Patriation and Its Consequences

Constitution Making in Canada

EDITED BY LOIS HARDER
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Lois Harder and Steve Patten

On 3–5 November 2011, the Centre for Constitutional Studies at the University of Alberta hosted the Patriation Negotiations Conference to mark the thirtieth anniversary of the fateful deliberations that culminated in the *Constitution Act, 1982.* The speakers' roster included many of the key players involved in those 1981 negotiations, including Premiers Peter Lougheed (Alberta), John Buchanan (Nova Scotia), and Brian Peckford (Newfoundland), then Saskatchewan Attorney General Roy Romanow, and many political advisers and public servants who were intimately engaged in the strategizing, dealmaking, and agreement drafting. The conference provided a fascinating opportunity to reflect on Canadian "constitutional lore" associated with the patriation negotiations – the accepted stories about the role of the Kitchen Accord, the marginalizing of Quebec during the "Night of the Long Knives," the exclusivity of executive federalism, and the single-mindedness of Prime Minister Pierre Trudeau. Interestingly, many of the key players remembered those events differently, and for some the desire to "set the record straight" was intense.

Repeated with sufficient frequency, particular narratives of historical events become authoritative, while alternative readings are regarded as self-serving revisionism. Yet what lore, revisionism, and record straightening demonstrate is the very elusiveness of one shared truth through

which to understand momentous historical events. In the case of the patriation negotiations, we do, of course, have a document whose signatories and terms attest to the dynamics of the bargaining. Yet the dry formality of the agreement's provisions obscures much of the passion that infused the negotiations themselves, the long history that had precipitated them, and the struggles of Indigenous peoples, women's groups, and Canadians generally to see themselves reflected in their constitution.

The Patriation Negotiations: A Synopsis

Patriation refers to the effort to "retrieve" Canada's constitution from the British Parliament. Because Canadian governments had never managed to agree on a domestic process for amending the constitution, it remained a British statute for half a century after the 1931 *Statute of Westminster* granted independent self-governance to the dominions of the British Empire. This situation was increasingly untenable for a modern nation-state, particularly for the francophone province of Quebec, where the spectre of British colonial domination was especially galling.

Prime Minister Trudeau imagined that patriation, an amending formula, and a constitutionally entrenched charter of rights would engage Quebec more fully in the Canadian federation and articulate a national vision of Canada through the shared values of liberal rights. Throughout the 1970s and in 1980, Trudeau and the provincial premiers tackled this agenda, but mutually agreeable terms proved elusive. In October 1980, therefore, Trudeau threatened to act without the provinces – to patriate the constitution unilaterally. This gambit was ultimately blocked when, in September 1981, the Supreme Court of Canada handed down its ruling on the *Patriation Reference*, holding that while a unilateral action would not be illegal, it would offend a constitutional convention requiring substantial provincial consent in order to secure a constitutional amendment. That ruling forced Trudeau back to the bargaining table in one last, and not especially hopeful, effort to realize his constitutional ambitions.

The constitutional negotiations of 2–5 November 1981 were, on the surface, a classic example of executive federalism, with First Ministers

debating in front of television cameras while their officials negotiated in the corridors of Ottawa's National Conference Centre. Of course, the negotiations were inflected by the long-standing animosity between Trudeau and Premier René Lévesque and doubt about whether terms could be found that Quebec's separatist premier would ever accept. However, seven other provincial premiers also resisted Trudeau's agenda, and, along with Quebec, had formed the "Gang of Eight" provinces to oppose many aspects of the federal government's unilateral patriation initiative. Agreement seemed unlikely, and never more so than when the prime minister proposed a referendum on the amending formula and on a charter of rights as a way of breaking the deadlock. The premiers were well aware that the Canadian public supported a charter, and they worried that Trudeau's appeal to the people would undermine their own desire to protect provincial autonomy and parliamentary supremacy. As the conference progressed, the search for common ground included the so-called Kitchen Accord discussions among federal minister of justice Jean Chrétien and the attorneys general of Saskatchewan and Ontario (Roy Romanow and Roy McMurtry), as well as a proposal from Premier Peckford of Newfoundland. During the night of 4 November, premiers and officials from Alberta, Saskatchewan, Newfoundland, and British Columbia gathered to work on these terms and develop a new proposal. Representatives of all of the remaining provinces except Quebec were informed of the developments over the course of those late hours, while Quebec learned of the new proposal only at a premiers' breakfast meeting on 5 November. Lévesque was livid (Leeson 2011, 59–66). A bargain had been worked out, but Quebec felt it had been abandoned during a "Night of Long Knives" and refused to support the plan. Canada would patriate its constitution with a "made in Canada" amending formula and an entrenched charter of rights and freedoms, but this impressive political feat was also deeply scarred by Quebec's missing signature. As scholars Keith Banting and Richard Simeon (1983) poignantly observed, "no one cheered."

