*"But Where's the Association?"*
***continued from page 101.***

nations within Quebec. One would have to be extremely naive, or entirely ignorant of the recent course of world events, to think that these conflicting territorial claims will permit a straightforward peaceful reconciliation. Any proposal for the future of Quebec-Canada relations after secession that ignores this reality is, in the last analysis, a dangerous fairy tale. Failing a negotiated settlement before the referendum, in the case of a "yes" vote, Canada will be forced to choose between the Aboriginal and the separatist territorial claims and will have to choose quickly. This choice will have a fateful impact on the future of the Canada-Quebec relationship.

A careful analysis of the three-party agreement reveals at least one thing—that what the sovereigntists are after is separation *tout court*, not an economic and political union, a third option, or a decentralized confederation. The agreement proposes the kind of relationship that now prevails between separate, sovereign states during periods of relative peace and stability. The question, of course, is whether even this will be easy to build from the ashes of what may become a bitter conflict of absolutes.

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# EDITORIAL

## The Charter's Impact on the Criminal Justice System

*by Jamie Cameron*

### The Politics of Justice

As Canada heads into summer, justice issues continue to command the public's attention. Barely a day or week passes without Justice Minister Rock announcing a new policy initiative or defending others already in process. A short time ago, Parliament enacted the Minister's gun control legislation, as well as a sentencing bill, which creates enhanced penalties for crimes motivated by bias, including discrimination against gays. While the ink on those measures was drying, a mandatory DNA testing law was introduced and passed in one day. Yet to come is legislation which will outflank the Supreme Court of Canada's controversial drunkenness decision, a statutory solution to the income tax/child custody/equality quagmire, and amendments to federal human rights legislation that will add sexual orientation to the existing list of prohibited grounds of discrimination.

The politics of justice this year have been dominated by a cacophony of noisy, fractious voices. Though debate on controversial issues has always been spirited, who would have predicted such powerful resistance to gun registration or the vehemence of opposition to "special rights" for gays? There can be little doubt that the Charter has ignited the debate on these issues. No longer are groups and individuals content to express polite interest: as stakeholders under the Charter they demand a voice and role in the process.

In the courts, the Charter has wreaked havoc on Canada's system of criminal justice; today the accused enjoys protection that would have been unimaginable ten years ago. As might be expected, the public vented its anger when the Charter caused thousands of criminal charges to be stayed and accepted extreme intoxication as a defence to sexual assault.

Meanwhile, the Charter has been quietly altering the underlying assumptions of our *system* of justice. Changes to the system, which up to now were less dramatic, have been exploded by the Bernardo trial.

### The Homolka-Bernardo Proceedings

Canada will be a long time recovering from the crimes of Karla Homolka and Paul Bernardo. It is now comprehensible that an attractive married couple could plan and carry out the abduction and protracted sexual torture of two teenage girls, without arousing suspicion. The sordid details of a third death, Ms. Homolka's own sister, have also entered the public domain. These acts are only comprehensible because they are indisputably a matter of fact, having been recorded, in a twisted bid for posterity, on several hours of audio-video tape.

From the time Ms. Homolka turned herself in to authorities in 1993 to the present, the public's right to know has been hotly debated, and has come sharply into conflict with competing interests such as the accused's right to a fair trial and the privacy and dignity of the victims and their families. Two years ago, when Ms. Homolka's plea and sentence were settled, members

of the public and foreign press were excluded from the courtroom. The Canadian press was granted access, albeit under threat of contempt for any breach of a publication ban that was near absolute.

That ban was not lifted until May 1995, when the Crown's case against Mr. Bernardo began. In the interim, the sex tapes found their way to the Crown's office. Those tapes provoked a face-off between the press and the families of the victims (including one surviving victim), who bypassed the Crown and went directly to court. They sought to close the courtroom and seal the file of that evidence or otherwise prevent those in court from hearing and seeing the audio-video record of these crimes. The press, in turn, invoked the public's right to know, not only about Mr. Bernardo's deeds, but Ms. Homolka's deal with the Crown as well.

For a time, the Crown and accused were relegated to secondary status in the proceedings. In the end, the trial judge struck a compromise that restricts access to the videos involving the victims, but broadcasts the soundtrack in the courtroom. On further appeal, the Supreme Court of Canada declined to intervene.

### Criminal Justice and the Charter

These proceedings are a powerful example of the Charter's impact on the process of criminal justice. Trials no longer conform to an erstwhile conception of justice, which pitted the Crown against the accused, in a contest regulated by the judge and jury. Armed with the Charter, third parties, which include the public, the press, victim/witnesses and advocacy groups, have entered the fray. As a result, the equilibrium of traditional relations between the Crown, the accused, and the judge has been upset. Common law justice is based on a set of assumptions that simply cannot accommodate third-party stakeholders under the Charter.

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The roles and responsibilities of the Crown, accused, and judge have been thrown into confusion as a result. In the past, the Crown represented the public in criminal proceedings and, in doing so, made difficult choices that were accepted, for the most part, as a matter of public trust. The Charter has shattered the fiction of a monolithic public and caught the Crown in an awkward net of conflicts. Decisions once made in the public interest are now challenged by third parties who claim a direct point of entry into the system. It is no longer clear who, and by what authority, the Crown represents in criminal proceedings.

