Patriation Paradigms: Sovereignty, Power, and Rights

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I. Introduction

The patriation of the Constitution marked an important moment in Canadian history in two domains — sovereignty and rights. Patriation broke another strand in Canada’s colonial relationship with Britain and it constitutionally entrenched a range of fundamental rights and freedoms, including Indigenous rights. Sovereignty and rights, however, are contested concepts. Their meanings inform divergent versions of the story of Canadian constitutionalism.

The standard version highlights the connection between patriation and the enhanced sovereignty of the Canadian state. The affirmation of Canadian sovereignty was particularly critical to those already exercising political power in Canada, specifically to federal and provincial political actors. Negotiations leading up to patriation engaged an exclusive group of white male provincial and federal politicians.1 The advancement of Canadian autonomy from the United Kingdom, protection of jurisdiction, and political power were front and centre during these negotiations. Indeed, there were last minute compromises and federal concessions to provincial premiers concerned about the risks of losing political power.2

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1 Janine Brodie refers to this dominant political group as the “eleven white men in suits.” See “Constituting Constitutions: The Patriation Moment” in Lois Harder & Steve Patten (eds) Patriation and Its Consequences: Constitution Making in Canada (Vancouver: UBC Press, 2015) 25-48 at 25. Her chapter provides a fascinating account of the dominant, residual, and emergent narratives of the patriation moment.

2 The inclusion of section 33, the “notwithstanding clause,” which allows legislatures to override important Charter rights and freedoms, was central to garnering provincial governmental support for the patriation
Pursuant to this standard narrative, constitutional rights were understood as a promise to the politically dispossessed to secure equality, freedom, security of the person. Social movements, including those engaging women, persons with disabilities, linguistic minorities, multicultural, and racialized communities, mobilized for express inclusion in the rights affirmed by the Constitution. So too did Indigenous peoples, though their mobilization also contested the sovereignty claims of the Canadian state. The drafting of the constitutional reforms included rights and safeguards in response to these efforts. Specific provisions in the *Charter of Rights and Freedoms* were aimed at ensuring that the judiciary would give constitutional rights and freedoms an expansive and generous interpretation. A specific section was added to strengthen the protection of gender equality. With respect to Indigenous rights, the text included the promise of a constitutional conference to elaborate the meaning of the entrenched rights.

While one version of the story of Canadian constitutionalism follows this conceptual sovereignty and rights pathway, there is another version that lies beneath the surface of the standard story. This second version disrupts traditional understandings of sovereignty and rights, gesturing towards the possibility of a more transformative constitutional culture. Through this lens, sovereignty is multiple and divided. It is important not only for traditional political elites, but also for diverse communities that have been denied political power. Rights, too, are re-framed to go beyond substantive claims for protection within current power structures to address questions of political participation and sovereignty. Rights are expanded to advance political power through democracy, social inclusion and enhanced political agency. This alternative narrative disrupts traditional conceptions of both sovereignty and rights, making possible a more radical rethinking of Canadian constitutionalism.

In this article, I focus on the second version of the constitutional patriation story since it is often overlooked and invisible. I begin by exploring how nation-state sovereignty has been disrupted and challenged both externally and internally — bringing into question the idea that patriation ushered in an era of full-fledged Canadian sovereignty. I then turn to contested conceptions of rights — underscoring the importance of reimagining rights as sources of political empowerment and sovereignty. Such a reconceptualization means that rights become sources of enhanced jurisdictional authority, power-sharing, and self-governance. Thus, I seek to contribute to a rethinking of the two central dimensions of the patriation paradigm towards...
an approach that celebrates multiple and divided sovereignties and reframes rights as integral to empowerment.

II. Patriation Paradigms: Contested Conceptions of Sovereignty

Despite the importance of patriation as a marker of Canadian state sovereignty in relation to the United Kingdom, it is critical to recognize concomitant external and internal challenges to Canadian sovereignty.