Negotiating Constitutional Lore

In this brief précis of the patriation negotiations, we have encountered constitutional lore regarding the importance of the Kitchen Accord and

the extent to which the other premiers abandoned Quebec by excluding Lévesque from negotiations during the Night of the Long Knives, the extent to which the content of the deal emerged from the actors and processes of executive federalism, and the importance of Trudeau's obsession with patriation and entrenching a charter of rights. We now reflect on these elements of Canadian constitutional lore.

The Role of the Kitchen Accord

The November 1981 Federal-Provincial Conference of First Ministers on the Constitution was convened out of necessity, not hope. Given the Supreme Court's *Patriation Reference* decision, Trudeau was obliged to consult with his provincial colleagues, and the premiers had little choice but to engage in another round of negotiations. The conference had no formal agenda and began with no new proposals on the table. No meaningful progress was made during the first full day of negotiations on 3 November. In fact, when three premiers approached Trudeau with a British Columbia–sponsored proposal, the prime minister angrily rejected it. A second provincial proposal, this one offered by Saskatchewan premier Allan Blakeney, died a similar death early the following day. The mood turned even gloomier when Lévesque appeared to break with his Gang of Eight colleagues by agreeing to Trudeau's surprise suggestion of a referendum to address the constitutional impasse. The Gang of Eight had agreed that any change in their strategy would require consultation, and Lévesque's sudden concession to Trudeau appeared to crack their united front (Clarkson and McCall 1990, 378–80). Arguably, Trudeau successfully used his referendum proposal to split the Gang of Eight and frustrate any chance of making progress towards a negotiated amending formula and charter.

Less than twenty-four hours later, however, an agreement to patriate the constitution with an amending formula and charter of rights was signed by the prime minister and nine provincial premiers. How did a settlement emerge from a conference that appeared doomed to failure? According to a CBC news special, the seeds of this momentous compromise were sown during a brief meeting in a kitchen on the fifth floor of the National Conference Centre (CBC 1981). As Canadians watched, Jean Chrétien, Roy Romanow, and Roy McMurtry re-enacted their

historic kitchen meeting for the news cameras, and in that moment the mythology of the Kitchen Accord was born. Canadian constitutional folklore now tells us that these three ministers saw an opportunity to bridge the divide between the federal government and the Gang of Eight. On two pages ripped from a notepad, they recorded what they believed would be a workable trade-off that combined elements of the Gang of Eight's preferred amending formula, Trudeau's rights charter with a notwithstanding clause, a commitment to the principle of equalization payments, provincial control of nonrenewable resources, allowances for affirmative action policies that conflict with mobility rights when a province's employment rate is below the national average, and a compromise approach to implementing minority language rights. This accord, the story goes, was the focus of a long night of backroom negotiations and resulted in an agreement that, by the morning of 5 November, all First Ministers other than Lévesque were prepared to sign.

But not everyone is comfortable with the narrative that credits the Kitchen Accord trio with seizing an otherwise unrecognized opportunity for a breakthrough in the constitutional negotiations. Former Newfoundland premier Brian Peckford claims that the seeds of the compromise were actually sown early in the afternoon of 4 November, when he turned his mind to compiling the points of potential agreement. In his contribution to the University of Alberta's 2011 Patriation Negotiations Conference, Peckford was adamant that the Kitchen Accord story was a "myth." It was his proposal, fleshed out by Newfoundland officials, that he claimed was taken forward, fine-tuned in negotiations with other members of the Gang of Eight, and then prepared and presented to the conference on 5 November.

Perhaps the truth is less dramatic than the Kitchen Accord story, or even Peckford's narrative of a lone premier drafting a proposal that his colleagues eventually rallied around. It seems clear that a lot of ideas and proposals were being shared between delegations. In a paper delivered at the 2011 conference, Romanow continued to argue that the ideas he documented in the fifth-floor kitchen were the "key catalyst" that made agreement possible, but he was also quick to credit ideas put forward by others, including Peckford. He prefers to refer to the ideas that he, Chrétien, and McMurtry advanced as the "kitchen proposals," one among

many noteworthy pieces in the constitutional jigsaw (Romanow 2012). By November 1981, there were very few First Ministers or constitutional advisers who had not participated in, or been briefed on, the substance of dozens of constitutional meetings and likely hundreds of draft proposals. Some had been involved as far back as the nearly successful Victoria conference of 1971. It must have been clear to everyone that Trudeau and the federal delegation were most fixated on entrenching a charter of rights, while Gang of Eight premiers worried at least as much about the amending formula. So long as the principle of equalization, western demands regarding provincial control of nonrenewable resources, and Newfoundland's request for some flexibility on mobility rights were also addressed, the key to an agreement would be giving Trudeau his charter (with a sufficiently comprehensive notwithstanding clause to calm provincial skeptics) and giving the Gang of Eight their amending formula (minus the fiscal compensation for opting out to which Trudeau objected).

