CANADA

TODAY / D'AUJOURD'HUI

The Constitution Comes Home
Le Rapatriement de la Constitution

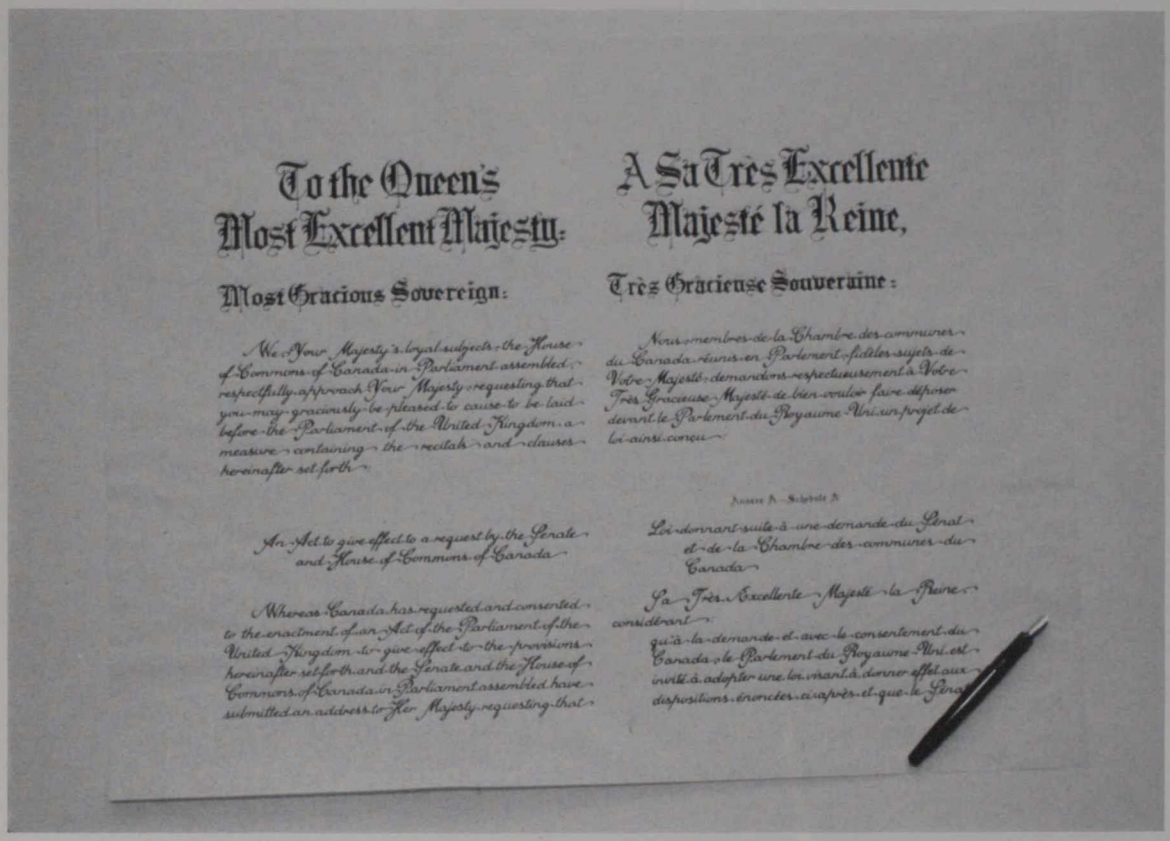
"I wish simply that the bringing home of our Constitution marks the end of a long winter, the breaking up of the ice-jams and the beginning of a new spring."

Pierre E. Trudeau.

