

# Four Lenses of Patriation

In the decades since 1982, there have been many attempts to explain and evaluate the patriation of the Canadian Constitution. Some have concentrated mainly on winners and losers. Others have attempted to provide explanations that are rooted in the fundamental social and political characteristics of Canada. Some analysts and observers have concentrated on specific individuals or players, attempting to explain the final shape of patriation by way of their involvement. Each of these attempts provides a specific or particular lens through which Canadians can understand and evaluate the events of 1982.

Of course, each lens or paradigm leads to a different conclusion about the worthiness and impact of the event. Questions such as “Was it good or bad for Québec, Indigenous peoples, or women?” are important if we are to properly evaluate the constitutional provisions which were implemented at that time. However, as we know from other political events, terms like “good” and “bad” are laden with assumptions about the particular impact and shape of events on society. One person’s “bad” is another’s “good,” and seldom do individuals or groups think that their own interests have been completely realized. More importantly, it is often the case that our evaluation changes over time as the provisions involved are tested or used in the body politic.

For the purposes of this article, it seems appropriate to look at four assessments of the 1982 patriation exercise. Each concentrates in large part on the process and on judgments that were tendered shortly after the completion of patriation. Some of these paradigms — or lenses — are well known. Others may seem novel or even completely unfamiliar. This article will attempt to evaluate the claims put forward

and draw some conclusions about the impact of patriation.

## Systemic Level Interpretations

Analyses of the patriation process tend to follow some familiar patterns. Some analyses concentrate on the immediate outcomes of the exercise. Generally, these are cast in terms of winners and losers. However, many also attempt to describe or predict the long-term implications of patriation. Others look at the root causes of the negotiations and outcomes. That is, what caused the various participants to engage in such a sweeping process of change?

Generally, these analyses have concentrated on systemic-level explanations rooted in the regional, economic, and ethnic divisions of Canada but many have examined the process and outcomes from the point of view of individual participants, especially the Prime Minister and the Premiers. Finally, after 35 years, there are an increasing number of analyses that depend on the actual outcomes of various constitutional changes. These include, for example, the impact on the Canadian federal system of having a *Charter of Rights and Freedoms*, the use of the amending formula, or the development of a body of judicial decisions on the rights of Aboriginal peoples in Canada.

This article concentrates mostly on the first approach. That is, what were the immediate outcomes of the exercise and how were they viewed? However, it will also provide some observations on actual versus expected outcomes and the impact of patriation on general political life in Canada.

## Four Ways of Looking at Patriation

Using the first systemic approach, patriation can be viewed through one of several lenses. One lens, which has the greatest currency in Québec, is that it was a betrayal of the Canadian compact between the two founding nations in Canada, the French and English. This interpretation is usually called “The Night of the Long Knives,” referring to the night of November 4, 1981, when the nine English-speaking provinces hammered out a deal with the federal government, to which the government of Québec, headed by René Lévesque, could not agree. A second lens involves the assumption that the Trudeau initiative was a triumph for a broader and more inclusive pan-Canadian identity, involving mainly the *Charter of Rights and Freedoms* and the patriation of the Constitution to Canada. These two lenses have largely dominated discussion over the past 35 years.

A third lens considers patriation as the last gasp of a society dominated by privileged white men seeking to maintain their own power and to exclude rising groups of women, Indigenous peoples, and disenfranchised groups largely made up of immigrants, the economically disadvantaged, as well as those who had hitherto been excluded because of sexual orientation. These people, many of whom were involved peripherally in the negotiations, were able to assert their limited influence in a way which ensured that future constitutional discussions would not be conducted behind closed doors between largely privileged white male political leaders. That is, while they were unsuccessful in some respects, especially regarding the *Charter of Rights and Freedoms*, they were successful enough to ensure that any future fundamental changes to Canadian society would be negotiated on a much broader basis than those that took place in 1981.

Finally, a fourth lens — less accepted and less well-known — is that patriation was ultimately the assertion by the nine English-speaking provinces of a package of proposals that were unacceptable, in whole or in part, to both the Premier of Québec and Prime Minister Trudeau, but generally served to preserve Canadian unity at a crucial time in our history. That is, patriation

was the result of the assertion of political power by provincial administrations that were largely exasperated with the continuing fight between Pierre Trudeau and René Lévesque. More importantly, it was the initiative of the nine provincial governments, led primarily by Ontario and Alberta, and facilitated by Saskatchewan, that ultimately resulted in a compromise that was not only acceptable to most Canadians, but conducive to strengthening the bonds of the Canadian federation at a time when it was under siege from various important internal forces of dissolution. Put more bluntly, the premiers of the nine provinces saved Canada from Trudeau and Lévesque.

Not all of these lenses will seem familiar to us but each has some currency with various Canadians. That is because they each contain plausible explanations of the event. Let us now turn to each of these explanations in more detail.

### “The Night of the Long Knives”

For many in Québec, the negotiations that took place in Ottawa on the night of November 4, 1981, were a fundamentally flawed process with a deeply flawed result. In particular, they argue that the reasonable and necessary aspirations of the people of Québec were excluded or unrecognized. The fact that the government of Québec was not involved in the negotiations on the night of November 4, and did not agree to the outcome of those negotiations, has convinced many Canadians, both inside and outside of Québec, that patriation was suspect if not completely illegitimate.

This view, or lens, had considerable support immediately after the agreement, especially among academics in Canada who concentrated on this area. In a book entitled *And No One Cheered*, edited by Keith Banting and Richard Simeon, many leading academics condemned patriation. Phrases like, “Québec in Isolation,” “A Dangerous Deed,” and “Questionable Jurisprudence,” echoed throughout the book. In the final article, Banting and Simeon concluded that in “the other nuts and bolts of constitution making are another set of questions which we have inadequately addressed — questions about commu-

nity, democracy, the role of government. That the First Ministers did not think them all through — and often use them in a purely rhetorical manner to cloak self-interest in principle — should occasion no surprise.”<sup>1</sup> Together with other authors, they considered the whole project to have been flawed, if not dangerous.