Howard Leeson's retelling of the backroom negotiating during the evening of 4 November 1981 reveals how agreement emerged from multiple sources. Saskatchewan officials had drafted proposals based on Romanow's meeting with Chrétien and McMurtry. Newfoundland had a draft proposal based on Peckford's scheme. Alberta officials laid out a position that was "substantially the same as that of Newfoundland and Saskatchewan" (Leeson 2011, 60). There were, of course, points of disagreement – for example, Newfoundland had originally included language on Aboriginal rights to which BC officials objected – but everyone was working with the same constellation of approaches to the set of constitutional issues that needed to be addressed. Premier Peckford and the ministers who drafted the kitchen proposals certainly deserve recognition for putting to paper the elements of a compromise that would save another First Ministers' conference on the constitution from failure, but neither the story of the Kitchen Accord nor Peckford's narrative deserves to be privileged by Canadian constitutional mythology. Why, then, has the story of the Kitchen Accord been retold in a manner that seems to suggest that the patriation agreement was drafted by three ministers meeting in a kitchen at the National Conference Centre? The answer may lie in the desire of officials from other provinces not to allow

a single premier (Peckford) to take credit for the agreement. The *Globe and Mail*'s Rosemary Speirs reported that officials from Saskatchewan and Ontario circulated among reporters on 5 November, saying that they had orchestrated the compromise and suggesting that Peckford was merely the front man for the consensus (Speirs 1981). However, as was evident in the CBC news special the day the conference concluded, the degree of popular attention given to the Kitchen Accord might be explained by the fact that there is something attractive and convenient – and redolent of Canada – about the story of three innovative individuals (French, Anglo, Ukrainian; federal and provincial; central Canadian and regional), hammering out an accord that would define Canada's new constitution.

The Night of the Long Knives

To many observers, the patriation agreement represented an abandonment of Quebec by the other members of the Gang of Eight. As Alain-G. Gagnon and Alex Schwartz argue in Chapter 12, the settlement evidenced a general failure – perhaps a refusal – to acknowledge the constitutional significance of Quebec's distinctive national reality. Without consulting Lévesque, Canada's English-speaking First Ministers and their advisers drafted a constitutional proposal that included elements – such as an amending formula that failed to include a commitment to provide financial compensation to provinces that opt out – that Quebec was unlikely to accept. Lévesque said that when he was presented with the proposal on the morning of 5 November, he felt abandoned, as though he had been stabbed in the back during the night – the Night of the Long Knives.

Several observers and participants in the 1981 conference dispute this interpretation. Alberta premier Peter Lougheed wrote that there was "no attempt to develop something behind the back of any province in the Group of Eight" (cited in Meekison 1999, 26). Because Lougheed, like several other premiers, had not been physically present in the hotel suites where negotiations and drafting had occurred during the evening of 4 November, he could claim, in correspondence with Lévesque, that the document outlining the proposed agreement was "first presented" to the Gang of Eight premiers at an 8:00 a.m. breakfast meeting on

5 November – implying that Lévesque had the same opportunity as others to discuss, amend, and accept or reject the proposal. All of this is technically true, but it is also clear from accounts of the events of the evening of 4 November that the premiers and officials involved in the negotiations were aware of Quebec's absence from the discussions (Graham 2011; Leeson 2011). Thus, it is disingenuous to assert that Quebec was not excluded from a key moment in the constitutional negotiations. But why was Quebec excluded? To what extent was Quebec's exclusion a calculated risk that Donald Smiley would later label a "dangerous deed" (Smiley 1983)? Was Quebec's exclusion an inevitable consequence of what many participants assumed to be Lévesque's aversion to ever agreeing to any constitutional package? To what extent were Lévesque and his advisers actually responsible for Quebec's exclusion from the negotiations and agreement?

Howard Leeson's *The Patriation Minutes* (2011) includes a revealing outline of his recollection, as a deputy minister and constitutional adviser to Saskatchewan premier Allan Blakeney, of the negotiations on the evening of 4 November. Leeson details how and when different delegations were brought into the discussions and the distinct roles they played. He reports that shortly after midnight, when the deal was being completed and the final strategic decisions were being made, there was a discussion of what to do about Quebec:

> The general conclusion was that Québec could never agree with anything, and specifically would not agree to this package, because of the lack of compensation in the Amending Formula. Nevertheless, it was agreed that the proposal must be put to Québec at the already scheduled 8am meeting of the "Gang of Eight." (64)

Pierre Trudeau (1993, 246) echoed this view when he later wrote that it was always unrealistic to believe a separatist premier could be persuaded to participate in the renewal of the Canadian constitution. If designing a successful compromise was not, in fact, on Lévesque's agenda, Leeson is likely correct that Quebec's exclusion from the negotiations until a nearly finalized proposal was presented to the premiers was essential to success. Not everyone accepts this assessment, however. In Chapter 11 of

this volume, Peter Russell argues that given space and time to negotiate, the Quebec premier may have been willing to come on side. Lévesque had already accepted the April 1981 Gang of Eight amending formula, a procedure that did not include a Quebec veto. Perhaps if a real effort to negotiate with Lévesque had been undertaken, Quebec could have been convinced to come on side. Lévesque did, after all, support the Meech Lake Accord six years later.

