

## LEGAL REPORT

### A REFERENDUM POST MORTEM

by Jamie Cameron

#### THE CHARLOTTETOWN ACCORD: DEAD ON ARRIVAL

At 9:00 p.m. EST on October 26, 1992, one hour after the CBC's referendum coverage had begun, Peter Mansbridge pronounced the Charlottetown Accord DOA: dead on arrival. Across the country, the people's voice was heard, and it spoke definitively against the proposals for constitutional reform. To some, defeat of the referendum signified a return to the status quo.

Others argue that, at a minimum, the referendum changed the amending formula: a condition of public ratification has now been read into the constitution. However, amendments to any constitution are few and far between; that is just as true of Canada's constitution as of any other. Of much greater significance are the referendum's broader implications for democratic discourse and participation.

#### NEGATIVE CAMPAIGNING

Canada's first national referendum since the conscription debacle of 1942 marked the arrival of no-holds-barred negative campaigning. Parliamentary elections in the past have produced heated exchanges, as in the case of the 1984 and 1988 federal leadership debates. Just the same, Canadians assume that the crass manipulation that is associated with US politics—the negative advertising and smear tactics—does not apply to us.

The images of the referendum, however, were overwhelmingly negative and confrontational. By the end

of the campaign, the negativity of the Yes campaign would be indelibly imprinted on the public's mind—through the prime minister's histrionics, and an advertising campaign that included images of, among other things, a stove-top pot boiling over.

Opponents of the Accord also employed a rhetoric that preyed on fear. Canadians were told not only that new social programs would be impossible, but also that existing programs were threatened by the Accord. In addition, Canadians were told that the Canada clause would destroy their rights under the Charter. And PQ leader Parizeau displayed a post-Charlottetown map showing most of the province being ceded to aboriginal peoples.

One might expect debate on proposals for constitutional reform to be more rational and reasoned than a fight for office between candidates who are openly competing with each other. Precisely because the referendum was about issues, none of the ethics that restrain debate during a parliamentary campaign applied. In the end, credibility imposed the only limit on debate about the Accord.

Only a few months ago, restrictions on referendum campaigning had been demanded to protect the "fairness" of the process. Many now argue that the civic participation triggered by the Accord was one of the healthiest developments in the history of Canadian democracy. Can it seriously be argued, after the Accord, that restrictions on third-party participation and expenditures are necessary to protect the integrity of the democratic process?

#### POLITICAL ACTION COMMITTEES AND DEMOCRATIC PARTICIPATION

In Canada it is widely believed that the 1988 federal election was bought by money—specifically, free

enterprise money that supported the free trade agreement. This year, the Royal Commission on Electoral Reform (the Lortie Commission) responded to that perception with recommendations that would impose strict limits on campaign expenditures, including a \$1,000 limit on third-party participation. The purpose of these restrictions is to promote the "meaningful exercise of the rights and freedoms essential to a healthy electoral democracy."

The Lortie Commission's recommendations rest on two assumptions, each of which has been undermined, if not disproved, by the national referendum. First, the commission assumed that money buys votes: "unrestricted freedom to express political views during a campaign cannot prevent some electoral communications from overwhelming the communications of others, *thereby advantaging one political point of view*" (emphasis added).

According to projections, the Canada Yes Committee expected to spend \$7.8 million on the campaign. Outside Quebec, the scattered and ideologically diverse forces of the No campaign could not begin to match the resources of the Yes campaign. And the result? A negative correlation between campaign expenditures and the referendum vote.

Nor can Canada's referendum experience be dismissed as purely fortuitous: two weeks later, the US presidential election revealed a similar pattern. There, Democrat Bill Clinton prevailed against disproportionate campaign spending by both opponents, President Bush and challenger Perot.

Second, the Lortie Commission noted that "the principal means whereby Canadians actively participate in elections is as supporters of candidates and members of political parties." In making that statement, the commission assumed that demo-

cratic participation in Canada should be defined in terms of affiliation with parties and their candidates. The role of non-partisan, third-party participation was accordingly reflected in the commission's proposal to limit independent party expenditures to \$1,000.

On this point, the referendum campaign is once again instructive. The Canada Committee was organized and directed by a tri-partite coalition of the federal parties, with disastrous consequences. Far more

successful were the ad hoc "political action committees" that, in many cases, were citizen-based or otherwise formed by interest group organizations.

It surely remains open to question whether, and to what degree, the referendum experience translates into the traditional process of parliamentary election. But this much is clear: it can no longer be assumed that money buys elections. Nor can it be assumed that restrictions on non-partisan civic participation en-

hance, rather than diminish, the fairness of the democratic process. As significant as the Accord's defeat may be for the future of constitutional reform, its broader implications for Canada's political culture may ultimately be more important.

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## CANADA WATCH CALENDAR

October 1	Former Prime Minister Pierre Trudeau blasts the Yes side at Maison du Egg Roll in Montreal.	October 26	National Referendum results — No: 53.7%; Yes: 45.2%.
October 7	Premier Clyde Wells tours western Canada for Yes side.	October 29	Federal task force issues report on economic development and prosperity.
October 8	Television advertising campaign begins.	October 30	PEI Premier Joe Ghiz announces his resignation.
	BC Constitutional Affairs Minister Moe Sihota claims that English Canadian premiers "stared down" Premier Robert Bourassa.	November 3	Bill Clinton defeats George Bush in the US presidential elections.
		November 16	New session of House of Commons to commence.
October 12	Quebec Premier Robert Bourassa and PQ leader Jacques Parizeau engage in televised debate.	November 19-20	Quebec government retreat to consider constitutional options in the light of the failure of the Charlottetown Accord.
October 16	<i>L'Actualité</i> publishes memos of Quebec civil servants claiming that Quebec lost in the negotiations.	November 24	Quebec National Assembly resumes sitting.
October 18	Assembly of First Nations' chiefs refuse to endorse the Accord.	November 28	Initial voting in Alberta Progressive Conservative leadership contest.
October 22	Elijah Harper urges natives to boycott the referendum.	December 5	Run-off vote in Alberta Tory leadership contest, if necessary.
	Yes side advertising campaign becomes more aggressive.	December 17	Scheduled signing of legal text of North American Free Trade Agreement (NAFTA) by Presidents Bush and Salinas and Prime Minister Mulroney.
October 23	Reform Party convention begins in Winnipeg.		
October 24	Toronto Blue Jays win the World Series.		