How legitimate is this interpretation? As a matter of law, the Supreme Court decision in 1981 simply did not agree with it. Indeed, the Court rendered a further decision on this matter several years later, reinforcing the 1981 ruling.

Nevertheless, many argue that there was a “conventional” constitutional requirement that would include Québec, if not some other provinces. Put another way: despite the legal requirements, the exclusion of Québec from the agreement violated the basic conception of Canada as having two founding nations. Québec should have had a veto over any major constitutional change.

The participants in the process did not take this position lightly. Everyone understood how important it was to make sure that all provinces, but specifically Québec, were involved in, and were in agreement with, any major constitutional change. That was the goal of all participants.

What changed? Why did the other nine provinces agree to a set of proposals which ultimately forced the federal government to agree as well? The answer to these questions is found in the previous articles in this issue. The other provinces came to the conclusion that the existing government of Québec had no intention of agreeing to a constitutional settlement. In *Canada Notwithstanding*, published in 1984, the authors noted that:

In the final analysis the difference between Québec’s actions and those of the majority were their goals. Québec’s sole objective at this stage of the negotiations was to wreck Ottawa’s plan for patriation. A defeat of the federal resolution represented a “successful” conference for Québec. The other provinces refused to equate the defeat of the federal resolution with the success of the conference.<sup>2</sup>

The counter to this assertion has always been that with reasonable arrangements the government of Québec could, and would, have agreed to patriation. This view is supported in part by the exchanges between Trudeau and Lévesque when the First Ministers met on November 5, 1981 to agree to the compromise that had been hammered out overnight. In that exchange, published first in 2011, Lévesque says the following after the other provincial Premiers have spoken:

I will be brief. We have had a veto for 114 years. Yank out compensation and there is nothing left. Québec says no. Just for historical purposes I would like to state our opposition to this.

*There was more discussion about various details and possible permutations on the amending formula. However these were in the nature of last-minute suggestions by Ontario in order to see if Québec could be brought into the agreement. Finally, the document was placed before the First Ministers. At that point the delegation from Québec left.*<sup>3</sup> (Italics in original.)

As noted in the original notes: after the exchange, Lévesque and Trudeau discussed a number of things including language rights and the compensation provision of the amending formula in the patriation package.

Can we conclude from this exchange that a deal between Lévesque and the other First Ministers was possible? In my own opinion, as someone who sat in the room and listened to this exchange, I believe that such an agreement was not possible. I firmly believe that Lévesque was simply trying to secure changes, especially to the amending formula, that would make the applications of these provisions less onerous to Québec during the period between its application and any future successful referendum on separation.<sup>4</sup>

This view is supported by the exchange between Claude Morin and his counterparts in June 1981, at the Ministers meeting in Winnipeg where he clearly states that a failed conference, or the isolation of Québec, were outcomes that his government would consider a success. While the government of Québec clearly felt stung by the fact that it had been out-manoeuvred at the conference, it did not see the outcome as doing

long-term damage to its ultimate goal of sovereignty association.

Many will argue, however, that whether or not Lévesque could or would have agreed to anything at the conference, the First Ministers should not have gone ahead with patriation over the objections of Québec. They argue that this action did tremendous damage to the body politic of Canada, leading to the failed Meech Lake and Charlottetown agreements, and the narrow win of the “No” side in the 1995 Québec referendum. They further argue that Canada is still left in constitutional limbo, without a constitutional agreement from any government of Québec, and no near-term expectation of getting such an agreement. Finally, they argue, the fact that Québec has been absent from the constitutional consensus has hindered the normal processes of constitutional development on other matters, for example the Senate, where any federal government is reluctant to proceed in the face of Québec’s absence from any consensus on change. Put another way, by proceeding with patriation in 1981, we may have paralyzed normal constitutional development in Canada.

In the final analysis, this is the most important part of the discussion on this lens of patriation. Did it do more damage than good?

Before dealing directly with this question, we should deal with the matter of whether or not patriation itself was responsible for the political deadlock, or whether subsequent actions by Prime Minister Mulroney were effectively responsible for the constitutional deadlock of today.

As I stated in my book, *The Patriation Minutes*, in 2011:

In many circles there is a consensus that patriation was the beginning of 30 years of turmoil in Québec. That is, by going ahead without the approval of the government or people of Québec, the Prime Minister and the other Premier’s ensured that there would be considerable risk to the unity of Canada. Indeed, many believe that the turmoil of Meech Lake, the Charlottetown Accord, and the 1995 referendum in Québec are a direct result of

the patriation agreement. I do not accept that assessment.

First, it is quite clear that in the several years after 1981, patriation did not serve the interests of those who wanted Québec to separate from the rest of Canada. Public opinion polls from the first two years after patriation tell us that the majority of the population of Québec did not view the agreement as a rejection of Québec itself. When the election came in 1985, the Parti Québécois was unable to use this issue to mobilize the vote and they were defeated in the election by the Liberal party of Québec under the leadership of Robert Bourassa. Indeed, as we know, it was the failure of the Meech Lake Accord that led to the creation of the Bloc Québécois and the 1995 referendum.<sup>5</sup>

Everyone who agreed to patriation fully recognized that at some point a government of Québec would have to say yes to the Constitution of Canada. It was a political necessity. That opportunity was available when the Liberal party was elected in the province of Québec in 1985. For its part, the Bourassa government conducted the negotiations and concluded an agreement which it found acceptable. Unfortunately, the federal government under Brian Mulroney failed to tailor provisions that were fully acceptable to the other provinces. As well, the Prime Minister and his advisers completely misread whether or not unanimous consent was required for all of the provisions in Meech Lake. As an aside, I think the key point is that either the PM or his staff totally misunderstood the need to use section 41, the unanimous consent section of the Amending Procedures. I should add that the unanimity section had been intentionally designed to protect the formula that had been agreed to. The consequences were disastrous. It was the mishandling of Meech Lake that created the long-term problem, and not patriation itself.