In Chapter 8, however, Guy Laforest and Rosalie Readman offer a different perspective on Quebec's exclusion. They contend that "René Lévesque and his government must also be held responsible for the constitutional isolation of Quebec." Lévesque arrived at the conference with a "weak team" that allowed him to make a number of strategically inept and fateful decisions. Greatest of all was his decision to signal that he was breaking from the Gang of Eight by accepting Trudeau's proposal to submit an entrenched charter and amending formula to the people in a referendum. This departure from the Gang of Eight's April 1981 accord allowed other provinces to assume that Quebec was no longer committed to working with the "gang." Then, Laforest and Readman point out, on the evening of 4 November – when, as Peter Lougheed says, "every premier would have expected a great deal of lobbying and exchanges of views" (cited in Meekison 1999, 25) to be occurring – Lévesque and his delegation spent the night at their Hull hotel without making any effort to communicate with either their allies or adversaries. Of course, it is difficult to predict what would have happened if the Quebec delegation had been actively engaged in negotiations that evening. In the event, they were not, and most other premiers believed that Lévesque was unwilling to sign any sort of deal. Moreover, after he expressed his willingness to accept patriation followed by a referendum, many of the premiers wanted to seize the moment and take control of the conference agenda. They were willing to exclude Quebec if that made agreement more likely. Clearly, in terms of Quebec's exclusion, there was plenty of blame to go around.

Patriation as a Product of Executive Federalism

The patriation story is typically told with a focus on the role played by Canada's First Ministers and the formal, often secretive processes of

executive-level intergovernmental relations known as "executive federalism" (Sheppard and Valpy 1982; Graham 2011). Clearly, the prime minister, premiers, and their advisers were centre stage as the patriation agreement was negotiated, but understanding this key moment in Canadian constitutional history requires that attention be paid to the interface between the politics of executive federalism and the constitutional engagement of organized interests and ordinary citizens. Indeed, actors who played no formal role at the First Ministers' conference first raised some of the core issues, perspectives, and language under consideration. Advocacy organizations had become increasingly attentive to constitutional politics during the 1970s, and citizen engagement was particularly apparent after Trudeau launched his unilateral patriation initiative in October 1980. Although few demonstrations matched the November 1980 Constitution Express that brought Aboriginal peoples from across Canada to Ottawa to participate in public demonstrations and constitutional workshops, or the February 1981 women's conference that led to the creation of the feminist Ad Hoc Committee on the Constitution, Canadians from all walks of life sought to have their voices heard.

When the Special Joint Committee on the Constitution (the Hays-Joyal Committee) was established to seek public input into the federal government's draft constitutional provisions, over 200 groups made oral presentations to televised committee hearings, and over 900 groups and individuals submitted written briefs. These interventions had an impact on the content and language of the constitutional proposals that would be debated by the First Ministers in November 1981. By addressing issues ranging from the wording of a "reasonable limits" clause to the specification of equality rights and approaches to recognizing and protecting Aboriginal and treaty rights, groups as diverse as organizations of persons with disabilities, the National Action Committee on the Status of Women, the National Indian Brotherhood, the Canadian Civil Liberties Association, and the Canadian Association of Lesbians and Gay Men were an important part of the patriation story.

By November 1981, constitutional politics was no longer the exclusive domain of the political elite. As Penny Bryden argues in Chapter 5, Canada had entered an era of "spectator constitutionalism" in which ordinary citizens followed the twists and turns of constitutional politics

and realized they had a stake in the outcome of negotiations. Canadians wanted to see their constitution patriated, and they strongly supported entrenching a charter of rights. Trudeau used this popular support for the constitutionalization of rights and freedoms to his strategic advantage by proposing immediate patriation followed by a referendum to legitimize an amending formula and charter. In addition to splitting the Gang of Eight, this proposal also increased the pressure on the other premiers by introducing the possibility of breaking from the traditions of executive federalism and allowing the people to decide. If a deal had not been struck, the premiers would have risked losing their capacity, derived from the processes of executive federalism, to be the constitution makers.