A. External Challenges: Rethinking Sovereignty in a Global Community

The traditional conception of sovereignty — premised on a Westphalian or nation-state-based territorial sovereignty — has been challenged by both external and internal forces. With respect to the external challenges, Nancy Fraser explains that "the social processes shaping … [our] lives routinely overflow territorial borders." She highlights, for example, "geopolitical instabilities," "superpower unilateralism," "neo-liberal globalization," and the rise of transnational entities to reinforce her argument that justice needs to be reframed to account for globalization.\(^6\) In a world that is fundamentally interconnected, traditional conceptions of nation-state sovereignty, though important, are inaccurate and incomplete.\(^7\) The global dimensions of contemporary problems require responses that transcend nation-state boundaries and, in turn, fundamentally constrain sovereign authority. Multiple state and non-state relationships across international borders disrupt historical conceptions of nation-state sovereignty.\(^8\)

Patriation as a moment for celebrating Canadian sovereignty, therefore, must contend with how it is significantly compromised and challenged by globalization. Rather than celebrating patriation as a marker of absolute Canadian sovereignty, it would be more apt to recognize how sovereignty in our contemporary era has changed. The patriation of the Canadian Constitution occurred at an historical moment when critical questions were being raised about the ways in which governance transcends the borders of the nation-state. Indeed, scholars have observed the emergence of what has been called “global constitutionalism,” defined as “the global field of diverse, formal and informal assemblages of laws and governance, norms and actors that exhibit constitutional qualities.”\(^9\)

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7 *Ibid* at 13-14.
8 The Russian invasion of Ukraine, however, reminds us of the importance of the traditional nation-state conception of sovereignty, and the tragic risks of violence in a world without peace between nation-states.
One approach to global constitutionalism, premised on a development paradigm, focuses on advancing transnational economic interests and global capitalism. Operating “through the exercise of military and financial power, the more advanced states and corporations establish institutions of global governance.” Alternative approaches to global constitutionalism, however, are also emerging — rooted in local community mobilization and what has been called “globalization from below.” Challenging the economic development paradigm, scholars have identified “eco-social constitutionalism” and “contestatory constitutionalism” as promising models for rethinking constitutionalism in a global era. These alternative models respond to external challenges to nation-state sovereignty, while being rooted in internal challenges to sovereignty.

B. Internal Challenges: Shared Sovereignties Within Canada

A singular conception of nation-state sovereignty has been contested by diverse internal actors throughout Canadian history. Most visibly, the former British colonies that became the provinces of the Canadian confederation continued to assert sovereignty. Additionally, Indigenous peoples who lived for generations as self-governing autonomous communities never accepted the asserted sovereignty of the French, British, or Canadian governments. Finally, a conception of sovereignty as a concept exclusively relevant to formal state actors has been increasingly challenged by social movement mobilization seeking democratic participation in the institutions of everyday life and community-based governance.

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12 See Tully et al., supra note 10. They critique this dominant model for its contribution to four crises of sustainability and well-being: 1) “the systemic, intergenerational inequalities, poverty, starvation and suffering,” 2) “the expanding military-industrial-intelligence complexes engaged in escalating cycles of violence and counter-violence: war preparation, wars of massive human, infrastructural and environmental destruction, reconstruction, and rearmament,” 3) “the ecological crisis, including climate change,” and 4) “the refugee and migrant crisis” (at 6).


14 Tully et al, supra note 10, define eco-social constitutionalism as centering ecological sustainability in all “practices and networks of internalizing interdependency, co-sustenance, and well-being of ‘all affected’” at 11; see also, Fritjof Capra and Ugo Mattei, The Ecology of Law: Toward a Legal System in Tune with Nature and Community (Oakland, CA: Berrett-Koehler Publishers, 2015). Contestatory constitutionalism refers to agonistic activities leading to “diverse forms of contestation of the development paradigm by exercising formal human rights, representative democracy and rule of law in innovative ways” (Tully at al at 13); see also, Antje Wiener, A Theory of Contestation (New York: Springer, 2014). Building on these two models, Tully et al propose “global integral constitutionalism,” “which combines the constitutional norms of sustainability and well-being and the all-affected principle in conjunction with human rights, democracy and rule of law, yet enact them differently” — through horizontal and vertical types of citizen engagement (at 14).

