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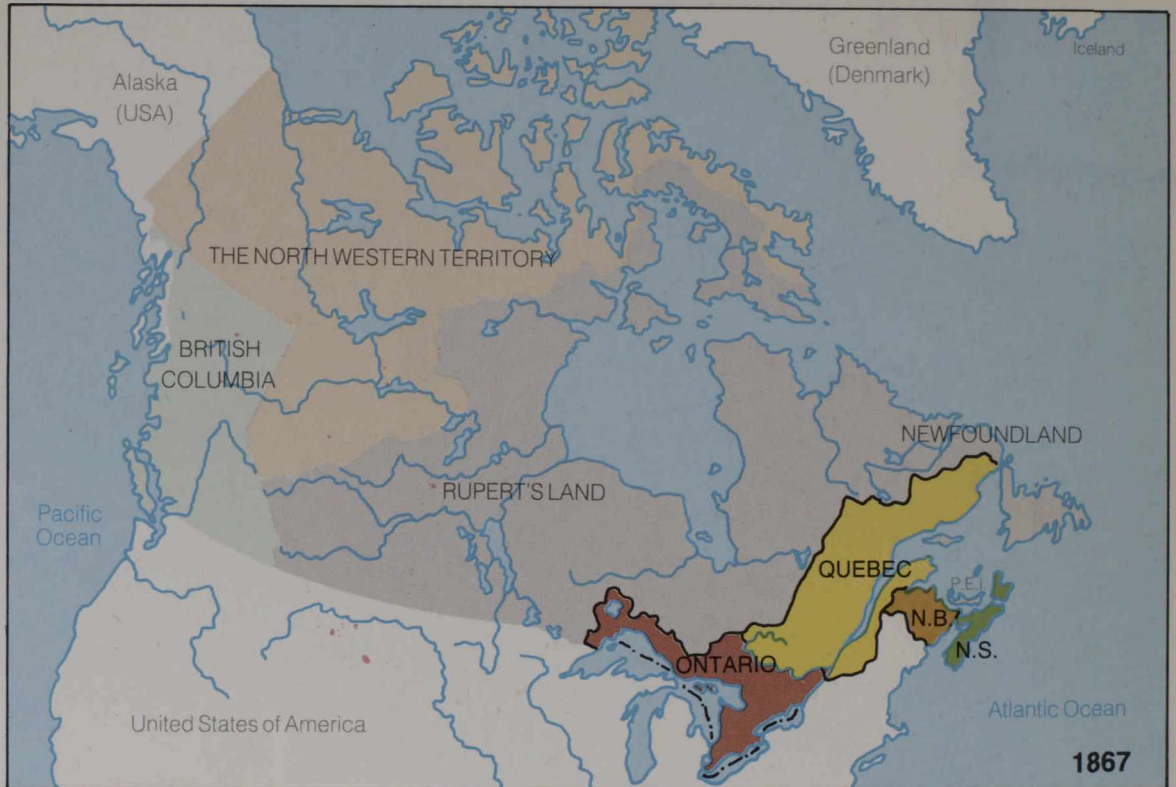


On April 17th Canada's Queen proclaimed the transfer of custody of the Canadian constitution from London - to Ottawa, and the incorporation in it of a new charter of rights and freedoms.



Patriation

September 1982



New Brunswick, Nova Scotia and Canada are united in a federal state, the Dominion of Canada, by the British North America Act on 1 July 1867. The province of Canada was divided into Ontario and Quebec.

Front cover: Drawing taken from a stamp designed by Vancouver artist Friedrich Peter. It represents an open book symbolizing the history and traditions of Canada – past, present and future. The coat of arms is a reminder of the country's origins; the flag denotes its more recent history; and the words 'Constitution 1982', evoke a new step for Canada and the hope it brings for the future.

The Canadian federation was created by the British North America Act of 1867. However, the power to make any subsequent changes in the Act remained the responsibility of the British parliament, which meant in effect that one country, Canada, had to ask another country, Britain, every time it wanted to amend its own constitution, an embarrassing situation for both countries.

A nation lives by its laws and is sustained by its symbols. This issue examines the tumultuous events which culminated in 'bringing home' Canada's constitution and the significance of this action for Canada's future.

A three minute history of Canadian constitutional development

Perhaps the first written constitutional document for Canada was that promulgated when Sir Humfrye Gilbert established the first colony in Newfoundland in 1583. It was direct and to the point. 'Anyone who speaks disparagingly of the monarch,' it read, 'will have his ears cut off.'