Following the First Ministers' constitutional agreement of 5 November 1981, attention turned to preparation of the legal language of the *Constitution Act, 1982*. The drafting process created an opportunity for organized interests to shape the final document. Two of the most significant changes made during the weeks after 5 November would not have occurred if not for pressure from such interests. First, the language regarding Aboriginal and treaty rights that was added to federal proposals in April 1981 was dropped from the 5 November agreement but restored later in November (Hogg 2010). First Nations organizations had developed working relationships with a number of provincial delegations and most certainly played a role in the decision to include section 35 of the *Constitution Act, 1982*. An even clearer case of citizens influencing the drafting of the constitution was the successful feminist lobby that ensured that the sex equality guarantee in section 28 would be protected from the section 33 notwithstanding clause. Marilou McPhedran, Judith Erola, and Loren Braul's contribution in Chapter 8 is particularly instructive on the important interaction between the politics of executive federalism and the constitutional activism of citizens. Their insights underscore the extent to which the lens of executive federalism is insufficient to the task of understanding the patriation negotiations.

Trudeau's Magnificent Obsession

Another prevailing narrative defines patriation and the entrenchment of the *Canadian Charter of Rights and Freedoms* as one of Pierre Trudeau's great accomplishments. In this narrative, it was Trudeau's single-minded

pursuit of a particular constitutional vision for Canada that shaped the patriation agreement. In their expression of this narrative, Stephen Clarkson and Christina McCall (1990) examine Trudeau's dogged pursuit of his constitutional obsession, beginning with his appointment as justice minister under Prime Minister Lester Pearson. They describe the November 1981 conference as the

> week that saw the climax of the great drama of [Trudeau's] public life ... However large the cast of characters that gathered in Ottawa for the event ... however flamboyantly the bit players strutted on the stage (and at least a dozen of them claimed afterwards that *his* role had been crucial in reaching the final outcome), there was no question who was the star. It was Trudeau who physically and figuratively wielded the gavel that caused the proceedings to unfold. (357)

There is no doubt that Trudeau was the driving force behind constitutional renewal in Canada, a fact explicitly acknowledged by Saskatchewan premier Allan Blakeney and BC premier Bill Bennett, among others (Cohen, Smith, and Warwick 1987, 84). However, none of the parties expressed much optimism that a deal was likely when Trudeau initiated the November 1981 conference (Romanow, Whyte, and Leeson 2007, 192), and few close observers of the negotiations attribute the conference's eventual success to Trudeau.

Indeed, one of the persistent themes to emerge from the 2011 Patriation Negotiations Conference was that 4 November 1981 marked a pivotal moment in the patriation process. Before that date, constitutional politics was defined in response to Trudeau's agenda and concerns about national unity. Sometime during 4 November, however, the initiative shifted from Trudeau and his nemesis, René Lévesque, to the other nine premiers. Trudeau's body language at the conclusion of the conference spoke volumes; he did not appear to be a man triumphant. Many will recall Trudeau's lament that Canada got "a Charter," but not "the Charter." The prime minister was clear that the final compromise was "not of my making" (CBC 1981).

In an era of political celebrity, it is hardly surprising that someone with the charisma of Pierre Trudeau would come to embody the patriation

moment, but students of constitutional history are ill served by a diet of great-man invocations. The complicated and contradictory details of the constitutional negotiations reveal a much richer and more complex story.

Patriation and Its Consequences

The chapters that comprise this volume elaborate the patriation moment. Rather than "setting the record straight," these analyses offer a range of perspectives, attesting to the contested character of the patriation negotiations and the *Constitution Act, 1982.* Several chapters indulge elements of the patriation lore even as they seek to subvert it, but perhaps such indulgences are unavoidable. After all, they carry their own preferred versions of events, and they make a great story.

The Significance of Constitution Making

This book begins with Janine Brodie's overview and assessment of the patriation negotiations and the politics they have wrought. Drawing on Raymond Williams's theory of dominant, residual, and emergent forces (1977), Brodie asks: "How do we go about recalling this moment, which was so rife with conflicting motivations, visions, and memories, so contradictory and equivocal in its outcomes, and yet so integral to our collective present and future?" She begins with the dominant forces – with Trudeau's desire to secure Quebec's place in Confederation through constitutional renewal and Lévesque's challenges in balancing sovereigntist objectives with a pro-federalist provincial referendum outcome. In Brodie's estimation, by 1981 Quebec's claims to a special place in Confederation were a residual though still influential force in Canadian politics. From there, she considers "the people" as emergent forces. However, in contrast to scholars who argue that the *Constitution Act, 1982* produced "Charter Canadians" who made their claims through a Charter-invigorated Supreme Court (Cairns 1992; Morton 1995), Brodie insists that claims makers were part of the political process well before the early 1980s, and that the Charter has been both a blessing and a curse to progressive movements for social change. While the constitution might have freed Canada from Britain, Brodie argues it still requires substantive recognition of the relationship between the Canadian state and Indigenous peoples. If Canada is to be freed of its colonial heritage – one

of the espoused goals of patriation – respect for treaties and new relationships with Indigenous peoples are a necessity. In that broader project, the accomplishment marked by patriation may well be a footnote.