15 Sovereignty is divided between branches of government as well, and the Charter was feared for its risk of undermining Parliamentary sovereignty. This is an idea we shall revisit in Part III of the paper.
1. Provincial Autonomy and Sovereignty

In the Canadian political imaginary, there has been the longstanding understanding that “political power is shared by two orders of government” — federal and provincial — a reality that fundamentally challenges the notion of a singular conception of sovereignty. Federalism has been conceptualized to affirm provincial autonomy within distinct territorial spheres of jurisdiction. As the Supreme Court of Canada recognized in the Secession Reference:

Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. ... The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments.

Increasingly, other orders of government (including territorial, municipal, and Indigenous) are also claiming recognition in a re-imagined federalism. Since Confederation, however, a recurrent theme in Canadian constitutionalism has been the importance of provincial autonomy, understood to affirm sovereignty within specific provincial spheres of jurisdiction.

In the pre-patriation context, Guy Laforest explains that the “Trudeau vision of the Constitution embraced Canadian sovereignty as the means to challenge Quebec nationalism.” For those deeply committed to the promise of a multinational state and recognition of Quebec as a sovereign nation within Canada, the centralizing rhetoric of the patriation project meant “the end of the Canadian dream that was created through the Confederation.” The focus on Canadian sovereignty and pan-Canadian nationalism in the patriation process seemed to cast aside the historical idea of autonomous provinces and sovereignty — so central to Quebec since Confederation.

Of course, it was not only Quebec. Other provinces also resisted the federal government’s attempt to patriate the Constitution unilaterally and were concerned about potential loss...
of political power and the centralizing effects of the Canadian Charter. In the wake of the Supreme Court’s affirmation of a constitutional convention requiring substantial provincial consensus on constitutional amendments impacting the provinces, Trudeau ultimately obtained the support of a sufficient number of provinces to proceed with the patriation process. But, at the end of the day, Quebec was excluded from the final negotiations and did not support the final accord — an exclusion that would have longstanding consequences for the Canadian federation.

A discourse of Canadian sovereignty that fails to situate it within an historical reality of shared sovereignty with provincial orders of government, and increasingly with territorial and Indigenous orders of government, seems out of sync with our historical development as a federation. The critical importance of multiple sovereignties to Canada was eclipsed by the patriation celebration of Canadian sovereignty. Perhaps ironically, ignoring the reality of our multiple sovereignties risks undermining the unity and well-being of our federation.

2. Inherent Indigenous Sovereignty

The colonial assertion of Canadian sovereignty has long been challenged by Indigenous peoples — a second significant internal challenge to a singular conception of sovereignty in Canada. Patриation did not redress the erasure of Indigenous sovereignty in the colonial practices and assumptions of Canadian constitutionalism. In this regard, the underlying legal justifications for the assertion of Canadian sovereignty are flawed and deeply problematic. Despite Indigenous attempts to stop the patriation process until Indigenous sovereignty was addressed, the British courts did not intervene. Nor was Indigenous sovereignty clearly affirmed in the framing of Aboriginal rights in the Constitution Act, 1982. The patriation moment appeared at a time when Indigenous sovereignty could potentially have been recognized and a colonial legal fiction remedied. As numerous scholars and activists have lamented, however, such was not to be the case.

23 Reference re: Resolution to amend the Constitution, [1981] 1 SCR 753 at 755, 125 DLR (3d) 1 (“prompted by the opposition of eight provinces” ... “based on their assertion that both conventionally and legally the consent of all the provinces was required”).


27 A case was brought to challenge the patriation of the Constitution in 1982 on the grounds that it would interfere with treaty and other obligations the Queen of the United Kingdom owed to the Aboriginal peoples of Canada. The challenge was dismissed on the grounds that although at one time the Crown was one and indivisible, this was no longer the case. See Lord Denning’s decision: R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta, [1982] QB 892, [1982] 2 All ER 118 (CA).