4:82

PHOTOS: COVER, MICHAEL MITCHELL PHOTOGRAPHER; PAGE TWO, ROBERT COOPER

The Queen Proclaims



To the Queen's Most Excellent Majesty:

Most Gracious Sovereign:

We Your Majesty's loyal subjects the House of Commons of Canada in Parliament assembled respectfully approach Your Majesty requesting that you may graciously be pleased to cause to be laid before the Parliament of the United Kingdom a measure containing the recitals and clauses hereinafter set forth

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that

A Sa Très Excellente Majesté la Reine,

Très Gracieuse Souveraine:

Nous membres de la Chambre des communes du Canada réunis en Parlement fidèles sujets de Votre Majesté demandons respectueusement à Votre Très Gracieuse Majesté de bien vouloir faire déposer devant le Parlement du Royaume-Uni un projet de loi ainsi conçu

Loi donnant suite à une demande du Sénat et de la Chambre des communes du Canada

Sa Très Excellente Majesté la Reine considérant

qu'à la demande et avec le consentement du Canada le Parlement du Royaume-Uni est invité à adopter une loi visant à donner effet aux dispositions énoncées ci-après et que le Sénat

Parliament's petition to Westminster

Cover Photo: The Painted Flag #31, *by Charles Pachter*

On April 17 Canada's Queen proclaimed the patriation of Canada's Constitution.

It has been legally under the control of the British Parliament in Westminster. It is now wholly in Canadian hands.

Some points may need clarification.

The Constitution is not new. Its principal ingredient is still the British North America Act of 1867, which will now be called the Constitution Act, 1867.

There has been, however, a significant addition to Canada's basic body of law—the Charter of Rights and Freedoms. Though most Canadians have enjoyed basic rights since the beginning, there have been occasional breaches. These rights are now entrenched in its Constitution and this is of great significance, legally and symbolically.

A nation lives by its laws and is sustained by its symbols. In this issue of CANADA TODAY/D'AUJOURD'HUI we examine the process by which all this came about.

PHOTO: CP

The Canadian Charter

The Charter of Rights is now an essential fact of Canadian life. It spells out fundamental freedoms and democratic, legal, language, equality and mobility rights.

A Canadian Bill of Rights was passed by the House of Commons at the urging of Prime Minister John Diefenbaker in 1960, but it had serious limitations. It was only a law, passed by Parliament, and it could be amended, repealed or superseded by other laws. Moreover, it applied only in areas of federal jurisdiction. The Charter is entrenched. It can be amended only through the concerted action of the federal government and at least seven provinces which together have at least half the population.

It is a complex document, painfully arrived at. It was proposed by the government to the House of Commons in 1980 and then debated, amended and reshaped. The process took 267 hours.

Last November the Prime Minister and the Premiers of the provinces met to discuss the full constitutional resolution. They negotiated for three difficult days and reached accord on the fourth. The final document is not precisely what any one of the negotiators sought, but it has significant value for all.

A provincial legislature or parliament may pass laws overriding some Charter provisions. Such a law would apply only to that province and would die automatically in five years unless it was passed again.

The Charter has a short Preamble—"Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law"—followed by thirty-four sections.

The first says that the guaranteed rights and freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free democratic society."

This means, for example, that although Canadians have an entrenched right to move in and out of Canada, a prisoner may not walk out of his prison.

The second section defines the fundamental freedoms—of conscience and religion, of thought, belief, opinion and expression, of peaceful assembly and association. The freedom of conscience means, for example, that doctors and nurses opposed to abortions need not perform them; that of association means that a government may not outlaw a political party no matter its ideology.

The third section gives every citizen the right to vote, and this will enfranchise federally appointed judges who, hitherto, could not.

The fourth section limits the maximum life of a House of Commons or a provincial assembly to five years except in time of real or apprehended war, invasion or insurrection. At those times they may be extended by two-thirds of the members plus one. The fifth section says the House of Commons and other legislatures must meet at least once every twelve months.

The sixth is of particular interest—it says that every citizen or permanent resident "has the right to enter, remain in or leave Canada." During World War II the Canadian government interned Japanese-Canadians. It could not now legally do so. This section also gives citizens and permanent

On December 2, 1981, the Prime Minister announced to a jubilant Parliament that a constitutional agreement had been reached.

residents the right to "move to and take up residence in any province" and to "pursue the gaining of a livelihood" there. A subsection permits a province with above average levels of unemployment to pass laws giving preference to disadvantaged persons already there.