By 1867 there were seven separate British colonies in Canada who had refused to join the American revolution. Fearing an invasion from the United States, representatives from three of these colonies asked the British Government that they be united into one nation, to be called Canada. Britain responded and in February 1867 the Earl of Caernarvon introduced the

British North America Act, the 'Act of Confederation' to an only mildly interested British parliament. History records that when the vote was taken the House was almost empty, though it filled rapidly when a debate began on a proposed dog tax.

Of the three provinces which united to become Canada, one was divided to make the two provinces of Quebec and Ontario. Canada is not strictly speaking a confederation of sovereign states but is a federal country with authority divided between the central and provincial governments. Historically, however, Canadians have referred to the creation of federal Canada as 'Confederation'.

British North America Act

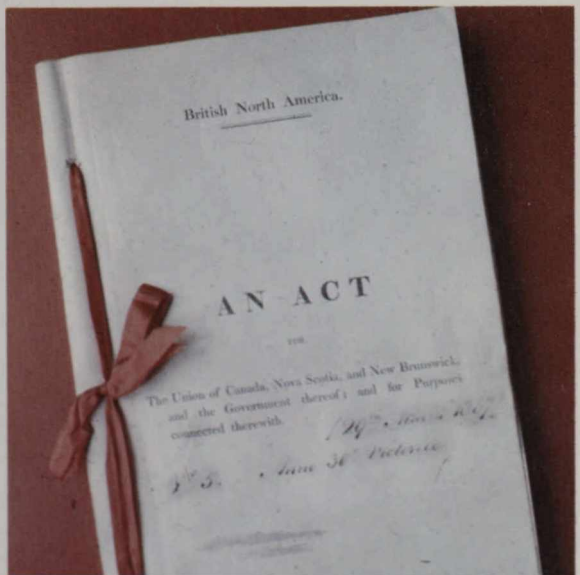
The Act which created the 'confederation' of Canada became law on July 1, 1867. It was concerned essentially with the division of powers between the central or federal government and the then four, now ten, provinces. The provinces were given few responsibilities – most notably over education and social programmes – 'small and absurd powers' one provincial leader complained. The Act made no mention of rights of individuals since these were assumed, as in Britain, to be already incorporated in common law precedents.

But the Act's most notable omission was in provision for having it altered, modernized or otherwise amended in Canada. Each time Canadians wished a change, both houses of the Canadian parliament had to send a joint request to the British parliament.

Even when the Statute of Westminster in 1931 made clear that the British parliament had no power to enact laws binding on the four dominions, ie that the dominions were completely independent countries, Canada had to request that an exception be made insofar as amending its own constitution, the British North America Act, was concerned. The reason was simple: the federal and provincial governments were unable to agree on how such amendments should be made if Canada were given the power. For example, would the agreement of none, some, or all, of the provinces be a prerequisite. 'We shall, however,' declared the Canadian prime minister of the day, 'have agreed on a formula within six months.'

In fact it was to take fifty years. Between 1931 and 1980 repeated meetings were held, which sometimes came close but never quite reached unanimous agreement. The provincial governments' share of national

economic power was increasing dramatically. Education and social programmes, the 'small and absurd powers' of 1867, consumed steadily increasing proportions of national expenditures. In 1959 the provincial governments were spending 41 percent of these expenditures but by 1979 the figure was 67 percent. Provincial barriers to the free movement of persons, goods and capital within the country were being erected. Finally in 1980 a major event convinced Prime Minister Pierre Trudeau that the time for strengthening the constitution and transferring (or 'patriating') the power to amend it to Canada had indisputably arrived.



'In the beginning...' the actual document enshrining the British North America Act. (CP photo)

The political landscape

The 1950s and 1960s witnessed in Quebec a 'quiet revolution', in which the rigid conservatism of three centuries was dramatically replaced by adventurous intellectual and social changes and an increasing self-awareness by French Canadians of the value of their distinctive heritage and traditions. This self-awareness in the 1970s led to growing assertiveness on the national scene. In 1968, René Lévesque had founded the Parti Québécois, dedicated to withdrawing Quebec from the federation and making it an independent state. Pragmatic French-Canadians, fearing the economic consequences of such separatism, twice rejected the party's call to arms in provincial elections, but when Lévesque soft-pedalled independence in favour of efficient government in 1976, he won a decisive victory.

Anxious nevertheless to pursue his dream of independence, Lévesque proposed a provincial referendum on the subject. A Gallup Poll taken in June 1977 had revealed that more than 70 percent of Quebecers continued to be opposed to any idea of separation or independence for Quebec. The premier thus asked his people whether he might have a mandate merely to discuss with the federal government the possibility of what he called 'sovereignty association', a status which he described to mean political independence, but continued economic integration with Canada.