Meanwhile, the accused has unquestionably reaped benefits from the Charter. Investigative procedures are subject to the Charter and in prosecuting charges, the Crown is lumbered by a variety of constraints. One advantage of common law justice was that the accused confronted a single adversary: the Crown and its witnesses. The Charter's third-party entitlements have due process implications for the accused who now may face any number of parties, in addition to the Crown, in court.

Still, the judges are most deeply affected. Ironically, their powers have been both contracted and expanded by the Charter. At common law, the judiciary had extraordinary authority to control criminal proceedings. Rightly or wrongly, third-party participation and access to the courts have become matters of entitlement under the Charter, not a privilege to be bestowed or withheld by judges. The trial of O.J. Simpson is a compelling example of the public's right to know run amok: while Judge Ito struggles daily to control in-court proceedings, the out-of-court media circus has unquestionably tainted the integrity of justice in America. When the public's right

***Continued, see "The Charter's Impact" on page 104.***

With this issue, Jamie Cameron steps down as Co-Editor of *Canada Watch*. Professor Cameron, who was *Canada Watch*'s Legal Editor in 1992-93 and Co-Editor from 1993-95, will be on sabbatical leave next year.

Professor Patrick Monahan, who was Co-Editor of *Canada Watch* in 1992-93, its first year of publication, will return as Co-Editor along with Professor Daniel Drache, Director of the Robarts Centre for Canadian Studies.

*"The Charter's Impact" continued from page 103.*

to know will peak and at what cost is anybody's guess.

While undercutting the judiciary's authority to control the trial process, the Charter has granted judges extraordinary powers to shape and decide public policy. By recalibrating the scales of criminal justice, the judiciary has triggered demands for greater accountability and transparency in the justice system. The judiciary has responded to its loss of authority with publication bans, sealing orders and other restrictions on access. In the circumstances, measures that frustrate the public's demand for accountability can only arouse suspicion and cause a loss of legitimacy.

*"By recalibrating the scales of criminal justice, the judiciary has triggered demands for greater accountability and transparency in the justice system."*

### A Sea Change

We are witnessing a sea change in Canada's justice system. The upheaval of traditional assumptions about the trial process is accompanied by dramatic shifts in the public's perceptions and expectations of the system. The time is now for a response. First and foremost, legislation is needed to establish rules of access and participation in criminal proceedings. Just as important, we must begin the difficult task of rethinking the underlying assumptions of our justice system.

*Jamie Cameron is an Associate Professor at Osgoode Hall Law School, York University. The Centre for Public Law and Public Policy will publish a book titled* The Charter's Impact on the Criminal Justice System *later this year.*

# Let's Talk—The Quebec Referendum and Canada's Future

## Part One

*by James Tully*

Slightly different uses of the key terms of Canadian constitutionalism provide most Canadians with their identity as citizens. This is where the constitutional problem arises. The last five rounds of negotiations have shown that there is no single comprehensive description of Canada's constitutional characteristics agreeable to all. For example, Quebeckers tend to see Canada first as an association of two nations, but federal governments regard it first and foremost as a single, bilingual and multicultural nation. Many westerners recognize Canada as a union of ten identical provinces while the majority of Aboriginal peoples identify it as an assembly of 600 First Nations in treaty relations with the non-Aboriginal federation. Charter sovereigntists construe Canada as a single society of free and equal persons, but to linguistic minorities or the Maritime provinces, yet other characteristics are given priority. If Canadians are to recognize the diverse character of their association, they must be willing to enter into negotiations of mutual recognition with the aim of reaching agreement on a form of accommodation that gives due recognition to the similarities and differences of the different descriptions of the association.

The Meech Lake and Charlottetown accords provide evidence that this form of negotiation works. In both cases, the participants in the multilateral negotiations and public dialogues surrounding them were able to reach agreement on a form of constitutional accommodation acceptable to all. Conversely, those who did not participate, and who judged the accords unilaterally from within their customary descriptions of the association, tended to misunderstand the accommodative nature of the accords, to take the most intolerant stances and to vote them down.

In the current impasse, the claim to the sovereignty of Quebec is said to be incompatible with Canadian federalism. Is there a way to recognize and accommodate both positions? Let us see by listening first to the sovereigntists, then to the federalists.

### Quebec's Right to Secede and Two Concepts of Federalism

There are four constitutional arguments that justify Quebec's right to secede.

1) The *Canadian Charter of Rights and Freedoms* was enacted in 1982 without the consent of the people of Quebec through their representatives in the provincial assembly. This constituted an injustice from Quebec's viewpoint because it violated one of the basic constitutional conventions of the federation: the common law and liberal convention of *quod omnes tangit* (what affects all must be agreed to by all or by their representatives). On this view of liberal federalism, a fundamental amendment to the constitution requires the consent of the provincial assemblies affected. Yet, although the Supreme Court ruled that the convention would be breached, nine provinces and the