Creating the conditions for the exercise of Indigenous sovereignty is a critically important dimension of an alternative patriation paradigm. Reconciliation demands that the inherent sovereignty of Indigenous peoples be recognized and reinforced as part of our Constitution. As Keira Ladner suggests, the “encrypting of [Indigenous] rights opened a window of opportunity to reimagine the Canadian constitutional order and create the opportunities necessary for decolonization and the realization of a post-colonial Canada.”  

Louise Mandell and Leslie Hall Pinder similarly maintain that:

“We cannot erase the past, but we can change history by the stories we tell. We can tell a new story — where Indigenous legal orders, with their sacred connections and transmitted ancient consciousness, have constitutional space to grow and deepen, and our collective endeavour can shine like a light as an example to the world.”

More recently, Canada endorsed the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), including passage of a federal law to secure its implementation in Canada. As affirmed in the preamble to the UNDRIP Act, “the Government of Canada recognizes that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government.” UNDRIP itself affirms the right of Indigenous peoples, in “exercising their right to self-determination,” to “autonomy or self-government in matters relating to their internal and local affairs,” although it also protects the “territorial integrity and political unity of … sovereign States.”

In its final report in 1996, the Royal Commission on Aboriginal Peoples examines diverse Indigenous conceptions of sovereignty and endorses the idea of “shared sovereignty” as “a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government.” The report further explains:

These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.

Interpretations of Indigenous rights have also been critiqued: see e.g. John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997-98) 22 Am Indian L Rev 37. See also June McCue, “Kapp’s Distinctions: Race-Based Fisheries, the Limits of Affirmative Action for Aboriginal Peoples and Skirting Aboriginal People’s Unique Constitutional Status Once Again” (2008) 5:1 Directions 56. For a discussion about the difficulties in reconciling differences between Canadian and Indigenous constitutional orders, see Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847.

29 Ladner & McCrossan, supra note 25 at 264.
30 Louise Mandell & Leslie Hall Pinder, “Tracking Justice: The Constitution Express to Section 35 and Beyond” in Harder & Patten, eds, supra note 1 at 200.
32 Ibid, Preamble.
35 Ibid.
Though sovereignty remains a contested concept, the inherent sovereignty of Indigenous peoples is embedded in our history of multiple internal sovereignties in Canada.

3. Participatory Democracy & Social Movements: Sovereignty Beyond the State

A third internal challenge to a unitary conception of nation-state sovereignty has been articulated by individuals and communities that have historically been excluded from the formal channels of political power. Beyond recognition of the ways in which sovereignty characterizes federal as well as provincial, territorial, and Indigenous orders of government, emerging critical theory scholarship on sovereignty re-imagines it as a bottom-up rather than top-down, state-centric concept. Sovereignty — as a bottom-up concept rooted in a radical conception of democratic politics and social inclusion — disrupts traditional understandings of formal state sovereignty. In outlining a feminist conception of sovereignty, Vaishnavi Pallapothu maintains it “would move beyond the implication of sovereignty as domination, towards sovereignty as the right to individual agency and prosperity.” From this perspective, as John Hoffman has argued, “if we see sovereignty as autonomy, freedom and emancipation, then the state is a barrier to sovereignty, despite the fact that we frequently speak of ‘state sovereignty’ as though sovereignty was an intrinsically state concept.” Sovereignty can accordingly be understood to extend beyond formal governance structures and to embrace the autonomy and political agency of non-state actors in civil society. This exercise of sovereignty is expressed through community-level political and democratic engagement.

In her work on “jurisdictional justice,” Hester Lessard critiques the focus on formal jurisdic- tional authority and power in the traditional debates about federalism, unity, and diversity in Canada. Instead, she affirms the importance of political and democratic mobilization of non-state actors (civil society and social movements) and argues that their participation in governance should be recognized and reinforced. In effect, her claim engages a rethinking of sovereignty beyond the state to recognize how political engagement and governance operates within communities.

During the patriation debates, civil society organizations mobilized to participate in the political processes of constitutional reform — advocating for inclusion in the debates about constitutional reform and appearing, for example, before the Joint Senate-House of Commons Committee on the Constitution. They were actively asserting an entitlement to participate in the democratic processes of constitutional change, claiming their political agency and sovereignty understood broadly to extend to “individual and community-level sovereignty.”