Sections seven through fourteen guarantee life, liberty, security of person, security against unreasonable search and seizure and security against arbitrary detention or imprisonment. They also specify the rights of persons who are arrested or detained. Most of these are traditional rights but a few have new elements. There had been no specific law prohibiting arbitrary searches. Customs officers now may not hold someone on the basis of his appearance alone, and the courts now exercise tighter controls over warrants. Police must tell suspects "without delay" of their right to see a lawyer and of the specific nature of the charge against them. Canadians now have a specific right against self-incrimination; they may be asked to testify against presumed accomplices but they cannot be required to testify against themselves. Witnesses or defendants who do not speak the language of the court have a specific right to an interpreter.

The fifteenth section is basic. It provides equality "before and under the law" for everyone, whatever their "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." A subsection does, however, permit special affirmative action programs.

The sixteenth to the twenty-second are among the most vital sections. They deal with language rights—an old, real and particularly Canadian problem. The BNA Act provided for the use of both French and English in the federal courts and Parliament and in the courts and legislature of Quebec.

When Manitoba, which had a large French-speaking population, was admitted to the Confederation in 1870, the same provisions were applied.

In 1890, however, Manitoba passed a law which did away with French-language guarantees. In subsequent years the use of French was also restricted in other provinces, particularly in the field of education.

There was much resistance from French speakers, and in 1963 the Royal Commission on Bilingualism and Biculturalism was created. In 1969 Parliament, following its recommendations, passed the Official Languages Act, which provided for the use of French and English in all "institutions of the Parliament and government of Canada."

Since 1969, there has been a gradual expansion of French rights in areas of provincial jurisdiction.

In 1970 New Brunswick passed a law applying provisions similar to those of the federal Act to its own institutions; and in 1979 the Supreme Court of Canada ruled that the Manitoba law of 1890 was unconstitutional, and the original status of French was restored.

The Charter entrenches the above provisions in the Constitution.

Section twenty-three entrenches the rights of linguistic minorities to education in their language. It provides that all citizens of Canada who received their primary education in Canada in either French or English have the right to have their children educated in the same language if it is the minority language of the province in which they reside.

The Quebec Official Language Act (Bill 101) passed in 1977 provided for such a right on the basis of reciprocal agreements with the other provinces. In November, all the other provinces agreed to this guarantee, and it is now entrenched and applies throughout Canada.

Section twenty-three also provides a guarantee of minority language education rights to the children of Canadian citizens "whose first language learned and still understood" is that of the linguistic minority of the province in which they reside, whether or not the parents had been able to receive their primary education in that language (which was often not possible during the period when rights to education in French outside Quebec were being restricted). This supplementary guarantee will apply in all provinces except Quebec, where it will only come into force if approved by the legislature.

The twenty-fourth section provides that those who feel their Charter rights to be infringed may take the offending government to court. An important subsection deals with the admissibility of evidence in criminal cases. In the United States improperly obtained evidence is always excluded, no matter how minor the infraction. Canada now provides a more flexible protection. A defence attorney must show that the admission of such evidence would "bring the administration of justice in disrepute." This means that evidence cannot be excluded if, for example, a police officer signed the wrong form or if an impatient prisoner insisted on confessing before he had seen his lawyer.

Section twenty-five assures that the rights of native peoples of Canada will not be diminished by the Charter. For example, the Charter provision that guarantees language education rights in French and English may not be interpreted to deprive the Indians of James Bay of their established right to educate their children in Cree.

Section twenty-six provides more general assurance: the Charter may not be used to deprive anyone of existing rights or freedoms. Section twenty-seven adds further that its interpretation must be "consistent with the preservation and enhancement of the multicultural heritage of Canadians." This has significance since Canada has always emphasized its cultural diversity. The United States in the nineteenth and early twentieth centuries considered itself a "melting pot" in which immigrants became culturally homogeneous. Canada pursued a different image, a "mosaic" in which distinct cultures—French, English, Ukrainian, German, Scottish, Irish and many others—remained distinctive but harmoni-

PHOTO: RICHARD VROOM

Jeanne Sauvé, the Speaker of the House of Commons, presents the joint address of the House and the Senate to Governor General Edward Schreyer for transmission to the Queen.

ous. This section assures its citizens that Canada is still committed to the mosaic.

