

## *The End of Canadian Dualism?*

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by Pierre A. Coulombe

An analysis of the latest constitutional plan brings us back, once again, to a crossroads. Basically, we have been there since 1982. What the failure of the Charlottetown Accord confirms is that English Canada appears to be pursuing national affirmation, relying on a discourse based on the *Canadian Charter of Rights and Freedoms* that leaves little room for competing forms of nationalism, whether native or French-Canadian. This discourse makes it improbable that a constitutional agreement will become a reality.

One recalls how the rejection of the Meech Lake Accord had sounded the death knell of executive federalism. What formerly seemed justified in the name of maintaining the fragile balance between the two national communities would from then on be the subject of condemnation and contempt: condemnation because, it was said, executive federalism served provincial interests more than "national" ones; and contempt because it placed greater value on the supposedly elitist discourse of the negotiators than on the voice of so-called ordinary Canadians. Since blame was assigned to executive federalism, it was most important not to see the rejection of Meech as a rejection of Quebec's claims. The next round would be more sound: it would encompass the claims from the West and the native peoples and would be the fruit of public participation. Above all, however, it would reflect English Canada's self-image, as seen through the prism of the *Canadian Charter of Rights and Freedoms*.

In due course the Charlottetown Accord was negotiated. It, too, would fail, despite unprecedented participation by Canadians in developing it. There is no point in recalling here the sad details of that failure. This time, the new scapegoat would be the vote of non-confidence in the Mulroney government and, for good measure, a rejection of the entire political class. It was as if many Canadians were shouting the "No" they

wished they had said during the Meech round. Behind the scenes, however, the Charlottetown Accord was arraigned by the proponents of Canada's civic identity, strong in the Charter.

The magnitude of this latest failure is underestimated. It is indeed a monumental failure, not just a chance accident on the road toward the inevitable compromise. It expresses what more than one observer has noted, a powerful discourse on the *Canadian Charter of Rights and Freedoms* that endows with new legitimacy the traditional refusal to recognize the two national communities within the federation.<sup>1</sup> In a way, it is the latest attack on Canadian duality, enlivened this time by a deficient liberal morality.

Firstly, this Charter-based political culture of English-speaking Canada evokes a national civic identity that transcends federalism and the communities that divide it.<sup>2</sup> From this perspective, the Charlottetown Accord was problematic because it was to entrench the fact that some Canadians belong to a community of identity other than the Canadian "nation". The unity of the Canadian people—or at least the search for a form of unity—would have been undermined in advance by recognition of values conferring different constitutional statuses on persons of different origins or from different regions. By referring to Quebec as a distinct political community, the Charlottetown Accord—like the Meech Lake Accord—would have challenged the plan for equality among citizens, the keystone of this new national identity.

Secondly, some supporters of the "No" side were able to brandish the Charter to invoke the risks to human rights the Accord would have brought with it. Pierre Trudeau's categorical remarks naturally come to mind. Although his extreme opinions were not universally shared, a number of persons still considered that the Accord threatened individual rights. Three points were most often raised.<sup>3</sup> Firstly, the Canada clause seemed to create a hierarchy of rights that, sooner or later, would have eroded the system of interpreting the rights and freedoms contained in the Charter. Next, the distinct society clause might well have limited, in Quebec, the

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protections provided by the Charter. Lastly, the Charter was prevented from addressing too many aspects of the exercise of self-government by native people.

It is obvious that such a discourse is in conflict with the claims to nationhood by French Canada in general and Quebec in particular—not that individual rights are less respected there than elsewhere.<sup>4</sup> After all, both the Quebec courts and the Supreme Court of Canada struck down the sections of Bill 101 making French the sole language of signage. Furthermore, there is a tendency to forget that not only the *Canadian Charter of Rights and Freedoms*, but the Quebec Charter of Human Rights and Freedoms itself, supported the merchants' cause. The issue of conflict between individual rights and collective language rights, then, has its source in Quebec itself. The Canadian Charter is problematic more because the idea of a Canadian people with an identity based on the Charter is hardly compatible with the concept of Canadian duality. The Charter culture makes it possible to unite citizens under the auspices of a system of rights guaranteeing equal status within the nation regardless of age, sex, language, ethnic origin or other factors. It is, therefore, a dynamic that cuts through French Canada as a national community by appealing to pan-Canadian identities and thus circumventing the relationship between individual citizens and duality.

The problem of the Charter is different for the native people. For them, it is more a tension between liberal and community values, a tension that took on its full meaning during the debate on equality between the sexes and self-government. The liberal equation is simple: native people have the right to have the conditions of their own identity preserved, as long as the liberal values of free choice and individual autonomy are given priority over community traditions. However, vulnerable minority communities hesitate to pledge allegiance to a liberal discourse that too often masks cultural imperialism. Indeed, it is easy for members of a dominant group, who know that market forces work to their advantage, to invoke liberal morality. Of course, the misuse of individual rights does not mean we should do away with them. That is not the point. The challenge lies in the search for a balance between the conditions of political citizenship—as imposed by the Charter—and the conditions of belonging to a community.