Tracing the Long Road to Patriation

The next three chapters provide some of the history and motivating concepts for the patriation negotiations themselves. In Chapter 3, on constitutional nationalism, Eric Adams traces the patriation objective back through a long and fractious set of political and legal/scholarly conversations, first initiated at Confederation. Without an amending formula in the *British North America Act* (*BNA Act*), with an adjudicative structure in which Britain's Judicial Committee of the Privy Council (JCPC) served as Canada's highest court, and lacking foreign policy autonomy, Canada remained tethered to Britain in ways that would become increasingly contentious for the aspiring nation-state. As Adams points out, defenders of the status quo asserted that Britain served as a neutral arbiter for a linguistically and ethnically divided dominion. Moreover, the role of the British Parliament in adjudicating and amending Canada's constitution expressed Canada's respect for the British Empire and its parliamentary traditions. By contrast, Canada's constitutional nationalists regarded the continued British role as an intolerable expression of the dominion's infantilized status and as a barrier to Canada's abilities to develop policies, institutions, and constitutional practices that reflected the desires of Canadians themselves. As Adams observes, however, insight into who "Canadians themselves" might be was as shallow among constitutional nationalists as it was among the anglophiles. Certainly from the provinces' perspective, the tendency of the JCPC to affirm their powers and representative capacities was every bit as supportive of Canadian identity as the federalist/centrist ambitions that prevailed among constitutional nationalists. While it is undoubtedly important that Canada attained foreign policy autonomy (1931), the "supremacy" of the Supreme Court (1949), and subsequently its own amending formula(s), ultimately, Adams concludes, the patriation of 1982 resolved fewer problems than constitutional nationalists might have hoped, and generated several others in the bargain.

No volume (or conference) on the patriation negotiations would be complete without some consideration of the *Canadian Charter of Rights and Freedoms*. We are extremely fortunate to have in Chapter 4 the insights of Barry Strayer, who served as associate counsel on the constitution for Prime Minister Trudeau and was directly engaged in drafting the Charter. Strayer traces the long road of Canada's rights regime from the Westminster system of parliamentary sovereignty (or supremacy) – namely, that the people's representatives should be the ultimate authority for the laws of the land – to the adoption of a constitutionally entrenched charter that positioned the Supreme Court as the arbiter of parliamentary decision making. As Strayer points out, this shift was a matter of ongoing debate and struggle, and, as section 1 (rights are subject to reasonable limits in a free and democratic society) and section 33 (the notwithstanding clause, enabling fundamental freedoms, legal rights, and equality rights to be subject to legislative override) demonstrate, the tension or balance between the authority of Parliament and that of the courts remains very much alive in the Charter. Strayer provides an illuminating discussion of the debate and drafting decisions concerning sections 1, 7, 15, and 33. The politics of rights are apparent in his recollections, but it is also clear that democratic engagement provided Canada with a better Charter than executive federalism alone would have done.

Executive federalism was, of course, the primary mode for engaging Canada's constitution in the run-up to and throughout the patriation negotiations. The prime minister and premiers felt themselves empowered to bargain on behalf of their respective geographical (if not electoral) constituencies, an assumption of representative legitimacy that was facing growing scrutiny, as Penny Bryden observes in Chapter 5. While situating the process of constitutional negotiations firmly in the context of executive federalism, Bryden shines her analytical light on the role of citizens who, as interested spectators, became increasingly engaged with and important to the possibility of constitutional change. Televised segments of First Ministers' meetings, charismatic political personalities, and high-stakes bargaining helped fuel Canadians' interest in the debates. Federal and provincial leaders felt the weight of popular expectations, and understood the appeal to popular support as a key element of the constitutional negotiating strategy. Of course, most of the negotiating took

place behind closed doors, but Bryden demonstrates how, as the pressure to reach an agreement intensified, citizen-spectators became potential players when Trudeau proposed the ultimate appeal to popular support – the prospect of a referendum.

Shaping Patriation: Law, Political Vision, Political Actors, and Political Struggle

In Chapter 6, Philip Girard's discussion of the *Patriation Reference* of 1981 considers the political legitimacy of constitutional renewal in the context of the relationship between law and politics. Girard joins with others in concluding that law (i.e., the ruling on the *Patriation Reference*) affected politics by forcing Trudeau to abandon unilateral patriation and obliging him instead to secure political and constitutional legitimacy for his package. However, Girard points out, holding another First Ministers' conference was not the only option open to the governing Liberals. Indeed, Girard contends that if adequate ground rules had been in place – if, for example, the 1979 legislation on constitutional referenda had been enacted before Parliament was dissolved and an election called – Trudeau might have opted to appeal over the heads of the courts and the premiers and seek consent from the Canadian people. A federally initiated referendum would have resulted in a constitutional package quite different from the one that resulted from the First Ministers' conference of November 1981. With regard to the impact of politics on law, Girard contends that the Supreme Court of Canada's finding of a convention requiring provincial consent in the constitutional amendment process was affected by the political context, but he disputes Trudeau's characterization of this ruling as "blatant manipulation" (Trudeau 1996, 256). Girard argues that because the *Patriation Reference* was a *reference* – a question to the court about the legality and constitutionality of a unilateral approach to patriation – the court is empowered to advise governments rather than simply adjudicate the question and thus is able to articulate political views that would be inappropriate in non-reference situations.