Section twenty-eight applies the Charter equally to "male and female persons."

Section twenty-nine says the Charter does not change in any way Canada's long established and complex educational system in which religious denominational schools (in various provinces) receive public funding.

Section thirty applies the Charter to the Yukon and the Northwest Territories as fully as it applies to the provinces.

Section thirty-one says the Charter does not extend "the legislative powers of any body or authority," meaning that no government, federal or provincial, gains power.

The thirty-second section applies the Charter to the federal government and Parliament and to the provincial governments and legislatures. A subsection provides that section fifteen, the one protecting various specific groups against discrimination, shall not go into effect for three years. This will give governments time to examine and, if necessary, adjust old legislation and regulations to make sure they conform.

Section thirty-three allows provinces to enact laws overriding certain charter provisions.

The last section, thirty-four, gives the Charter its full and proper name: The Canadian Charter of Rights and Freedoms.

The Great Canadian Evolution

The Canadian Confederation began in 1867.

The British North America Act, then as now the core of its Constitution, made two things perfectly clear.

Canada was a colony and would remain part of the British Empire, and though it was now a Confederation of provinces, the central government in Ottawa would have paramount powers.

People, pressures and the passage of time would change all that.

Canada now has severed its last political link to the British Parliament, and there has, in the course of 115 years, been a remarkable shifting of power at home.

A stranger reading the Canadian Constitution might still reach a number of erroneous conclusions. The most powerful office holders in the country would seem to be the Queen's representatives, the Governor General in Ottawa and the Lieutenant Governors in the provinces. The federal executive appoints the Lieutenant Governors. Parliament pays them and only the federal executive can remove them.

The Governor General has, on paper, some-

PHOTO: PUBLIC ARCHIVES CANADA C-21873

thing close to absolute authority. He can, for example, dissolve Parliaments.

The Lieutenant Governors can reserve bills passed by provincial legislatures—that is, they can hold up their application until the federal government approves or rejects them. Further, the federal government on its own can disallow them within a year of their passage. These powers, however, have not been exercised for the last forty years. In fact, the duties of the Governor General and the Lieutenant Governors are largely ceremonial.

Changes from the original plan began early, and though there have been occasional movements in the other direction, the trends have been toward autonomy for Canada and power to the provinces. Indeed, the provinces in Canada are probably the most powerful member states of any federation in the world, the Cantons of Switzerland being the closest contenders.

The Nineteenth Century

The Fathers of Confederation had been conditioned by the American Civil War, in which a central government, originally designed to be weak, had to go to war to preserve the union.

They decided to give Canada a central government with dominant powers. The provinces were given a few specific areas of authority—over education and social programs, for example—that didn't seem to be particularly important government activities in 1867.

"We are left," one bitter provincial leader said, "with small and absurd powers."

The final legislative and judicial authority over the Canadian Constitution was in Great Britain. The Judicial Committee of the Privy Council remained the arbiter of all disputes until 1949.

In 1892 the Committee ruled that the provinces were "supreme" within their areas of jurisdiction. The purpose of the British North America Act, it said, was "neither to weld the provinces into one, nor to subordinate provincial governments to a central authority." In subsequent years the Privy Council would continue to give a very broad interpretation of provincial legislative powers.

As the provinces became more autonomous within the federation, Canada as a whole became more autonomous within the Empire. In **1885** Canada's Prime Minister, Sir John A. Macdonald, refused to send troops to help Britain in a war in the Sudan. In **1899** Prime Minister Laurier declined to order troops to the Boer War though he did permit volunteers to go in Canada's name.