Of course, many might argue that without patriation there would have been no need for further negotiations with a new government of Québec. Should we not then simply have waited? The answer to that question must be discussed as we move through the other three lenses of patriation.

## Triumphant Federalism

Another approach portrays the patriation of the Constitution as a necessary and positive development in the Canadian federal state. Through this lens, Prime Minister Trudeau is seen as a valiant political leader dedicated to the principles of equality and justice, seeking to create a Canada that transcends local or divisive forces, especially in Québec. In the end, although forced into some compromises, he vanquishes the forces of disunity. This view is widespread and supported in many articles and books which deal with the political careers of the federal participants.

The arguments in favour of this lens are straightforward. As a result of the Québec referendum, the Prime Minister promised to move ahead with change that would alter constitutional relationships in Canada, thereby giving substance to his promise to the people of Québec who had voted to remain part of the country:

But in his final speech on May 14 at Paul Sauvé arena in Montréal, Trudeau gave a solemn pledge on behalf of himself and his Québec MPs that if there was a “No” vote in the referendum, they would immediately put in motion a mechanism for the renewal of the Constitution ... . He also warned the rest of Canada that a “No” vote would not mean that nothing would change or that things would remain as before. He said that he and the other Liberal MPs from Québec were putting their seats at risk to achieve this (that is, presumably, to achieve a mechanism for renewal of the constitution, apparently meaning that if they did not achieve it they would resign). Read carefully, the statement could be taken as a promise to patriate the Constitution with a Canadian amending formula (a mechanism for renewing the Constitution). But for years after he was accused by Québec nationalists, and a number of well-meaning federalists inside and outside Québec, of thereby having promised to accept large transfers of jurisdiction to Québec or to the provinces generally. Few who knew Trudeau’s constitutional views would have jumped to the same conclusion.<sup>6</sup>

There is little evidence to support the view that Trudeau had reneged on a promise to transfer key areas of jurisdiction to the province of

Québec. Such a course of action would have betrayed his view of Canada and the role of Québec within the country. Indeed, the elements of his proposals were virtually the opposite of what the nationalists in Québec thought necessary:

In his meeting with Saskatchewan Premier Allan Blakeney, Chrétien elaborated upon Trudeau’s statement to the house. He outlined the federal government’s objectives: patriation and constitutional reform. According to Chrétien, an agreement on patriation and reform had to be achieved quickly in order to capitalize on the positive mood within the nation. The urgency was heightened by the negative uncertainty surrounding Québec’s attitude to the renewed negotiations. No one could be certain that Lévesque would act in good faith. In fact, Ottawa was apprehensive that the Parti Québécois would attempt to frustrate the process in a rearguard action to salvage its objectives and to revive its sagging provincial support.

Chrétien listed the reform proposals of the federal government. There was to be a new “made in Canada” Constitution with a preamble outlining certain principles and a short list of specific constitutional reforms in areas, such as equalization and family law, where there was a large degree of consensus. The agreement would include a commitment to a federal system with two orders of government; a recognition of French and English as the two official languages of Canada, including a provision for minority language education rights; and entrenchment of individual rights in a charter; and a confirmation of the concept of equalization. Chrétien suggested that the provincial Premiers could readily agree to this limited set of reforms when they met with Trudeau on 9 June 1980. Thereafter parliament would be requested to prove a joint resolution and dispatch it to Westminster for speedy passage. The remaining issues surrounding the division of powers would be dealt with at a later date in a forum similar to the 1978-79 CCMC.<sup>7</sup>

It is evident that the matter of division of powers was not a priority for the federal government immediately after the referendum victory. It is also evident that each of the proposals outlined by Chrétien corresponded perfectly with Trudeau’s view of what a renewed Canada would look like.

There was to be patriation, which would symbolically and actually establish Canada's independence from Great Britain. The commitment to a federal system was to reassure the provinces that there would be no unilateral changes to the division of powers. The affirmation of language rights both inside and outside of Québec, especially with regard to the establishment of the "French fact" in English-speaking provinces, would guarantee the continuing role of the two founding nations in the country as a whole. Finally, the proposal for a charter of rights would guarantee the continuance of the country as a liberal democratic society. In Trudeau's mind, these constitutional changes spoke directly to those in Québec who had voted "No" in the referendum.

One matter which Trudeau left open was the type of amending formula which would be included in the package of constitutional proposals. There was to be no compromise with the principle that constitutional change in the country in the future would be "made in Canada." That is, there would have to be a domestic amending formula:

Chrétien was more tentative with respect to the amending formula. He sought Blakeney's ideas. Should the principles of the Victoria charter be adopted or was there an alternative amending formula that was acceptable to the governments? Chrétien was, however, clear on one issue: the unanimous consent of the provinces was not a legal precondition of the patriation plan and was likely unattainable because of the Parti Québécois.<sup>8</sup>

The federal government remained consistent on two matters involving the amending formula. First, unanimous consent was not required. Second, in whatever formula was adopted, Québec should have a veto over any constitutional proposals that affected the provinces. Their preference obviously was for the Victoria formula, a regional formula which was ultimately rejected by Québec in 1971.

How did the final compromise compare to the original Trudeau proposals? With the exception of the amending formula it would appear that he accomplished most of his goals. There was patriation, with a preamble. The principles

of a federal state were maintained. French and English were entrenched as official languages in Canada, and minority language rights were included. Finally, there was a charter of rights, albeit in some respects not exactly what Trudeau had envisaged.

