

HOW WE GOT THE CHARTER: A REALITY CHECK

Hugh Segal

The Charter of Rights and Freedoms is the end result of a decade of discussions for terms of patriation of the Canadian Constitution that began with the Victoria Conference in 1971 and finally concluded a decade later with the agreement between Ottawa and nine provinces on patriating the Constitution with a Charter of Rights. The terms of patriation, and the amending formula, were always key drivers of the process. The Charter was essentially an add-on toward the end, and even then was only made possible in the November 1981 agreement because of the inclusion of the notwithstanding clause. Hugh Segal, who represented the Ontario government throughout, and was present at the creation of the Charter, separates Charter myth from reality.

La Charte des droits et libertés est le résultat d'une décennie de discussions sur les modalités de rapatriement de la Constitution canadienne, qui ont commencé à la Conférence de Victoria de 1971 pour se terminer dix ans plus tard avec l'entente conclue entre Ottawa et neuf provinces sur un rapatriement accompagné d'une Charte des droits. Les modalités de ce rapatriement, de même que sa procédure de modification, ont toujours été des vecteurs clés du processus. La Charte était en essence une adjonction de fin de parcours, et même à ce stade, elle a été intégrée à l'entente de novembre 1981 grâce à la clause dérogatoire. Hugh Segal, qui a représenté le gouvernement ontarien tout au long du processus et qui était présent lors de la création de la Charte, départage les mythes de la réalité.



Mythology in the capturing and transmitting of a country's history is both unavoidable and not without value. But there are times when the distortions offered by the myth-makers can be harmful and disruptive. This is precisely the case about the relationship between the Charter of Rights and Freedoms in the *Constitution Act* signed by the Queen on April 17, 1982, in Ottawa. The main purpose from the very beginning of discussions in Victoria at the beginning of the 1970s was, and remained, the patriation of the Constitution from the control of the British Parliament and the clear establishment of the sovereignty of Canadian parliaments and legislatures over our own constitution and its further amendment. The Charter of Rights and Freedoms became part of the Trudeau patriation strategy because the idea of it polled extremely well among almost all population groups of both languages and all regions. It, of course, had its own individual merits for inclusion in the Constitution, and should not be in any way diminished by its political role as a popularity prop to make the patriation process relevant and reasonably salient to Canadians generally.

At the time, I was associate secretary of cabinet for federal provincial relations for the province of Ontario, and participated in various negotiation meetings among federal and provincial officials leading up to the fateful meetings in Ottawa in November of 1981. The Charter was a critical part of Ontario's strategy shared in common with the federal government and the province of New Brunswick. It was a valuable part of the case made by Premier Bill Davis to countless meetings of Conservatives and others across Ontario and Canada about the Charter's capacity to be a restraint upon all governments' abilities to limit individual rights or proceed in arbitrary ways. But to suggest that it was the central thematic or core motivation of the patriation process and package is to wildly overstate its importance and role.

In fact, from Ontario's perspective, and I suspect from that of the indefatigable Richard Hatfield, New Brunswick's remarkable premier, the key motivation for the post-1980 constitutional reform process was the commitment made by Davis, Hatfield, Peter Lougheed and other leaders during the 1980 referendum in Quebec to the effect that if Quebecers voted no to the sovereigntist option, Canadian leaders from other provinces

could be counted upon to work for constitutional reform and improvement along with Quebecers thereafter.

On a succession of small aircraft flights across the reaches of Ontario, I would ask Premier Davis whether supporting Trudeau on the Constitution — despite his obvious unpopularity in the West, in rural Ontario and within the Ontario Conservative caucus at Queen’s Park — was really worth it. His response was always clear and direct: “Ontario made a promise to the people of Quebec in the referendum. Ontario will keep that promise.”

Reflecting on how the mythology of the Charter has negated the historical reality of the myriad of meetings held, agreements reached and failed, and resolutions in Parliament and legislatures during the decade of activity between the failed Victoria First Ministers’ Conference of 1971 (when an agreement was reached that was later vacated by the Bourassa administration during its first incarnation) and November 1981 is helpful for two reasons. It allows us to reflect on this distortion effect in more contemporary contexts, and it allows us to put the Charter of Rights and Freedoms in some appropriate perspective.