Such a 'mandate' was hardly necessary, because any provincial government already had the power to discuss any issue it wished with the federal government. The federal government, however, became

convinced that a positive vote encouraging negotiations for sovereignty association would be declared by the Parti Québécois, if such negotiations broke down, to be a mandate for a unilateral declaration of independence. Federal spokesmen decided to enter the fray of the pre-referendum campaign. It was indeed, they declared, time for constitutional change, and in particular for the consolidation of French-Canadian rights, including rights for French-Canadians to be provided with education at state expense in their own language anywhere in Canada. But it was not the time, they maintained, nor was there the need, for Quebec to try to go it alone.

The referendum result, by a margin of 60 to 40, was a denial by Quebecers of permission to their government even to discuss any idea of 'sovereignty association' with the federal government.

The federal government now considered itself committed to early action on constitutional change; a first requirement of which was to create a system for amending the constitution in Canada. That summer Ottawa and the provincial governments had a series of meetings, culminating in a major conference held in September, in one last attempt to negotiate an agreement on 'patriation'. The battle lines were so firmly drawn that the federal government made contingency plans for failure. Listing these plans in a confidential memorandum, a copy of which subsequently fell into the hands of provincial leaders, polarised positions further. Nevertheless, the largest province, Ontario (with 36 percent of the Canadian population) and New Brunswick (a province which is 40 percent French-speaking and the most enthusiastic exponent of bilingualism) aligned themselves with the federal government, leaving eight provinces in opposition.

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 several months of examination and debate, and many significant changes, it was adopted.

The federal government made clear its intention to carry the resolution to Westminster, even though eight of the ten provincial governments remained opposed. There was, however, the question of whether such near-unilateral action would be legal, and six provinces took the matter to court, saying it would not be.

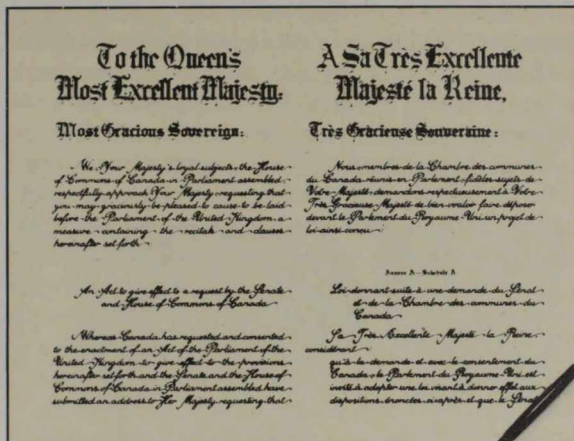


Minister of Justice Jean Chrétien being interviewed by the press after the adoption of his resolution to the British Parliament had been passed by the Canadian House of Commons.

Meanwhile, in Britain, many Westminster parliamentarians were developing misgivings. The Select Committee on Foreign Affairs of the House of Commons, under Sir Anthony Kershaw, concluded that the British parliament would be wrong to approve an amendment affecting provincial rights without the consent of at least a majority of the provinces. A Conservative and a Labour member of parliament joined forces to form an all-party committee, which frequently provided a forum for opponents of the federal initiative. Competitive lobbying by the dissenting provinces and of the federal government developed rapidly in London.

In Canada the eight dissenting provincial governments attempted to consolidate their position. The federal government had proposed that Ontario and Quebec, in view of their size (respectively 36 percent and 26 percent of the total Canadian population) together with any two western and any two Atlantic provinces, be given in effect a veto power over subsequent amendments. Smaller provinces opposed the principle of a veto for the larger ones, and in April 1981 the eight dissenters met in Ottawa and agreed on an amending formula they could all support, namely that changes in the Constitution would require the consent of the federal parliament and of any seven provincial governments, provided the provinces they represented contained at least 50 percent of the national population. The Quebec government would later have considerable cause to regret agreeing to this formula.

In May the legal actions by the provincial govern-



Canada's request that the Queen present its constitutional resolution to the British Parliament.

ments ended up in the Canadian Supreme Court, and on 28 September that court brought down two rulings which, if anything, left the issue further confused. On the one hand, the court ruled that unilateral constitutional action by the federal government was indeed legal, but on the other hand, that such action would be contrary to the spirit of federalism, and to the convention taking root that amendments should be sought only with the consent of at least a majority of the provinces.

After initial thoughts of 'going it alone', Prime Minister Trudeau decided on one last attempt to obtain provincial concurrence, and the stage was set for a dramatic climax involving major compromises on both sides.