However, the package also contained provisions not anticipated by the Prime Minister in the spring of 1980. The amending formula was of course considerably different from what he preferred. There were substantial changes to the division of powers, especially regarding natural resources. *The Charter of Rights and Freedoms* contained a notwithstanding clause. Equalization was included in principle, but also with a commitment to payments. Section 35, on Aboriginal peoples, was also included. Finally, there was a section on mobility rights. Several other provisions were also added or changed. In all, it could be easily argued that the Trudeau government failed to achieve what it set out to do in several important respects.

This conclusion is reinforced by the initial reaction of the Prime Minister in his closing speech to the First Ministers conference on November 5, 1981. His mood was sombre. He stated that not everything in the package was as he would have wished. He referred to the fact that there was now "a charter" but not "the charter." He also referred to the fact that the amending formula was not his first choice. As one watches the tape of that speech, it is clear that the Prime Minister felt anything but triumphant. His overall mood was that of one who had been forced to do something that he did not wish to do. More will be said about this later.

Despite the Prime Minister's initial mood, it could be argued that the final patriation package, although the result of a compromise, was a fulfilment of the government's pledge to enact constitutional change for those who voted "No" in Québec. Certainly, the confirmation of the Canadian federal system and the enactment of language rights guarantees were crucial to the argument that Quebecers should stay in Canada. And, although the National Assembly of Québec did not agree with patriation, it is clear from public opinion polls and the 1985 provincial election

that the majority of Quebecers were willing to accept patriation as at least a partial fulfilment of the Trudeau promise.<sup>9</sup> As for the rest of Canada, the package was received positively if not enthusiastically in most parts of the country.

Now, after 35 years, it is difficult to imagine a Canada without a Constitution that has a *Charter of Rights and Freedoms*, a section 35 confirming existing Aboriginal rights, or an amending formula that has, if infrequently, served us well on minor amendments. Even in Québec, there is little talk about undoing patriation. Notwithstanding — no pun intended — the arguments of those who viewed it as a flawed project, there is little dispute that the constitutional provisions enacted with patriation are now inextricably woven into the public and political life of this country. In that sense, one could argue that it was a “triumph” for Canada.

## Participation of the Powerless

A third way to look at the patriation project is through the lens of what could be termed the disempowered groups in society. The negotiations and changes that were undertaken in 1981, and formalized in 1982, were largely the result of closed-door talks by and between the federal and provincial governments of Canada. There were no representatives of municipal governments, Aboriginal governments, trade unions, or other groups among the decision-makers. Further, the negotiations were finalized in secret and were not subject to a referendum or even action by all of the provincial legislatures. Subsequent negotiations on the Constitution used a much more open procedure and notably involved Aboriginal governments. In the case of the Charlottetown Accord, Canadians were asked for their approval through a national referendum.

Despite the lack of involvement in the formal decision-making process, patriation marked the first time that groups outside government were substantively involved in altering our constitutional arrangements. As Peter Russell, one of our foremost constitutional scholars, has said:

The crucial instrument in the process of building legitimacy for the federal initiative was the special parliamentary committee that sat through the late fall of 1980 and early winter of 1981. This committee, made up of 10 Senators and 15 MPs (in all, 15 Liberal, eight Conservative, and two NDP), was in several respects a new phenomenon in Canada's constitutional politics... . Unlike those at previous committees, most submissions came not from academics, government, or ordinary citizens but from interest groups. The committee permitted only five individuals to appear as witnesses (two each chosen by the Liberals and Conservatives and one by the NDP). The interests represented covered a wide spectrum; aboriginal peoples, the multicultural community, women, religions, business, labour, the disabled, gays and lesbians, trees [*sic*], and a number of civil liberties organizations.<sup>10</sup>

These concrete changes in the constitutional proposals secured through interest group activity in the parliamentary arena did more than expand the base of political support for the Trudeau government's unilateral initiative. The process itself created a new public expectation about popular participation in constitution making... . It also produced a new set of players in the constitutional process — the interest groups whose rights claims gain constitutional recognition and whose perspective is distinctly indifferent to federalism. As Allan Cairn's writings have shown, this development poses a fundamental challenge to the traditional pattern of constitutional politics in Canada.<sup>11</sup>

In particular, the *Charter of Rights and Freedoms*, and section 35 covering existing rights of Aboriginal peoples opened up the process of change forever. This was especially evident in the Charlottetown negotiations and the referendum that followed the agreement by governments.

However, it was not only the process of constitutional change that was altered, but also a large number of political processes involving the groups which were important in constructing the Charter and securing section 35. The development of the “charter society,” as it is called, has ensured the involvement of the courts in a number of political processes as not only preferable, but mandatory.

As constitutional expert John Whyte has written:

The 1982 constitutional amendments that enacted a constitutional human rights regime for Canada were the most intensely contested of the 1982 constitutional reforms and have had a dramatic impact on the policies of governments and on the national political culture. While constitution-based judicial review of legislative policies has been a constant feature of Canadian governance since Confederation, the addition of human rights to the range of constitutional standards has driven Canadian courts, especially the Supreme Court of Canada, into the emotional centre of Canadian politics; in imposing moral limits on regulation, the Charter of Rights has placed the constitution at the centre of the deepest social and personal concerns, from liberty to equality to personal security.<sup>12</sup>

Viewed through this lens, patriation is usually considered in a positive light. Initial criticisms generally involved whether or not the Charter was as fully developed as it should have been, and not about whether or not the existence of a *Charter* would contribute to Canadian democracy and the Canadian political system.<sup>13</sup> No one has argued or would now argue for the removal of the *Charter of Rights and Freedoms* or Section 35 from the Canadian Constitution. By contrast, there is still a healthy debate about the role of the notwithstanding clause, the role of the Senate, and whether or not property rights should be included in the Constitution, to name just a few.