In summary, three major forces are in opposition: the new political culture of Canada outside Quebec, based on the Charter; the will of French Canada to escape being reduced to folklore in the restructuring movement of the Canadian dynamic; and native resistance to an inflexible liberal discourse.

A number of difficulties loom. Logically, it is hard to imagine how the various players could come to the

constitutional table with fewer claims than they had previously. It is unlikely that the Western provinces will accept less than a genuine triple-E Senate. It is also improbable that Quebec will be satisfied with entrenchment of the status quo regarding the distribution of legislative powers, or that asymmetrical federalism will replace the doctrine of equality among the provinces. Where native issues are concerned, the Canadian public can be expected to be more vigilant and even more mistrustful about what implementing self-government means in concrete terms. To these factors are added public participation, which will only increase, and English Canada's growing fascination with a constituent assembly—a process that may well drown Quebec's claims once again in the myriad of interests invoking the Charter, not to mention the strong likelihood that in that process French-Canadian minorities would find themselves relegated to the background.

A possible response to these concerns is that in politics compromise is always possible. It is clearly felt that the compromise approach of the Charlottetown Accord will have to be set aside. When agreement is seen as compromise with one's conscience,<sup>5</sup> positions can be expected to harden.

Beyond political strategies, however, one point must be acknowledged concerning French Canada's position in the Canadian whole. The *Constitution Act, 1982* and the resulting political culture make the status quo increasingly unacceptable. The issue is no longer knowing how Quebec could gain advantage by using constructive ambivalence in a federalism that is manageable, at least in practice. That federalism, which had long kept alive the French-Canadian dream of full duality, has been seriously damaged since 1982.<sup>6</sup> Since that time, a system of rights and a concept of citizenship, bolstered by a Charter as a common measure of both, has been created and has resulted in a clash of national affirmations.

Does this new system not protect the minority French-speaking communities? Certainly, constitutional entrenchment of bilingual federal institutions and the right to education in French constitutes undeniable progress. Paradoxically, the discourse on the Charter itself could, in the long run, call such rights into question. Are they not, after all, collective rights, that is, rights that favour certain individuals depending on whether they belong to a specific language group? While there is no need to exaggerate the danger, the new discourse on redefining Canadian citizenship and the role of this discourse in challenging duality must nonetheless be understood.

What does the future hold? Certain separatist rhetoric will undoubtedly try to convince Quebecers of the virtues of independence, which ignores the problem of the minorities—both English-speaking in Quebec and French-Canadians elsewhere and which fails to explain the very real risks of independence: a heavier tax burden, complete submission to a foreign monetary policy, renegotiation of the Free Trade Agreement and land claims. Not that secession has no charms: the image of an independent Quebec is crystal clear, purged of a federal structure that cannot be renewed without becoming more cumbersome. No longer would citizens' attachment to this fully sovereign political community be mixed; divided loyalty and scattered identity would thus be things of the past. Having one's country is no small thing. (The same is also true for Canada, which, once liberated from competing Quebec nationalism, could pursue its own nationalism with one less obstacle.) This plan, then, is a sound asset in the romantic imagination, but is still too often silent about improvements in day-to-day life.

One can also imagine a renewed federalism that would fit French Canada and gain the confidence of a majority of Quebecers as well as the support of the minority French-speaking communities. Such a form of federalism would fall somewhere between the Meech Lake Accord and the "beau risque" of 1985. It would be based on a recognition of duality across Canada and on Quebec's unique place in the federation. Undiluted recognition of French Canada as a nation and Quebec as a distinct society would thus have to be obtained. The language issue would also have to be cleared up in order to guarantee the integrity of Quebec's Charter of the French Language and meet the needs of the minority language communities as well. (In this regard, however, the Brown's decision had provided a perfectly reasonable compromise.) These aspects would be accompanied by commitment by the governments—including the Quebec government—to fostering minority French-speaking communities in all parts of Canada. Any reform to the central institutions would have to be approved by seven provinces, necessarily including Quebec, and representing 50 per cent of the population. Federal spending power in areas of provincial jurisdiction would be delineated, allowing for the right to opt out with full financial compensation. Where the distribution of powers is concerned, most Quebecers would probably want their government to have more control over labour market training, regional development and immigration, as well as increased power in the telecommunications sector and within the international French-speaking community. Quebec could take part in appointing Supreme Court justices,

three of whom would be from Quebec, and could even have the power to appoint Quebec superior court judges. Lastly—and not least—in Quebec this constitutional reform should replace the *Canadian Charter of Rights and Freedoms* almost in its entirety with the Quebec Charter of Human Rights and Freedoms, and the Quebec Court of Appeal would become the court of last resort.

Clear, undiluted entrenchment of such reforms would give French Canada control of its destiny as a nation. The catch is that, in the rest of Canada, support for such a plan cannot be obtained except through acceptance of asymmetrical federalism. There is every reason to believe that the simplistic doctrine of equality among the provinces and among citizens would still be an obstacle. Furthermore, it is hard to imagine how English Canada would consent to Quebec's no longer being subject to the Charter, since the Charter is the symbol and the supreme instrument of the pan-Canadian civic identity. In summary, resistance to the idea of a genuine special status for Quebec as the home of the French-Canadian nation seems more rooted than ever in the new political culture.