Broadening the discussion of the role of the courts, Chapter 7 by David Schneiderman considers the intellectual foundations of Trudeau's proposal to entrench a charter of rights within the constitution and thus override parliamentary sovereignty. Schneiderman argues that Trudeau,

in fact, did not give much intellectual attention to judicial review in the run-up to patriation, primarily because he was not concerned about it. Certainly, his education and his mentors at Harvard and the London School of Economics would have acquainted him with arguments outlining the tendency of courts to block progressive social change. Yet, Schneiderman argues, various influences, including the constitutional thinking of F.R. Scott, Trudeau's admiration for the US Constitution, and inattention to the adjudicative function in the work of Trudeau's intellectual touchstone, Jacques Maritain, as well as in the instruments of the postwar international human rights regime, may have encouraged Trudeau's heedlessness regarding the development of a full-blown theory of the judicial role in rights enforcement. Chapter 7 concludes with the suggestion that Trudeau's vision of the judicial role is best understood as Madisonian – that is, as emphasizing the cultural role of rights in articulating shared values and curbing factionalism, rather than the power of the courts as ultimate arbiters.

In Chapter 8, Guy Laforest and Rosalie Readman outline some of the core causes and consequences of the 1981 patriation agreement, but the chapter's most significant contribution is the new light it sheds on Pierre Trudeau and René Lévesque. Drawing on the work of philosopher and former Trudeau confidante and speech writer André Burelle, Laforest and Readman explore the ways in which Trudeau's political philosophy was for several decades shaped by a blend of anti-nationalist individualism and a less individualistic "communitarian personalism." They contend, however, that understanding Trudeau's role during the patriation negotiations requires an examination of the reasons for his eventual abandonment of his more communitarian ideas during the 1980–81 period. As for Lévesque, Laforest and Readman judge his performance on the constitutional file during 1980 and 1981 to be disastrous. They criticize Lévesque for, among other things, seeming to give up on Quebec's historic constitutional veto in his deal with the Gang of Eight, failing to make use of potential federalist constitutional allies such as Claude Ryan, and arriving at the November 1981 conference with a weak and indecisive team that failed to prevent him from undermining any alliances he had formed by accepting Trudeau's offer of a referendum to break the constitutional impasse.

Taking up the fascinating story of Indigenous peoples' engagement in the patriation process in Chapter 9, Louise Mandell and Leslie Hall Pinder describe the Constitution Express and the efforts of Aboriginal leaders and activists to persuade British parliamentarians to honour the historic relationship between the Crown and First Nations. Through a first-hand account of mobilization efforts in Canada and months of negotiating in London, this chapter illuminates the political and legal strategies employed by Aboriginal leaders to focus international attention on the First Ministers' failure to include Indigenous peoples in the constitutional negotiations. The hope was that if Canadian politicians were unwilling to respect the constitutional status of treaties or acknowledge the existence of Aboriginal rights, the British Crown would do so. Legal challenges were brought to contest the transfer of authority from the British Crown to the Canadian government. Although these arguments were ultimately unsuccessful, they served an important educative function for British jurists and parliamentarians and the public, and reinforced solidarity among Indigenous activists.

In Chapter 10, Marilou McPhedran, Judith Erola, and Loren Braul also offer first-hand accounts of the patriation moment, this time from the perspective of feminist efforts to free section 28 – which guarantees Charter rights to men and women equally – from the constitutional override of section 33. The women's movement had been deeply involved in the constitutional negotiations of the early 1980s, and its influence was evident in the sex equality clauses of the various proposals for a charter. In the last minute dealmaking in November 1981, the section 33 notwithstanding clause was developed as a means of striking a balance between parliamentary sovereignty and an entrenched charter of rights. As Trudeau's minimum ante, language and mobility rights were not subject to the section 33 override, but equality rights (section 15) were. This situation might have been tolerable to the women's movement, given that the new deal also included a paramountcy clause (section 28) that ensured that all rights in the Charter would be guaranteed to men and women equally. As it turned out, however, even the paramountcy clause was subject to the override in the November 1981 agreement. Minister Responsible for the Status of Women Judith Erola immediately set about mobilizing her contacts in the women's movement, with the aim of

persuading each of the premiers to free section 28 from the notwithstanding clause. The hard-fought battle resulted in an important symbolic victory even if, as McPhedran, Erola, and Braul note, there is uncertainty about the substantive contribution of an unfettered section 28 to equality of the sexes in Canada.