Overall, while there is a tendency to view the *Charter* and the elaboration of section 35 as an unfinished project, few would attempt to argue that patriation should be reversed on the basis that the *Charter* and Aboriginal rights were included in the final package. Whether or not the inclusion of the *Charter* and Aboriginal rights is considered a positive development in the Canadian political system depends largely on the specific political question at issue. For those who wish to proceed quickly with oil pipelines that run through First Nations' reserves, the existence of section 35 and the interpretation of this section by the courts since 1982 is viewed as a burdensome stage that did not exist prior to patriation.

Generally, however, it would seem that Canadians have accepted the proposition that section 35 and the rights of First Nations ought to be dealt with in a respectful manner. While it might be more "efficient" to proceed without such consultations, they are now considered to be a legitimate part of the Canadian political process.

## The Nine Keep Canada Together

The fourth and final lens to be examined involves both the process by which patriation was secured and the package itself. Put more succinctly, who was responsible for securing the compromise package, and was the final agreement "good" for Canada? The attribution of credit or blame has become the topic of some heated exchanges over the years, depending heavily on whether or not the project is viewed positively or negatively.

The view of nationalists in Québec is quite straightforward. It was in fact a dangerous deed and while the main architect of the project was Pierre Trudeau, who must shoulder most of the blame, it was ultimately acceded to by a group of Anglophone premiers who stabbed Québec in the back late on the night of November 4, 1981. The political reverberations of this action have been felt throughout Canada for the last 35 years. In their view, patriation without Québec should never have occurred.

For those who believe that patriation should have proceeded, the attribution of credit is a bit more complex. As mentioned earlier in this article, there is a tendency by most to give Prime Minister Trudeau and the federal government considerable credit for pushing the project to its completion. At times in the process, players like the "kitchen crew" (Chrétien, Romanow and McMurtry), Premiers Davis and Lougheed, and even Newfoundland Premier Brian Peckford (who has lately been attempting to cast himself as a primary player) were all contributors. However, many believe that without the Prime Minister and his dogged pursuit of constitutional change there would have been no patriation at all. Indeed, while he did not get everything he thought necessary, there is little doubt that what he did achieve was done in the face of much

resistance, even outright hostility, from other political leaders in the country. It was both a personal and a political triumph.

As mentioned at the beginning of the article, there is a third and less well-known explanation that forms our fourth lens. Put quite simply, this view proposes that the whole patriation initiative was on the brink of failure in late 1981 and only succeeded because it was salvaged by several premiers on the night of November 4, 1981.

In order to explore this view thoroughly, one must remember the context within which the negotiations took place late at night on November 4, 1981. The Trudeau initiative had started off positively after the success of the “No” side in the Québec referendum in 1980. There was considerable acceptance by the rest of country that the people of Québec required some tangible change in constitutional arrangements if they were to remain a part of Canada in the future.

However, the proposals put forward by the Trudeau government, and the manner in which they were pursued, frittered away that goodwill and left the federal government without the support of the majority of the provincial governments in Canada. Indeed, by the end of 1980 only two provincial governments, Ontario and New Brunswick, supported the initiative, while six governments, excluding Nova Scotia and Saskatchewan, were adamantly opposed. The longer the process continued, the more momentum was lost by the Trudeau government.

In Québec, as a result of the defeat of its referendum proposals, the Parti Québécois had been in considerable disarray throughout 1980, and into early 1981. The political situation began to shift in the late winter of 1981 however, ultimately resulting in a solid election win for the Parti Québécois in April. This profoundly changed the dynamic surrounding the federal initiative. The federal government was no longer facing a weak adversary in Québec, but rather one with a renewed mandate which it interpreted as carrying with it the legitimacy to oppose the constitutional proposals being put forward by Pierre Trudeau.

In March 1981, Saskatchewan and Nova Scotia joined the other six provinces opposing patriation and vigorously challenged it in the Supreme Court of Canada. This proved to be the turning point for the whole process. Without going into detail, the decision by the Court in the late summer of 1981 placed the whole federal initiative in jeopardy. It forced the Trudeau government to consult at least one more time with the provinces to try and seek a compromise. As Barry Strayer, former member of the federal Department of Justice team said:

Cabinet confirmed that one last attempt should be made for agreement with the provinces on a package and, if that failed, the government should proceed with the resolution in parliament and a request to Westminster. There was a feeling that the Canadian public would want to see one more attempted agreement, and Mark McGuigan, Minister of External Affairs, believed this would be important with respect to how the British Parliament would receive the request for an amendment. If the Canadian government did not appear to be conciliatory toward the provinces, “there would not be enough cooperation from Conservative backbenchers to ensure passage.”<sup>14</sup>

The view that there was “heavy weather” and the possibility of defeat for the patriation package in the British Parliament was shared by the provincial governments:

On 28 September 1981 the Supreme Court’s decision on the constitutionality of the federal resolution compelled all of the governments to meet again to seek compromise. The political impact of the court’s decision was immense. In Britain the *Guardian* reported that the Canada bill even under the strenuous sponsorship of the Thatcher government would have a tough time in the House of Commons. Some members of the Trudeau government privately acknowledged that the resolution’s fate at Westminster was unclear, even if it cleared the Canadian House of Commons. The opposing provinces, while buoyed by partial success in the Supreme Court, were divided on the situation in London. Québec believed that the provinces’ position had been greatly strengthened by the Court’s judgment and that

a majority of members of the British Parliament would oppose the bill.<sup>15</sup>

It is important to note that although the federal government decided to resume negotiations with the provinces, it was still prepared to go forward with patriation if the conference was not successful. Thus, the various scenarios presented by Claude Morin to his colleagues in Winnipeg in June 1981, outlined in a previous article in this volume, seemed to be playing out. If the federal government went ahead without a conference, the PQ would win. If the federal government went ahead after a failed conference, the PQ would win. If in the unlikely event that the federal government did not proceed after a failed conference, the PQ would still win. Privately, the PQ also believed that they would win even if a compromise was acceptable to some of the other provinces, notably Saskatchewan and British Columbia. It appeared to them that they had positioned themselves for every eventuality.