*A break with the Constitution Act, 1982, then, may seem necessary from the outset. That Act pulled Quebec into a dynamic that hardly meets its needs, not so much because of its content as because of the concept of equality connected with it.*

As Christian Dufour lucidly demonstrates, the Charter is the basic element of a new English Canadian nationalism that is resistant to any recognition of Quebec's being different that is not expressed in terms of folklore.<sup>7</sup> That is why he proposes a break after having obtained popular support with the post-1982 Canadian federation. Elsewhere, Guy Laforest argues that according to Locke's theory of consent such a break would be legitimate.<sup>8</sup> Indeed, the *Constitution Act, 1982* changed Canada's social contract without the consent of Quebec's elected representatives while simultaneously diminishing the powers of the National Assembly. As René Lévesque wrote to his federal counterpart, if the representatives of Lower Canada had realized in 1865 that agreeing to the federal plan would eventually have deprived them of all protection against constitutional changes imposed by others, they would certainly never have given that agreement.<sup>9</sup> Since the *Constitution Act, 1982* is no less illegitimate ten years later, a unilateral

declaration of sovereignty would appear entirely justified.

That declaration of sovereignty could therefore be, paradoxically, the only means for Quebec to affirm its identity as a distinct society in renegotiating the federal contract. It remains to be seen whether that declaration would create uncontrollable momentum toward independence. Whether or not that occurred, one can see from here the resulting legal tangle, not to mention the reaction of the rest of Canada.

From the perspective of future constitutional reform, French Canada must overcome two obstacles to its development. The first, which has been the main subject of this article, is the Charter culture, which may well further weaken the concept of Canadian duality. The solution offered in the Meech Lake Accord and to some extent in the Charlottetown Accord was to circumscribe that political culture using protective mechanisms such as the linguistic duality and distinct society clauses, the double Senate majority, and guaranteed representation in the House of Commons. That did not work. For the moment, it is illusory to think of starting up negotiations again on the same basis.

The second obstacle is the manipulation of concepts so as to mask the issue of French Canada behind the problem of Quebec. During the past thirty years, the issue of the French Canadian nation has been evaded, to the point where that expression has become archaic. However, any constitutional solution must take into account this reality, both in Quebec and in the rest of Canada, if it wishes to manage latent conflicts in a sound manner. That acknowledgment means that the future of the French-speaking minorities outside Quebec must regain its rightful place on the list of Quebec's constitutional priorities. It also means that Quebec's nationalist discourse must become clear about its *raison d'être*. Agreement among Quebec's minority communities and its French-Canadian majority depends on this transparency. Venturing to predict the future, I would say that the issue of the minorities both inside and outside Quebec will be the thorniest of constitutional problems to come. ─

## Notes

1. On the role of the Charter in this new political culture, see Alan Cairns, "Citizenship and the New Constitutional Order", in this journal, Vol. 15, No.3 (fall 1992); Louis M. Imbeau and Guy Laforest, "Quebec's Distinct Society and the Sense of Nationhood in Canada", *Quebec Studies*, No. 13 (1991-92); Kenneth McRoberts, "Separate Agendas: English Canada and Quebec", *Quebec Studies*, No. 13 (1991-92).

2. The following passage is an example of this evocation: "The vote on the Charlottetown accord should not be seen as a rejection of French Canada or the country's indigenous peoples. ...On Monday, Canadians said No to this vision of Canada... Canada is not a community of communities. Canada is not two solitudes, nor 10, nor 100. Canada is a nation of 27 million individuals." Tami Pailin Nolan, "Voting No has Brought us Together", *Hamilton Spectator*, October 28, 1992.

3. See "Legal Analysis of Draft Legal Text", distributed by a group of experts headed by Lorraine Eisenstat Weinrib, October 21, 1992.

4. See Paul Sniderman et al, "Political Culture and the Problem of Double Standards: Mass and Elite Attitudes Toward Language Rights in the *Canadian Charter of Rights and Freedoms*", *Canadian Journal of Political Science*, Vol. 22 (1989), pp. 259-284. See also R. Johnson and A. Blais, "Meech Lake and Mass Politics", *Canadian Public Policy*, Vol. 14 (special supplement), pp 25-42.

5. Examples of this perception include the editorials by Lise Bissonnette in *Le Devoir* during the referendum campaign.

6. In "Quebec's Distinct Society and the Sense of Nationhood in Canada", Louis Imbeau and Guy Laforest describe this issue well from the perspective of André Laurendeau's heritage.

7. *La rupture tranquille*, Les Éditions du Boréal, 1992, p. 72.

8. "Protéger et promouvoir une société distincte au Québec", a paper presented to the Commission on the Political and Constitutional Future of Quebec (working paper No. 4 - views of experts), Bibliothèque nationale du Québec, January 17, 1991, pp. 526-528.

9. "De Premier ministre à Premier ministre. Où nous en sommes, ici au Québec", *René Lévesque: Textes et entrevues 1960-1987*, Les Presses de l'Université du Québec, 1991. pp. 337-338.