The Early Twentieth Century

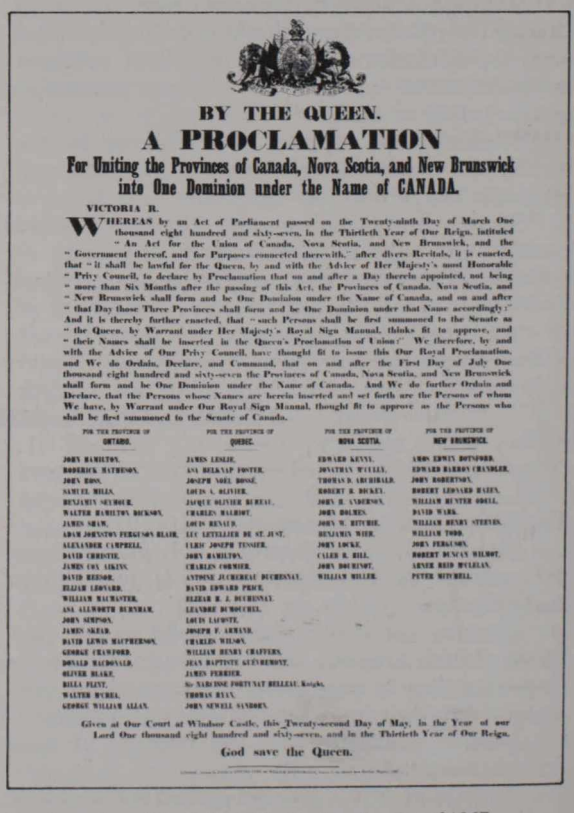
In **1919** Canada signed the Versailles Peace Treaty as a distinct member of the British Empire.

In **1926** there was a crisis. The year before, the Liberals under Prime Minister William Lyon Mackenzie King had won only 101 seats in the House of Commons. The Conservatives won 116, but the Progressives and others held the balance of power, and they supported the Liberals, who formed the government. Soon, however, there was a scandal in the Customs Department and the Progressives and the Conservatives indicated they would join in a vote of censure that would bring down the government.

To avoid the censure Mackenzie King asked Lord Byng, the Governor General, to dissolve Parliament before the vote was taken. The Governor General felt that this would be improper, he refused and Mackenzie King resigned. The Governor General then asked Arthur Meighen, the leader of the Conservatives, to form a new government. He did, but it was soon defeated and Parliament was dissolved.

In the ensuing election the Liberal Party made the Governor General's earlier refusal a prime issue—should this representative of the British government be allowed to ignore a Canadian Prime Minister's request?

The Liberals won the election and Mackenzie King pressed the issue at the Imperial Conference in London later that year. It was an issue whose time had come. The Balfour Report was adopted recognizing Canada and the other dominions as "autonomous communities," and in **1931** the Statute of Westminster removed Canada from the authority of the Parliament of the United Kingdom except for the BNA Act and recognized Canada's right to conduct its own foreign affairs. It also clarified the position of the Governor General, who henceforth would be an emissary of the monarch, not the British government.



BY THE QUEEN.

A PROCLAMATION

For Uniting the Provinces of Canada, Nova Scotia, and New Brunswick into One Dominion under the Name of CANADA.

VICTORIA R.

WHEREAS by an Act of Parliament passed on the Twenty-ninth Day of March One thousand eight hundred and sixty-seven, in the Thirtieth Year of Our Reign, intituled "An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the "Government thereof, and for Purposes connected therewith," after divers Recitals, it is enacted, that "it shall be lawful for the Queen, by and with the Advice of Her Majesty's most Honorable "Privy Council, to declare by Proclamation that on and after a Day therein appointed, not being "more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and "New Brunswick shall form and be One Dominion under the Name of Canada, and on and after "that Day those Three Provinces shall form and be One Dominion under that Name accordingly:" And it is thereby further enacted, that "such Persons shall be first summoned to the Senate as "the Queen, by Warrant under Her Majesty's Royal Sign Manual, thinks fit to approve, and "their Names shall be inserted in the Queen's Proclamation of Union:" We therefore, by and with the Advice of Our Privy Council, have thought fit to issue this Our Royal Proclamation, and We do Ordain, Declare, and Command, that on and after the First Day of July One thousand eight hundred and sixty-seven the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada. And We do further Ordain and Declare, that the Persons whose Names are herein inserted and set forth are the Persons of whom We have, by Warrant under Our Royal Sign Manual, thought fit to approve as the Persons who shall be first summoned to the Senate of Canada.