How then should we view what happened on the night of November 4, 1981? As indicated above, there are three views. The first (as reflected in my book, *The Patriation Minutes*) is that the federal government, after pushing the process as far as it could, was successful:

One of the most prevalent explanations is that the Prime Minister, in a rather Machiavellian way, pushed the process as far as he could and then determined that he had gotten the best deal possible. In other words, the provinces had been outmanoeuvred by the Trudeau government.<sup>16</sup>

Not everyone agrees with this assessment:

While this is a plausible explanation, it does not fit many of the facts. For example, in his closing speech the Prime Minister went to great lengths to dissociate himself from the process of compromise. “The final compromises were not of my making,” as he said. As noted above, his body language and demeanour were not those of somebody who had finally outmanoeuvred his opponents into an already anticipated outcome. Finally, if you read the minutes carefully you will see that he was less than helpful in seeking a compromise position throughout the process. Indeed he conducted

the meeting in a manner that indicated that he anticipated failure and was prepared to proceed with the unilateral package when that failure was realized. This leads us to the conclusion that the agreement by the Prime Minister was not part of some deep plot to outmanoeuvre the provinces.<sup>17</sup>

The second explanation, as also outlined in this volume, is that the First Ministers simply made a mistake:

The second explanation is that the Prime Minister and the nine Premiers simply made a mistake. In their haste and desire to achieve some kind of deal at the conference they simply forgot how important it was to get Québec’s approval. Those who hold this view believe that this was indeed a “dangerous deed” by the First Ministers, one which has led to three decades of division between Québec and the rest of Canada. They argue that no agreement was preferable to one which could not be signed by the government of Québec and the deliberate exclusion of Québec during the final negotiations led to the worst possible outcome for the process.<sup>18</sup>

There is a third explanation:

Both of the first two explanations are based on the assumption that the nine provinces were passive participants in a constitutional process largely directed by Prime Minister Trudeau and Premier René Lévesque. I would suggest that this was true up to the conference itself in November 1981. For the most part the nine provinces lined up either for or against the Trudeau initiative, allying with the province of Québec only because the unilateral action by the federal government was simply unacceptable in both process and substance. They were, quite simply, bit players in a play controlled by the two main protagonists.

However, this changed on Wednesday, November 4, 1981. When it became apparent to the other nine premiers that both the Prime Minister and the Premier of Québec seemed more interested in continuing their fight by means of referendum than in finding an agreement, they finally decided to take control of their own fate.

I still believe that this interpretation is correct. That is, the process of constitutional change was taken out of the hands of Lévesque and Trudeau on the night of November 4, 1981. Indeed, by agreeing to a package the other nine provinces went even further. They stated emphatically, as I said 30 years ago, that their views of a future Canada, their issues and dreams, were just as important as the dreams and views of the Prime Minister of Canada and the Premier of Québec. In the final analysis, the Prime Minister had no choice. He had to agree to the compromise package. Ironically, he had become a secondary character in his own play.

By contrast, René Lévesque did not have to agree. As we know from the process leading up to the conference, the Parti Québécois felt that they would win either way, in a conference failure, or in unilateral action by the federal government. What they did not anticipate was that the other nine provincial governments would get together and offer them a package that they could not accept. Nevertheless they had every reason to believe that their position was nearly as strong as it might have been in either of the first two alternatives.<sup>19</sup>

Thus, when Premier Davis of Ontario and Premier Lougheed of Alberta, facilitated by Premier Blakeney of Saskatchewan, agreed to the package of proposals worked out in the “Kitchen Accord” and got the agreement of six other provinces, there was no way that the Prime Minister of Canada could reject it. In particular, when Premier Davis, speaking later at night to Prime Minister Trudeau, told him that he was willing proceed with this package, the Prime Minister was left with no other alternative. At this point, the nine provinces took control of the patriation process.<sup>20</sup>

However, this leaves us with one more question. What if the agreement itself was nothing more than a cobbled-together compromise that was inferior both to the Trudeau package and to simple inaction? Put another way, was the substance of the agreement worth the damage to the constitutional equilibrium of Canada?

It is the opinion of many, including myself, that the final package was in some ways superior to that put forward by Trudeau. For example, the

amending formula, even without the compensation portion sought by Québec is superior to that proposed by the Prime Minister. In particular, it abandoned the outdated principle of regional representation for equality among the provinces. While regional representation, and the special position of Québec and Ontario in that formula, might have been relevant for the first 100 years of Canada’s existence, it was clear to most that with the rapid growth of the Western provinces there had to be an acceptance of the changing roles and situations in Canada. Nevertheless, there was a need to recognize the special situation of Québec and the French fact in Canada. This was achieved through the insertion of the opting out clause. It allows Québec, as well as other provinces if necessary, to preserve and protect constitutional arrangements which are integral to their very existence.

Many argue that the original charter put forward by Pierre Trudeau was superior to that of the final agreement, especially because the present Charter contains a notwithstanding clause. This is not an argument that can be adequately addressed in this short paper. The fact that section 33(1) has been used only sparingly, and may constitute a “paper tiger,”<sup>21</sup> is not an argument against its inclusion or against a presumption that it actually enhances the acceptability and workability of a charter of rights and freedoms in a parliamentary democracy. Nor does the fact that section 1 of the *Charter* seems to have proved adequate to the reconciliation necessary between the absolutism of prescribed rights, and the political realities of democratic societies, detract from the need for section 33(1). As with other provisions in the Constitution, its simple existence may be responsible for its lack of use.