Canada was not in any way bereft of rights and freedoms prior to the Charter, just as we were not lacking in constitutional protections. Nor in fact were we lacking in a constitution. The fact that our constitution was an act of the British Parliament, passed in 1867, did not diminish that fact that it was passed by that parliament on the basis of an agreement reached at Quebec City and Charlottetown between 1865 and 1867 by the Fathers of Confederation, who represented democratically elected governments in the province of Canada (Quebec and Ontario) and the founding provinces of New Brunswick and Nova Scotia.

From the *Quebec Act* of 1774, to the *Padlock* case in Quebec under Duplessis, to the *Ontario Human Rights Act* brought in under Premier Robarts, to the first piece of legislation introduced by the newly elected Premier Lougheed in Alberta (the *Alberta Human Rights Act*) Canadian legislatures and courts had been acting to protect human rights and uphold the core rights of freedom of expression, freedom of association, freedom of religion and the rest for centuries. The Quebec legislature allowed Jews to sit in that elected body long

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While chronologies of events can be troubling to the myth-makers, they are instructive in terms of what actually happened as opposed to what the myth-makers would wish us to believe happened.

In 1978, near the end of its mandate, the Trudeau administration published *A Time for Action*, making the case for constitutional reform. The government was unpopular for various reasons, notably, reversing its commitment in the 1974 election not to impose price and wage controls, which it did in 1975, and the rather large dimensions of a deficit and debt compilation which had begun in earnest under Trudeau and Turner in 1973. In October of that year, a First Ministers’ Conference met on the Constitution but could not reach agreement. On January 25, 1979, the Task Force on National Unity, the Pepin-Robarts Commission, was appointed, which advised that there was a need for a new and distinct Canadian constitution that re-balanced the federal provincial relationship and was more reflective of regional and Quebec linguistic and cultural concerns. (This task force took many months of hearings and discussions.) A further meeting of first ministers took place to follow up on the one of the previous October, but no progress was made. The defeat of Trudeau in May 1979, by the Progressive Conservatives led by Joe Clark, took place despite (or perhaps because of) the focus on the Constitution by Trudeau. The defeat of Clark’s minority government in the House in December 1979, and on the

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Prime Minister Pierre Trudeau and the Queen at the signing for the patriation of the Constitution with an entrenched Charter of Rights — April 17, 1982. The signing ceremony was the culmination of a decade of strenuous efforts by Trudeau to bring the Constitution home from Westminster, then considered to be more central to the purpose of the process than the Charter itself.

hustings in February 1980, had more to do with the political incompetence of that administration than the Constitution, which did not really come up. Indeed, had the Clark government not fallen, Trudeau would have remained in retirement, and there would have been no Charter.

The victory of the “Non” side in Quebec on May 20, 1980, reflected the desire of Quebecers both to give a reformed constitutional framework in Canada their support, and to reject the risk/benefit mix associated with the sovereignist experiment. After the referendum, Ottawa suggested a 12-item agenda for constitutional reform, 12 items that included but were in no way dominated by the Charter. Items like Supreme Court appointment processes, opting out options on federal programs, the nature

of the amending formula going forward, etc., were at least as important if not more so than any Charter reference.

Ottawa failed once again to get agreement, really until the late fall of 1981. Premiers who were opposed to unilateral patriation and the imposition of the Charter launched court actions to slow Trudeau down. Neither the British government nor the Canadian Parliament was particularly enamoured of being caught up among feuding Canadian governments.

Liberals had to use closure to impose a motion on the House of Commons, in October of 1980, to establish a joint committee of the House and Senate to consider constitutional reform proposals. In November of 1980, a Special Joint Committee of the House

and the Senate began examining the proposed joint address to Her Majesty respecting the patriation and amendment of the Constitution of Canada.