38 Pallapothu, supra note 36.
40 Lessard, supra note 37 at 94.
41 Pallapothu, supra note 36. See also Brodie, supra note 1 at 38; International Women’s Rights Project, “Constitute! The Film”, online (video): Constitute! Forum on Women’s Activism <.
In short, internal challenges to conceptions of sovereignty also prompt us to rethink the patriation project. Rather than viewing the reality of shared sovereignties within Canada as a source of divisiveness to be suppressed or overlooked, it is precisely the recognition of multiple sovereignties that will allow Canada to function as a political entity and country in which diverse communities flourish.

III. Patriation Paradigms: Contested Conceptions of Rights

Constitutional rights are a fundamentally important source of legal and normative guidance. Ensuring expansive protection and effective enforcement of fundamental human rights continues to be essential. Yet, the traditional approach to rights, based on the top-down protection of substantive entitlements defined and enforced by governmental and judicial actors, has been subjected to some powerful critiques.

One compelling critique of rights is put forward by Wendy Brown in her article on the paradoxes of rights. She argues that rights reduce “subordination” but fail to challenge either “the regime … [or the] mechanisms of reproduction” that caused the inequalities and violations.42 As she explains:

[R]ights for the systematically subordinated tend to rewrite injuries, inequalities, and impediments to freedom that are consequent to social stratification as matters of individual violations and rarely articulate or address the conditions producing or fomenting that viola-
tion. Yet the absence of rights in these domains leaves fully intact these same conditions.43

Pursuant to this conceptualization, rights protect against substantive harms but not the political, institutional, or structural conditions that produce and perpetuate those harms.

In the context of the patriation debates, Charter rights were framed predominantly as negative civil and political rights within the classical liberal tradition — to be claimed by individuals and defined by judges. There were exceptions, such as the section 15(2) affirmative action/ameliorative initiatives provision and the positive and collective rights dimensions of linguistic minority rights. But generally, Charter rights were layered onto an institutional and structural status quo. And Charter claims have rarely incorporated concerns about the relationship between rights violations and the dynamics of power structures and systems.

The channeling of rights claims through the courts also creates access to justice impediments and reinforces the power of a traditionally conservative and elite institution — the judiciary — to define the content of rights and remedies. Though potentially transformative in some cases, the courts tend to provide remedies that do not challenge the structural or systemic dimensions of rights violations.44

43 Ibid at 431-2. Brown further asks whether “rights for women are formulated in such a way as to enable the escape of the subordinated from the site of that violation, and when and whether they build a fence around us at that site, regulating rather than challenging the conditions within” (at 422).
44 Nancy Fraser distinguishes affirmative and transformative remedies, noting that affirmative remedies are “aimed at correcting inequitable outcomes … without disturbing the underlying framework that generates them.” Transformative remedies are “aimed at correcting inequitable outcomes precisely by restructuring
A further critique of traditional rights centres on their tendency to reinforce both victimization narratives and essentialist understandings of group-based identities.\textsuperscript{45} The complexities of group-based harms, contexts, and identities are often lost in the doctrinal and categorical exigencies of law. There are also powerful incentives to amplify the victimization of claimants rather than their agency in the juridical framing of rights violations. Melissa Williams notes that in seeking recognition by the state through the language of rights, subaltern groups must conform to “norms and expectations that are most conducive to the state’s capacity to manage social conflict, to maintain its moral authority to govern, and to secure the conditions of economic growth.”\textsuperscript{46}

In the face of these challenges to our standard understandings of rights, how might we re-imagine rights as part of a new paradigm of patriation? To what extent might our understanding of constitutional rights go beyond substantive claims for protection within the current institutional and societal power structures, towards enhanced democratic participation, social inclusion, political agency, and institutional change? Notably, such a reformulation of rights takes us onto the domain of the political — the terrain of sovereignty — sometimes overlooked by groups seeking justice in the courts.