Other substantial changes were made in the final agreement, but these two examples serve to illustrate the argument that the final package of patriation proposals was not only a compromise but was more “in tune” with Canadian society than the original Trudeau proposals.

More importantly, by insisting that Trudeau accept the new patriation package, the provinces ensured that Canada would not be put through yet more divisive and perhaps disastrous politi-

cal conflicts. In short, it could be concluded that the nine premiers not only gave Canada a new Constitution but literally saved the country from further division.

## Conclusion

What can we conclude from these four views of patriation?

First, and perhaps most important, it becomes quite apparent that patriation, and the process surrounding it, was the midwife of a new Canada. To paraphrase Lord Durham: for over 100 years, two nations had struggled within the bosom of a single state. Québec, and the French fact, will always be an important part of Canada, but after 1982, it no longer had a veto over political life in the country. The rest of Canada was prepared to move on with or without the agreement of Québec. The reaction of the people of Québec, including the referendum of 1995, tells us that Québécois have not yet come to terms with this new reality. We await their final decision about their role in our country.

Second, as might be expected, the final severing of our ties to Great Britain signalled the emergence of our country into the modern, post-imperial world. It is true that it would be difficult to measure the impact of that severance, but it clearly opens the door to a Canada which is no longer unequivocally British in origin and outlook. One might say that a parallel “English fact” has also ceased to have a veto over life in Canada.

Third, with the rising involvement of Aboriginal peoples and other groups in the patriation process, and in subsequent negotiations about constitutional matters in Canada, we recognize the emergence of Canada as a modern liberal and pluralist democracy. Patriation was a recognition that a new Canada had emerged after World War II, a new Canada that would be quite different from the country which had emerged in 1867.

Fourth, and finally, patriation told us that although the new Canada would be liberal and pluralist, it would remain profoundly regional. The decisive involvement of Premiers Davis, Lougheed, and Blakeney, signalled the end of

John A. Macdonald’s vision of a centralized Canada directed by a powerful and dominant national Parliament in Ottawa. It also recognized that important political leadership would continue to arise in the provinces of Canada. In this, the 150th year of our constitutional regime, what can we expect about constitutional change in the future? I would venture only a couple of broad observations.

First, as with our cousins to the south, the courts will play a more and more prominent role in political decision-making in Canada. As we move further away from the era where judges were trained in a non-charter society, those appointed to the bench will become increasingly comfortable with intervening on a wider variety of topics. Whether we like it or not, we are becoming a more judicial society. This will also mean that important constitutional change is more likely to take place in the courts than in parliaments.

Second, I would predict that formal constitutional change will continue to be quite rare. As I wrote in 2011:

All communities of humankind go through periods of decisive and important change. I believe that the patriation of the Constitution of Canada in 1982 was one of those critical junctures for the country of Canada.<sup>22</sup>

Barring a decision by the people of Québec to leave Canada, I do not foresee such a critical juncture arising in the near future.

This leaves us with one final question. Should we have gone ahead with patriation in 1982? Here I remain of the view that I have expressed in several articles and books since 1982. Canada is a stronger and better country because of the acceptance of the patriation package. After 35 years, I am even more strongly of the opinion that we did the right thing.

## Endnotes

- 1 Keith Banting & Richard Simeon, "Federalism, Democracy and the Future" in Keith Banting & Richard Simeon, eds, *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen Publications, 1983) at 359 [Banting & Simeon].
- 2 Roy Romanow, John Whyte & Howard Leeson, *Canada...Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 265-66 [Romanow, Whyte & Leeson].
- 3 Howard Leeson, *The Patriation Minutes* (Edmonton: Centre for Constitutional Studies, Faculty of Law, University of Alberta, 2011) at 69, 71 [Leeson, *Patriation Minutes*].
- 4 Lévesque knew with certainty that Prime Minister Trudeau would never accept an amending formula that allowed opting out with compensation. The Prime Minister clearly considered this to be a mechanism for separation by stealth.
- 5 Leeson, *Patriation Minutes*, *supra* note 3 at 83-84.
- 6 Barry L Strayer, *Canada's Constitutional Revolution* (Edmonton: The University of Alberta Press, 2013) at 118 [Strayer].
- 7 Romanow, Whyte & Leeson, *supra* note 2 at 62.
- 8 *Ibid* at 63.
- 9 Strayer, *supra* note 6 at 279-80.
- 10 Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2nd ed (Toronto: University of Toronto Press, 1993) at 113-14.
- 11 *Ibid* at 115.
- 12 John D Whyte, "Keeping Democracy's Promise" in David McGrane et al, eds, *Allan E. Blakeney and the Challenges Facing Canadian Democracy* (Regina: University of Regina Press, forthcoming).
- 13 See e.g. Chaviva Hošek, "Women and the Constitutional Process" in Banting & Simeon, *supra* note 1, 280 at 295, in particular lamenting what she called the "Unfinished Agenda". Interestingly, several of these concerns have never been addressed.
- 14 Strayer, *supra* note 6 at 195.
- 15 Romanow, Whyte & Leeson, *supra* note 2 at 188.
- 16 Leeson, *Patriation Minutes*, *supra* note 3 at 81.
- 17 *Ibid*.
- 18 *Ibid*.
- 19 *Ibid* at 81-83.
- 20 Former premier Brian Peckford has lately been attempting to amend this view of what happened. In particular, he is trying to claim that he was a pivotal player during that evening because the

dissenting provinces worked from a draft prepared by officials in Newfoundland. As I have stated elsewhere, his role was minor. In 2015, I wrote the following and made this point clear to a Senate committee looking at this matter:

I wish to state unequivocally that Mr. Peckford is wrong in his assertion that there never was a Kitchen Accord and that it played no role in the patriation discussions that night. As well, it is my assessment that Mr. Peckford himself did not, as the news story says, play a central role in saving the constitutional talks in 1981.

