

CHARLOTTETOWN AND ABORIGINAL RIGHTS: DELAYED BUT NEVER RELINQUISHED

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Charlottetown constitutes from an Aboriginal perspective the all-time high point in Crown-Aboriginal relations. In 1992, Canadians and their governments began to behave as though they really wanted and intended to do the right thing: to make space and share the country—and to share power. Those hopes were delayed with the defeat of Charlottetown, but they have not been dashed.

Du point de vue autochtone, l'Entente de Charlottetown a constitué le plus haut fait de l'histoire des relations entre l'État canadien et les peuples autochtones. En 1992, les Canadiens et leurs gouvernements semblaient ainsi résolus d'assumer leurs responsabilités en partageant leur territoire et leur pouvoir. Un espoir que le rejet de l'Entente a éloigné, sans toutefois l'anéantir.

It is hard to believe that ten years have gone by since the Multilateral Constitutional Negotiations, which led as we all know to the ill-fated Charlottetown Accord, took place in 1992.

I wish to acknowledge the remarkable effort of all of the people involved during that challenging year, primarily the extraordinary participation in that process of my predecessor, Ovide Mercredi. His involvement was skilled, courageous, principled, effective and, importantly, historically accommodating.

This is not to say that I do not acknowledge the efforts of the leaders and officials of the other orders of government in Canada, both federal and provincial, those forward-looking federal and provincial leaders who to a greater or lesser degree worked with the Aboriginal parties in achieving that historic accommodation, or even those leaders who refrained from time to time from working against us and in the end joined the consensus.

I acknowledge them all, because the result, a unanimous result, constitutes from an Aboriginal perspective the all-time high point in Crown-Aboriginal relations in Canadian history.

At the time of the Charlottetown process, I was Grand Chief of the Grand Council of the Crees in Quebec. The involvement of the James Bay Cree Nation was intensive from the moment that the Aboriginal parties were admitted to the process. Throughout the process, I and the nine James Bay Cree chiefs participated both in all First Nations policy gatherings and in many of the actual multilateral negotiating sessions between the governmental and Aboriginal parties.

The James Bay Crees were also continuously represented throughout the process by constitutional counsel with a simple mandate: take all possible steps to protect and advance James Bay Cree rights in our particular constitutional and historical context within Quebec and Canada.

The *Constitution Act* of 1982 contained three key parts: Part I, concerning core powers and institutions; Part II, a new Charter of Rights; and Part III, containing just one section, s. 35, recognizing the three Aboriginal peoples in Canada (Indians, Inuit and Metis) and recognizing and affirming our Aboriginal and treaty rights.

We believed in 1982 that we had turned a corner in our relations with the Canadian Crown, away from the colonial dominance inherent in section 91(24) of the British North America Act and the Indian Act, towards recognition of our Aboriginal status and rights, and towards reconciliation of our contending sovereignties.

Sadly, it was not long before we saw that while the few but powerful words in section 35 of the Constitution Act meant a lot to us, they meant less to the courts and extremely little to the Crown.

How little did they mean? I will illustrate how little with just one post-1982 word: Oka.

Oka, as you recall, represented the triumph in Canada of the inevitable outcome of almost total landlessness, resourceless and dispossession; the deployment of state force against legitimate grievance; and the culmination of

centuries of colonial greed in the cause of the enlargement of a golf-course.

Oka caused Canadians and their governments to look at themselves in the mirror, and they did not like what they saw. They knew—and still know—of the overall landlessness and mass poverty of Aboriginal peoples; of our over-incarceration, so that some provincial prisons have 85 percent Aboriginal prisoners; of epidemics of aboriginal youth suicide and despair; of hundreds of desolate reserves without adequate housing, sanitation or clean water. They were demanding that their governments take decisive steps. Nevertheless, at the start of 1992, the federal government tried to tempt and side track us into a separate, delayed constitutional process, and then also into a royal commission, but all of the First Peoples were insistent and so at last we gained admission into the corridors of power and the halls of Canadian constitution-making as full parties.

Leaving aside the substance of the Accord for now, with respect to the Charlottetown process, for that brief year Canadians and their governments began to behave as though they really wanted and intended to do the necessary and right thing: to make space and share the country; to share power and share the lands; to share the resources; to share the Constitution; and to finally and belatedly turn their backs on a shameful history of colonial policies, domination, the use of force, and policies of dispossession and exclusion.

It was very refreshing. We had been informed that many of the provincial governments and many federal voices had argued that there would be anarchy and chaos, anger, outrage or disturbances if Aboriginal peoples were admitted to the process. These preconceptions belonged in another era. Our leaders are angry and outraged only when we are being shamefully treated, and even then we are mostly polite and restrained. After just a few days of the Charlottetown process, everyone could see that the nation's supreme business took place without difficulty when we were fully involved and honourably treated.

Indeed all of the discussions of the nation's general business were greatly enhanced. First Nations peoples were effective advocates at all four of the negotiating tables and in the policy discussions. Our delegations were well-prepared, technically persuasive, highly attentive, fully capable of compromise, principled and articulate. Whenever agreement was reached, it was genuine, respectful and elated.