Constitutional claims rooted in community-based collective rights have been more attentive to the connection between political power and rights. Thus, increasingly, Indigenous rights are being framed through the lens of self-government,\textsuperscript{47} and linguistic minority communities have insisted that education rights should include entitlements to “manage and control” minority language education. In response, the Supreme Court of Canada has recognized that “empowerment is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns.”\textsuperscript{48}

Constitutional equality provides another example of the connections between political power, sovereignty, and rights. At the time of patriation, equality-deserving groups focused on ensuring the inclusion of groups and communities in the rights-based protections.\textsuperscript{49} Much of


\textsuperscript{48} Arsenault-Cameron v Prince Edward Island, 2000 SCC 1 at para 45 [emphasis added].

this mobilization still assumed, however, that violations of constitutional equality rights would be claimed retroactively and channeled through the apparatus of the courts. Indeed, the courts have steadfastly endeavoured to elaborate a substantive conception of constitutional equality, with its lodestar of equitable outcomes. But even beyond the importance of continuing to affirm a robust substantive definition of equality, I want to suggest that an approach to rights violations that is attentive to the systemic and structural dimensions of their reproduction has the potential to lead to more transformative remedies.

To remedy discrimination embedded in systems and structures requires new ways of thinking about equality rights. Judicial recognition of both adverse impact discrimination and systemic discrimination set the stage for this rethinking. As Justice Abella explains in her eloquent judgment in Fraser v Canada (Attorney General), adverse impact discrimination marks “a shift away from a fault-based conception of discrimination towards an effects-based model which critically examines systems, structures, and their impact on disadvantaged groups.”

Rather than simply compensating victims for past wrongs within an unquestioned institutional status quo, rights must attend to the systemic and the structural — towards the creation of innovative and forward-looking remedies. Such transformative remedies should redress institutional and societal exclusion from decision-making processes and democratic governance.

In my own work on equality, I have called this approach “inclusive equality” because it requires political and social inclusion, specifically for those who have been historically and structurally excluded from political power, institutional decision-making, and structures of democratic participation. It resonates with expansive feminist conceptions of positive sovereignty, which are linked to reinforcing agency and autonomy. Building a more inclusive and equitable society requires a restructuring of the historical, structural, and systemic relations that produce, reproduce, and justify social, political, legal, and economic exclusion and inequality. Restructuring processes and systems, moreover, will reduce the need to rely on retroactive litigation — contributing to access to justice beyond the courts.

IV. Conclusion

To conclude, in reflecting on patriation, I have come to realize that there can be no clear dichotomy between sovereignty and rights. Sovereignty should be conceptualized in a context where power is shared, relational, and multiple. It should be understood as relevant to communities and civil society. And this reconceptualized understanding of sovereignty is central to the realization of rights in ways that address not only important substantive guarantees, but also the inclusion of historically excluded groups and communities in systems and structures of political power and institutional decision-making. It is only when our traditional understandings of both sovereignty and rights are reshaped towards a new paradigm of patriation that we will be able to celebrate the coming home of our Constitution.

52 Pallopothu, supra note 36 (on negative versus positive sovereignty).
Canadian unity cannot be forged in a false discourse of pan-Canadian homogeneity or a singular conception of sovereignty; instead, it will be built and rebuilt by attentiveness to respectful relations and solidarity across our diverse nations, communities, and differences. As Janine Brodie explains:

Constitutions are both nouns and verbs. They are celebrated public documents that set out the supreme rules and fundamental values by which we govern ourselves. Constitutions also embody the results of previous struggles over sovereignty, recognition, and citizenship. However, constitutions also always actively constitute and reconstitute.53

In a similar spirit, Co-Chairs of the Royal Commission on Aboriginal Peoples, René Dussault and Georges Erasmus, taught us that the “story of Canada is the story of many … peoples, trying and failing and trying again, to live together in peace and harmony.”54 They cautioned, however, that “there cannot be peace or harmony unless there is justice.”55 We enhance this pursuit of justice by respecting multiple sovereignties as well as by reinforcing individual and collective agency towards belonging and well-being. In so doing, we may also open a pathway towards the celebration of a re-imagined patriation.

55 Ibid.