As stated above on the evening of November 4, 1981 a series of negotiations took place between and among the various provincial delegations, excluding Manitoba and Québec, as to what would constitute a set of proposals that would be acceptable to the federal government of Canada. The events were as follows. As the First Ministers were about to conclude their discussions at approximately 6 PM on the evening of November 4, 1981 several premiers, including Premiers Blakeney, Lougheed, and Peckford agreed to send officials to Mr. Blakeney's suite at 9:30 PM that night. Prior to this Mr. Roy Romanow, Mr. Jean Chrétien, and Mr. Roy McMurtry, all ministers with their respective governments, met in a small kitchen off of the meeting room, and put together a proposal for a compromise. Mr. Romanow brought this compromise to the attention of his premier Mr. Blakeney, and to me, at the end of the discussions at 6 PM. (Mr. Cyril Abery, Deputy Minister for Intergovernmental Affairs in Newfoundland, was standing beside us when this report was delivered.) Jean Chrétien brought the proposal to the attention of the Prime Minister and Mr. McMurtry brought it to the attention of Premier Davis of Ontario. Mr. Blakeney, after hearing the report from Mr. Romanow, talked briefly to Premier Davis of Ontario, and to the Prime Minister, about the proposals, later called the "Kitchen Accord." All of this is detailed in my book, *Patriation Minutes*, *supra* note 3 at pages 59 and 60. The facts in this discussion can also be substantiated from my personal memo to file on the subject, which is in the Archives of the Province of Saskatchewan.

It was agreed, therefore, that the Saskatchewan delegation would bring forward these proposals to the meeting scheduled for 9:30 PM that night. When we senior officials came together in Premier Blakeney's suite in the Hotel Château Laurier, I carried forward the proposals which would later be called the "Kitchen Accord." As well, Mr. Cyril

Abery, Deputy Minister for Intergovernmental Affairs from Newfoundland, also brought forward a proposal which looked almost identical to the Kitchen Accord. (I can only speculate, but I imagine that since he had heard the report earlier given by Mr. Romanow, he decided to put together a proposal based on those discussions, which included some small differences which were specific to Newfoundland.) After looking at both proposals, one from Saskatchewan, based on the Kitchen Accord, and the Newfoundland document, we decided to work from the one brought to the meeting by Mr. Abery. I agreed to do so not because the Kitchen Accord was not relevant, but because the proposals were relatively the same and there was a political advantage to working from the Newfoundland document. It carried with it the political approval of one of the Conservative provinces from the “Gang of Eight” provinces that were opposing the federal proposals and therefore had the advantage of getting another province on board. This was a crucial moment since for the first time we had the possibility of bringing together four provinces from the Gang of Eight, one province from the federal camp, and the federal government itself. Please note, Mr. Peckford was not involved in these discussions, and was not part of the discussions with Mr. Davis, or Prime Minister Trudeau. Indeed, he did not come to the suite until much later.

As you can see, the Kitchen Accord not only existed, but was the basis for discussion for the provinces of Saskatchewan and Ontario, as well as the federal government. It was fortuitous that the document from Newfoundland was virtually the same, and constituted another step forward. The fact that Premier Peckford was unaware of the Kitchen Accord is understandable. He did not come until much later, and was not part of the early discussions which we senior officials had prior to the inclusion of several Premiers. In short, the Kitchen Accord not only existed, but was one of several crucial linkages which ensured that we would get an agreement that night. All of this has been reported in several books, including my own, and it is disingenuous to say the least of Premier Peckford to now try and pretend that the Kitchen Accord did not exist.

Let me now turn to the role of Premier Peckford himself. I must say that I find Mr. Peckford's current stand on these matters to be disappointing. I'm disappointed that he would attempt to diminish the role of several of his colleagues in this matter at a time when many

of them have passed away and are unable to comment upon his assertions. In particular, I find his approach to Messrs. Romanow, Chrétien, and McMurtry to be extremely disrespectful. I have been at several conferences with them over the years and none of the three have ever asserted that they played the most important role in developing the compromise. Indeed, they always indicate that the document they developed was one of several crucial linkages and discussions which occurred on that night. Mr. Peckford's attempt to diminish that role is, as I said above, extremely disrespectful.

I also find Mr. Peckford's approach to be self-serving. His own role, in my opinion, was relatively minor. It is true that the document from Newfoundland eventually served as the discussion piece, but the final document was the creation of all of the provinces involved. In my opinion, as I say in my book, I believe that two provinces had virtual veto power over the agreement— Ontario, and Alberta. No agreement would have gone ahead without the approval of Premiers Davis and Lougheed. Without the approval of Premier Davis the federal government would not have agreed. Without the agreement of Premier Lougheed it is unlikely that the majority of the gang of eight provinces would have agreed to a proposal. By contrast, had the Premier of Newfoundland not agreed to the proposal, and the majority of other provinces did, it likely would have gone ahead without them. I say this to emphasize that the smaller provinces were simply not important enough to wield a veto.

I also believe that Premier Peckford's role was relatively minor because, unlike Premier Blakeney, he did not play a major role in the substantive negotiations with either Ontario or the federal government. If you read my description of the discussions in Premier Blakeney's suite that night you will find that Premier Peckford contributed very little to what had already been agreed to by senior officials. Indeed, at one point he attempted to make changes that were unacceptable to Ontario and the federal government, and had to be convinced by Premier Blakeney that they could not go into the agreement.

- 21 Howard Leeson, “Section 33, the Notwithstanding Clause: A Paper Tiger?” (2000) 6:4 *Institute for Research on Public Policy: Choices* at 20, online: IRPP Archives <[archive.irpp.org/choices/archive/vol6no4.pdf](http://archive.irpp.org/choices/archive/vol6no4.pdf)>.
- 22 Leeson, *Patriation Minutes*, *supra* note 3 at 84.