession. Following the referendum, focus on four main themes sharpened dramatically as the debate shifted from the merely theoretical to the pressing reality of Canada's predicament. First, there were legitimacy issues involving the referendum question, the size of the majority, partition, Aboriginal rights, recourse to a UDI, and international reaction. There were strong disagreements about the appropriate negotiating process and the players to be involved. The list of negotiable issues by the various governments and other players grew exponentially.

One thing was certain: Chrétien would never allow a repeat of the political and judicial blunders of 1995. He finally understood that it was imperative to implement quickly "Plan B,"

a combined political education campaign explaining the horrendous consequences of secession and a clearly worded reference to the Supreme Court requesting the justices to decide if the Quebec government, as it claimed, had a right to invoke a unilateral declaration of independence under Canadian and/or international law.

The Supreme Court's 1998 ruling on the *Reference Re the Secession of Quebec* stands as a landmark constitutional decision. The justices stated categorically that the National Assembly, legislature or government of Quebec could not carry out a unilateral declaration of independence from Canada under the Constitution of Canada or under international law. The justices then shifted from the legal to the political stage. They opined that four constitutional conventions—federalism, democracy, constitutionalism and the rule of law, and the respect of minorities—underlying Canada's constitutional framework and practice provided the principles whereby secession could become legal under an amended Canadian constitution. If a clear majority (by this the justices meant some kind of supermajority) of Quebecers voted *Yes* on a clear question pertaining to outright secession, then Canadian and provincial governments and other players would be obliged to negotiate in good faith. Every aspect of the Constitution would be on the table and there was no guarantee that the outcome of secession negotiations would be successful. If negotiations failed, Quebec could still opt to secede unilaterally fully aware that it would have to deal with the complex problems flowing from this act outside the rule of law, requiring a constitutional amendment even for secession.

The Supreme Court's long overdue reality check transformed the political discourse. The unrealistic debate between the *impossibilists* and the *inevitalists* dissolved like snow on a hot spring day. Theoretically, secession could be made legal given the ideal set of circumstances and players. In reality, secession had become highly improbable. Polls revealed that a majority of Canadians, including Quebecers, supported the justices' Solomon-like decision. Chrétien and his advisers, while grumbling that the justices should not have ventured into the realm of politics, moved quickly to prepare legislation setting out the terms and conditions of all future referenda on secession. The *Clarity Act*, a cautious and calibrated response to the Supreme

Court decision, mandated the Canadian government to accede to negotiations, provided the referendum question was on secession and only secession and a substantial majority of citizens voted in favour of the option. No more trick questions and no further pretense that 50 per cent plus one vote would suffice to break up the country.

Premier Bouchard, caught between a rock and a hard place, spun the historic decision the only way he could. The decision, he argued, obliged Ottawa to negotiate following any future referendum and it confirmed Quebec's right to a UDI if negotiations collapsed. He fulminated against the *Clarity Act* and promised a legislative riposte. He believed, momentarily, that he had found the elusive winning condition that would allow his government to launch a third referendum. Jean Charest's Liberals and Mario Dumont's ADQ, who could also read the dramatic turnaround in the polls, scoffed at Bouchard's allegations of Ottawa's deceit and humiliation. They rejected his plea for another "sacred union" against the Canadian federation. And though Bouchard won the 1998 Quebec election, an essential winning condition—legitimacy—was missing when Charest's Liberals gained a plurality of votes. Bouchard's keen political instincts told him the jig was up. He grasped the first opportunity to resign as premier and leave politics. Premier Landry and Parti Québécois militants, refusing to accept the new political climate, are evidently determined to engineer their exit from Quebec's raucous political stage with a bang instead of a whimper.

In the decade following the 1982 *Constitution Act*, with its *Charter of Rights and Freedoms*, Canadians agonized over two proposed mega-constitutional proposals, the Meech Lake Accord and the Charlottetown deal. Following the death of Meech and the rejection of Charlottetown, Canadians were left to deal with the political fallout, particularly the 1995 Quebec referendum.

But in defeating the Charlottetown Accord, Canadians took possession of their Constitution and, in so doing, helped transform Canadians into a truly sovereign people. Charlottetown, placed in this larger perspective, was both a necessary and positive experience for all Canadians.

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