FOR THE PROVINCE OF ONTARIO.	FOR THE PROVINCE OF QUEBEC.	FOR THE PROVINCE OF NOVA SCOTIA.	FOR THE PROVINCE OF NEW BRUNSWICK.
JOHN HAMILTON.	JAMES LESLIE.	EDWARD KENNY.	ANDW. EDWIN BOTSFORD.
RODERICK MATHESON.	ASA BELKNAP FOSTER.	JONATHAN WILLIS.	EDWARD BARRON CHANDLER.
JOHN ROSS.	JOSEPH NOEL DOSÉ.	THOMAS D. ARCHIBALD.	JOHN ROBERTSON.
SAMUEL MILLS.	LOUIS A. OLIVIER.	ROBERT B. DICKEY.	ROBERT LEONARD HAZEN.
BENJAMIN SEYMOUR.	JACQUE OLIVIER BUREAU.	JOHN B. ANDERSON.	WILLIAM HUNTER ODELL.
WALTER HAMILTON DICKSON.	CHARLES MALHIOT.	JOHN HOLMES.	DAVID WARK.
JAMES SHAW.	LOUIS RENAUD.	JOHN W. RITCHIE.	WILLIAM HENRY STEVENS.
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DAVID REESOR.	ANTOINE JACOBERGE DUCHESNAY.	WILLIAM MILLER.	PETER MITCHELL.
JELLIOT EDWARD.	DAVID EDWARD PRICE.		
WILLIAM MACMASTER.	ELZEAR R. J. DUCHESNAY.		
ASA ALLENWORTH BURNHAM.	LEANDRE DUBOUCHEL.		
JOHN SIMPSON.	LOUIS LACOSTE.		
JAMES SKEAD.	JOSEPH P. LEBLANC.		
DAVID LEWIS MACPHERSON.	CHARLES WILSON.		
GEORGE CRAWFORD.	WILLIAM HENRY CHAPERON.		
DONALD MACDONALD.	JEAN BAPTISTE ALEXANDRE.		
OLIVER MOWAT.	JAMES FERRIER.		
BILLA FLINT.	Sir NARCISSE FORTUNAT BELLEAU, Knight.		
WALTER ROME.	THOMAS RYAN.		
GEORGE WILLIAM ALLAN.	JOHN SEWELL SANDOM.		

Given at Our Court at Windsor Castle, this Twenty-second Day of May, in the Year of our Lord One thousand eight hundred and sixty-seven, and in the Thirtieth Year of Our Reign.

God save the Queen.

Proclamation of the British North America Act of 1867

PHOTO: PUBLIC ARCHIVES CANADA C-7299

The Fathers of Confederation, *by Robert Harris*

It was an appropriate time for Canada to patriate its Constitution—to remove the BNA Act from any control of the British Parliament and to lodge it in Ottawa. The federal and provincial governments had met in **1927** to discuss an amending formula—a method of changing a patriated Constitution. Some provinces wanted a rigid formula that would make changes difficult, some wanted a flexible one that would make them easier. They couldn't agree, so Canada asked Westminster to keep jurisdiction over the BNA Act and its amendments for a while longer.

Mid-Century

When Canada entered the war against Germany and Italy in **1939** it asserted its autonomy by declaring war a week after Great Britain had made its declaration. During the war the federal government extended its authority under the "emergency doctrine" to administer war industries across the country.

In **1941** the Parliament of Canada, with the consent of the provinces, asked Westminster to amend the BNA Act to permit the federal government to form a nationwide system of unemployment insurance. The British did as requested.

In **1945** the federal government suggested that it be given the power to establish a national old age pension plan and to inaugurate "equalization payments" to lessen economic disparities among the provinces.

In **1947** Canadians became "Canadian citizens" by an act of the Canadian Parliament instead of being merely British subjects.

In **1949** Mackenzie King's successor, Louis St. Laurent, secured adoption of an amendment to the British North America Act which gave the Commons the right to amend the Canadian Constitution, except for certain matters including the rights and powers of the provinces and French and English language rights. Appeals to the Privy Council in London were abolished the same year. The Supreme Court of Canada was now Canada's court of last resort.