At this point, a combination of events outside Trudeau’s control began to reshape the debate and the nature of the process. Sir Anthony Kershaw’s Westminster Parliament Committee on Foreign Affairs concluded in a formal report that the British Parliament was under no obligation to pass a request from Ottawa if there was no agreement concurrently from other Canadian provinces. Quebec and other provinces rejoiced in this expression of British parliamentary sovereignty over Canadian affairs — a sovereignty that would not be pushed around by anyone, actually. Various courts of appeal across the provinces ruled in different ways about

what capacity Canada had to proceed to full constitutional patriation without provincial accord. With the decision taken by the Supreme Court of Canada to hear an appeal on the Manitoba Court of Appeal ruling (which did support Ottawa's right to proceed), both the House of Commons and the Senate adopted separate motions that would see neither house proceed with a vote on the constitutional motion until such time as the Supreme Court ruled. In a historic and Solomonic ruling on September 28, 1981, the Supreme Court determined that while it was legal for Ottawa to proceed (a 7-2 judgment), it also ruled, by a 6-3 margin, that constitutional convention required substantial provincial consent.

So when the provinces and Ottawa went back to the table that fall, they were driven by a series of events, resolutions, British House of Commons reports and a political context not in any way shaped by any debate on the Charter of Rights and Freedoms or its content. The context was shaped by a Supreme Court ruling that made reaching a reasonable consensus absolutely essential, backed up by a British parliamentary reality inhospitable to a lack of reasonable consensus among Canadian government and provincial petitioners.

In fact large measures of the opposition to the patriation process by many of the provinces were driven by their concerns about the erosion of parliamentary sovereignty and legal precedent classically and since Magna Carta, the core protection of individual rights and freedoms, and by the rather Americanized approach reflected by a specific charter of rights and freedoms. It is not lost on some of the participants that the worst deployment of arbitrary measures in Canada's postwar history, namely the imposition of the *War Measures Act*, the arrest in the middle of the night of hundreds of Quebecers (not one of whom was ever charged

with anything), a blunder that fuelled the sovereignist movement for years to come, was brought in by the same advocate of this new Charter of Rights.

The final negotiations in early November of 1981 are also shrouded in mythologies about who did what where and how much it mattered to

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the outcome. The clear dynamics to the negotiation I saw as a member of the Ontario delegation, however, were few but compelling: the inability of a sovereignist Lévesque government's delegation to agree to anything that validated the federation had much more to do with their conduct than their trumped-up sense of exclusion and humiliation (the first being untrue and the latter being an electoral tactic to be used incessantly); René Lévesque's impulsive and spontaneous agreement in a closed session debate with Trudeau to a referendum on the Constitution (without consulting the seven other anti-unilateral-patriation so-called "gang of Eight" dissenting premiers, which freed them to look for their own separate peace); when an impasse seemed unavoidable, Loughheed's insistence on a day and evening of further discussions — as rushing out to announce failure seemed counter-productive); the proposal that was formally advanced by Saskatchewan and Newfoundland for a *non obstante* or "notwithstanding" clause as an integral part of the Charter, that affirmed the right of any parliament or legislature to introduce legislation "notwithstanding the Charter" which could last for five years. This was done so governments

could target social programs (to Aboriginal senior citizens in Saskatchewan, for example) or act in emergency times without being found to be discriminatory under the Charter.

There would have been no Charter without this bridging and key provision, which bridged between unelect-

ed courts and parliaments, and between the British tradition of parliamentary supremacy and the French Napoleonic and ensuing American tradition of explicit declaration of the rights people had. Davis informed Trudeau by telephone that this was a fair and appropriate package, and rejecting it (which some in the Trudeau cabinet, if not Trudeau himself, wished to do) would terminate Ontario's support.

As we observe a quarter-century for the Charter, we should in our reflections remember that we are celebrating a quarter-century for Canadian constitutional sovereignty, the democratic and judicial process that brought it about and the various provisions of that 1982 Constitution, which, while inclusive of the Charter, were and remain far more important and significant than the Charter itself. It was that framework that enabled the Charter to become a reality, and not the other way around.

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