The Political and Constitutional Consequences of Patriation

The agreement reached in November 1981 left a lot of unfinished business. In addition to the immediate post-patriation mobilization of the women's movement, Indigenous peoples, insulted by their exclusion from the constitutional negotiations, continued their efforts to lobby the British Parliament to reject patriation until treaties and Indigenous rights were properly incorporated into the amended constitution. And in the ensuing decade of "mega-constitutional politics" (Russell 1993), efforts to include Quebec within the Canadian constitution were attempted and failed. Has the *Constitution Act, 1982* made a difference to Canada? Absolutely. The Charter has had an enormous impact on Canadian politics and society, ranging from stronger rights protections for people accused of crimes to marriage rights for same-sex partners. Paradoxically, Quebec's exclusion has compelled long and important discussions about the character of the federation. Also paradoxically, the strictures of the amending formula, as well as a contemporary political class that insists on Canada's constitutional fatigue, have meant that changes of a constitutional character often happen in small, incremental, and circuitous ways (e.g., the parliamentary recognition of Quebec as a distinct society; the Conservative government's plans for Senate reform). Clearly, many of the consequences were neither intended nor anticipated, but they have, nonetheless, reshaped Canada and the vision through which it imagines its future.

In Chapter 11, the first of the chapters exploring politics in the wake of patriation, Peter Russell examines two of the most significant unintended consequences of the patriation settlement. First, by agreeing to a constitutional package that was rejected by Premier Lévesque and the Quebec National Assembly, the patriation process alienated Quebec nationalists and put Canadian unity at risk. As a consequence, Canadians found themselves launched into a decade-long season of mega-constitutional

politics that included the Meech Lake Accord, the so-called Quebec round of constitutional negotiations, and a nationwide referendum on the Charlottetown Accord, known as the Canada Round. The second unintended consequence was a set of important gains made by Aboriginal peoples. Russell argues that although the patriation process was initiated to deal with Quebec's aspirations, the final package included important advances in the recognition of Aboriginal and treaty rights of First Nations peoples.

In Chapter 12, Alain-G. Gagnon and Alex Schwartz contend that many of the deficiencies of Canadian federalism stem from, follow, or were reinforced by the 1981 patriation agreement. They argue that the agreement represented a denial of the constitutional significance of Quebec's distinctiveness. The lack of "recognition" is only a part of the problem, however; Gagnon and Schwartz champion a "federalism of empowerment" that looks beyond recognition and focuses on maintaining an open space where multiple orders of government are effectively empowered to move in response to the changing needs of governance. Such a pluralistic federalism of empowerment must be flexible, robust, and versatile in pursuit of the various utilitarian, liberal, and democratic communitarian values of federalism. Gagnon and Schwartz's analysis of the past thirty years suggests that Canadian federalism has failed. Rigidity has trumped flexibility, centralization has trumped robustness, and monism has trumped versatility – and all in the name of a single-minded focus on utilitarian goals of functional efficiency.

In Chapter 13, Kiera Ladner accepts Russell's contention that the inclusion of sections 25 and 35 in the *Constitution Act, 1982* was a significant achievement with very real transformative potential. In practice, however, this monumental achievement accomplished very little for Aboriginal peoples. With no precision or agreement on the meaning and content of the Aboriginal and treaty rights recognized and affirmed by section 35, non-Indigenous officials, politicians, lawyers, and judges have been able to vitiate and even undermine the supposed constitutional achievement of First Nations. In the absence of the political will and inclination to make section 35 transformative of western, Eurocentric constitutionalism, optimism has been dashed and what appeared to be an achievement to some has, in the end, been the monumental defeat

that most Aboriginal leaders thought it was when they refused to endorse the 1981 constitutional settlement.

Finally, in Chapter 14, Alexandra Dobrowolsky considers the post-patriation transformation in Canadian politics with regard to the political efficacy and legitimacy of the women's movement. From the heady days of the section 28 mobilization, through a federal leaders' debate on women's issues in the 1984 election, to the steady decline in government support for women's organizations and for matters of gender equality generally, Dobrowolsky paints a grim picture of a shrinking opportunity structure in which the claim that "we are all equal now" obscures ongoing practices and structures of oppression. For all of the attention paid to rights and equality spawned by the patriation moment and the operation of the Charter, the longer term has been marked by efforts to delegitimize women's claims making. Whether mobilization efforts on the part of Indigenous peoples and "the 99 percent" will inspire a more engaged relationship between citizens and the Canadian state remains an open question.

Conclusion

The negotiations of 2–5 November 1981 marked a key moment in Canadian constitutional history. The resulting constitutional agreement led to the passage of the *Constitution Act, 1982*, including its amending formula, entrenched charter of rights, and commitment to Aboriginal and treaty rights (section 35). This volume revisits the patriation moment with the goal of understanding the long road to patriation, the legal and political forces that shaped patriation, and the political and constitutional consequences of patriation. The essays contributed by political scientists, legal scholars, historians, and individuals who were involved in partisan, feminist, and First Nations politics associated with the patriation negotiations make a unique contribution to our understanding of patriation and its consequences.

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