In **1952** Canada appointed its first Canadian-born Governor General, Vincent Massey.

In **1965** Canada adopted its own Maple Leaf flag. Fifteen years later it would formally adopt "O Canada" as its national anthem.

The Recent Decades

The Statute of Westminster in 1931 had set the stage for the patriation of Canada's Constitution, but in the next thirty years, despite several formal efforts, the provinces could not agree on an amending formula.

In **1964** the provincial attorney generals did agree on one, and it was submitted to the Prime Minister and the premiers. Premier Jean Lesage submitted it to Quebec's National Assembly but opposition soon developed. The dissenters saw an opportunity to use the patriation process to negotiate greater powers for Quebec and said the province should not accept the formula unless greater constitutional powers went with it. Lesage withdrew it in January **1966**.

For the next several years the impasse remained, with Quebec demanding greater powers for the provinces, or at least for itself, and the other provinces being less concerned.

In **1971** the First Ministers met at Victoria and agreed in principle to a Charter that included an amending formula, but Quebec and Saskatchewan did not give it formal approval.

In **1976** a new alignment was formed. All provinces agreed that patriation should be tied to substantive constitutional change.

In May, **1980**, Quebec held a referendum

asking voters if they wished to pursue "sovereignty association" with Canada. This would have involved negotiating a new status for the province, making it "sovereign" but still associated economically and in other ways with the rest of Canada. The voters said no, by a margin of 60 to 40. Before the referendum, the federal government committed itself to a renewed federalism and constitutional change. Patriation was given a new emphasis.

That summer the federal government and the provinces had a series of meetings culminating in a major conference in September in Ottawa. There were twelve items on the agenda—including patriation, an amending formula, the Charter of Rights, the principle of equalization, the reform of the Senate and the Supreme Court, and the redistribution of powers.

No progress was made, and the federal government decided to proceed unilaterally to patriate the Constitution with a Charter of Rights. Ontario and New Brunswick decided that unanimous provincial agreement was impossible and supported the federal government's move. The Minister of Justice, Jean Chrétien, introduced a resolution in the House of Commons asking the British Parliament to provide for patriation, for the adoption of an amending formula and for the entrenchment of a Charter of Rights and of the principle of equalization.

A special Joint Committee of the Senate and the House of Commons considered the resolution, and after prolonged debate and many significant changes it was adopted. There was, however, the

Minister of Justice Jean Chrétien, Pierre Trudeau and Finance Minister Allan MacEachen

The Conference Centre

Allan Blakeney, William Davis and Pierre Trudeau

question of whether such unilateral action was legal, and six provinces sued, saying it was not. In April **1981** premiers from all the provinces except Ontario and New Brunswick met in Ottawa and agreed on patriation with an amending formula they could all support. Changes in the Constitution would require the consent of Parliament and of seven provinces, representing 50 per cent of the population. However, a province would be able to opt out of an amendment which took away existing provincial rights or powers, and it would be entitled to fiscal compensation in the event such an amendment did not apply in that province.

On September 28, **1981**, the Canadian Supreme Court handed down two rulings, giving some comfort to both sides. It said the unilateral action by Parliament was legal, but it also said that it was contrary to the "conventions" which held that patriation should be made with the substantial consent of the provinces. "Substantial consent" was loosely defined as meaning more than two provinces but less than ten. The Court said it would be up to the political actors to define it more precisely in the political arena.

The First Ministers met again in the wake of the decision in November, and after intensive negotiations and additional changes the federal government and nine of the provinces reached an agreement. Quebec was the one holdout.

The Final Hours

The First Ministers met Monday, November 2, 1981, at the government's old and handsome

Peter Lougheed, Angus MacLean and William Bennett

Brian Peckford

Claude Morin, then Quebec's Minister of Intergovernmental Affairs, Peter Lougheed and René Lévesque

PHOTO: ROBERT COOPER

"Today I have proclaimed this new Constitution—one that is truly Canadian at last. There could be no better moment for me, as Queen of Canada, to declare again my unbounded confidence in the future of this wonderful country."

Elizabeth II, April 17, 1982.

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CANADA

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