The key features of the Charlottetown Accord, which now seem so extraordinary, even revolutionary, were logical and fundamentally correct. As

you will recall, they included a number of important elaborations on the content of the Aboriginal and treaty rights already in the Constitution.

First, there was the Canada clause, stating that “the Constitution of Canada, including the Canadian Charter of Rights and Freedoms, shall be interpreted in a manner consistent” with the characteristics that “the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of the three orders of government in Canada.”

Second, there was provision for Aboriginal representation in the Senate, which would be guaranteed in the Constitution, and Aboriginal senators would have the same role and powers as other senators plus a possible double majority power in relation to certain matters materially affecting Aboriginal people.

Third, there was provision that the Constitution would be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada.

A contextual statement would be inserted in the Constitution, reading as follows: “The exercise of the right of self-government includes authority of the duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction: to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and, to develop, maintain and strengthen their relationship with their lands, waters and environment so as to determine and control their developments as peoples according to their own values and priorities and ensure the integrity of their societies.”

This important right was subject to negotiation before litigation.

Fourth, with respect to treaties with Aboriginal peoples, the Constitution would be amended as follows:

- treaty rights would be interpreted in a just, broad and liberal manner taking into account the spirit and intent of the treaties and the context in which specific treaties were negotiated;
- the governments of Canada and the provinces would be committed to establishing and participating in good faith in a joint process to clarify or implement treaty rights, or to rectify terms of treaties when agreed to by the parties;
- participants in this process would have regard, among other things and where appropriate, to the spirit and intent of the treaties as understood by Aboriginal peoples.

For a brief year Canadians and their governments began to behave as though they really wanted and intended to do the necessary and right thing: to make space and to share the country; to share power; to share the lands and share the resources; and to share the Constitution.

The minimum standards with respect to the positive recognition of our status and fundamental rights that we set at Charlottetown are not forgotten. The implementation of these rights, our fundamental human rights, may have been delayed but they will never be relinquished.

Fifth, with respect to the financing of governments of Aboriginal peoples, a political accord would commit the governments of Aboriginal peoples to:

- promoting equal opportunities all Aboriginal peoples' well-being;
- furthering economic, social and cultural development and employment opportunities to reduce disparities in opportunities; and
- providing essential public services at levels reasonably comparable to those available to other Canadians.

Sixth, which was critically important and consistent with our place in the federation, there would be Aboriginal consent to future constitutional amendments that directly refer to the Aboriginal peoples.

By way of broad features, this Charlottetown process is one of only three undertakings in Canadian history that represent a consensual, non-colonial model of Crown-Aboriginal relations. I have already mentioned section 35 of the Constitution Act. The third was the Royal Commission on Aboriginal Peoples, which was established according to a broadly negotiated mandate under the supervision of Chief Justice Brian Dickson, and whose five Aboriginal and four non-Aboriginal commissioners conducted their extensive work over five years with all sectors of Canadian society.

The consensual nature of the Charlottetown process was an inevitability once the decision was made to let First Peoples into the room. Once in the room, it was inconceivable that First Peoples be relegated to past conceptions of where we belonged—at the back of the room, or at the back of the room but denied speaking rights, or at the back of the room and denied speaking rights and denied legal counsel.

Unfortunately, as we all know, the effort of the process bore fruit in the form of the Charlottetown Accord, whose seeds were never planted and whose intended national constitutional amendments never grew nor flowered.

Just three years later in 1995, the Royal Commission released its final report. The key finding is as follows:

It is not difficult to identify the solution. Aboriginal peoples need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities

and structure the employment opportunities necessary to achieve self-sufficiency. Currently, on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.

In September 1995, Oka was repeated at Ipperwash, again over a small piece of the last remnant of a stolen Indian reserve. In 2000, Oka was repeated at Burnt Church, again over a small piece of the last remnant of a stolen treaty resource. I had just become national chief that summer.

The government of Canada is actively pursuing a neo-colonial, assimilation and extinguishment agenda, one that is diametrically opposed to that of the Charlottetown Accord. The Crown's explicit agenda is now clearly expressed in such approaches as its "non-assertion fallback release" policy and the unilateral imposition of Governance Act refinements to the Indian Act. Ten years have passed since Charlottetown, but we may as well be back in the 1800's.

Of all groups and peoples in Canada, only Aboriginal peoples are being singled out for the systematic surrender and extinguishment of their constitutionalized rights. In the case of the Metis, the application of these rights has been denied from the outset. In the case of impoverished First Nations, we are now literally being told: Here's the deal, take it or leave it: you can have a few tens of million dollars as once-only payments, and limited defined rights, if you forever agree to never again assert your Aboriginal and treaty rights, as though they never existed, and if you agree never to take the Crown to court to challenge the validity of these terms.

We First Nations peoples are patient. We are restrained in the face of epidemic suicide, tuberculosis, over-imprisonment, hopelessness, and mass poverty and unemployment. But we are also very committed and determined.

The minimum standards with respect to the positive recognition of our status and fundamental rights that we set at Charlottetown are not forgotten. These standards were about the simple solution identified by the Royal Commission: lands, resources, and recognition of inherent rights including the right of self-government. The implementation of these rights, our fundamental human rights, may have been delayed, but they will never be relinquished.

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