Prime Minister Pierre Trudeau savours the approbation of his colleagues during the constitutional debate.

The eleventh hour

Prime Minister Trudeau, Jean Chrétien and other federal officials began a meeting on 2 November 1981 with provincial premiers in a final attempt to reach a compromise. Mr. Trudeau had been anxious to reserve a right of veto for Quebec and Ontario over subsequent constitutional amendments. Ontario Premier Bill Davis agreed to relinquish this right on behalf of his province if other provinces would make concessions regarding the charter of rights. Since the Quebec government had already endorsed the new amending formula proposed by the seven other dissenting provinces, which also, in effect, eliminated veto powers for any single province, the Prime Minister accepted these provinces' 'Vancouver' formula. The original federal formula had also included provision for the federal government, when it could not obtain the agreement of a majority of the provinces to an amendment, to resort to a national referendum, which could override provincial opposition. This provision was dropped, however, because provincial premiers contended it would diminish their powers in a way contrary to the spirit of federalism.

The eight dissenting provinces were all individually against one or more provisions of the proposed charter of rights. These rights, they argued, already existed as they do in Britain without the need for a charter, based as they are on the vast body of British common law heritage dating back to the Magna Carta and Habeas Corpus. The provinces feared that if these rights were codified in a federal charter the result,

however unintended, would be to give new powers to federally appointed judges at the expense of provincial courts and administrations.

The federal government, however, was anxious to have uniformity of rights throughout the country, and in particular to eliminate the discriminatory decisions against non-residents imposed by a number of provinces. Examples included prohibitions against workers from outside a province accepting employment in certain fields; discriminatory taxes or prohibitions on investments or land ownership by citizens of other provinces, non-tariff trade barriers between provinces and the like. One by one compromise was obtained in each of these differences.

A number of provinces were also opposed to any declaration of equal rights for women, believing that such rights should be introduced gradually to avoid economic disruption. Other provinces were opposed to any statement of rights for aboriginal peoples, fearing that Canadian Indians would press claims for many lands which, subsequent to former claim settlements, had been discovered to be mineral or oil-rich. The federal side reluctantly agreed to drop provisions for women's and native peoples' rights, but such strong pressure was subsequently brought to bear on provincial leaders that within days these leaders had agreed to the reinsertion of both provisions, limited only by an insistence that only existing aboriginal rights be recognised.



The final Federal-Provincial patriation conference.

Vox Populi

What did the Canadian people themselves think of the constitutional proposals? Gallup and other public opinion polls suggested that they were often much more enthusiastic than their provincial premiers.

Among those offering an opinion, 87 percent of Canadians agreed with the need for a new constitution, 89 percent confirmed their belief in the parliamentary system, and 98 percent agreed that the constitution should enshrine basic human rights.

Many provincial premiers quite erroneously anticipated popular antipathy to linguistic rights. To the proposal that, where their numbers warrant, French-speaking minorities outside of Quebec and English-speaking minorities within Quebec should be guaranteed the right to state-financed education for their children in their own language, a remarkable 88 percent of Canadians nationwide having an opinion agreed. In Quebec the figure was an even more impressive 92 percent, in contrast to Premier Lévesque's efforts to curtail the availability of schooling in English.

French-speaking Canadians have always shown a willingness to learn English. Traditionally at least half of them have been bilingual. Today full 92 percent declare themselves in public opinion polls to be either bilingual or wish they had become so. A change in attitudes has been marked among English-speaking Canadians: whereas in the immediate postwar years barely 5 percent could claim to be able to also speak French, the figure today is 22 percent.

Canadians also support the principle that richer provinces should help the poorer ones. Traditionally this has meant certain provinces, notably Ontario, providing substantial portions of the budgets of poorer provinces. Nonetheless, 96 percent of Ontarians with an opinion on this proposal endorsed the principle. Even in the prairies, where newly oil-rich Alberta will be expected to contribute much more per capita in future to the poorer provinces, 76 percent agreed; nationally the figure was 89 percent.

The British North America Act decreed that natural resources are the property of the provinces but that interprovincial and international trade was a federal responsibility. Certain provincial governments interpreted this division of powers to mean that the provinces should have exclusive power to dictate production levels, tax revenue, national prices and international customers for their natural resources. Polls showed that only 24.8 percent of respondents shared this view.

Several provincial governments had also imposed restrictions preventing workers coming in from other

provinces to work in certain fields. Even in the economically depressed Atlantic provinces only 23 percent of respondents endorsed this position, and in Quebec two out of three persons polled were opposed; nationally 75 percent of respondents giving an opinion believed that job opportunities anywhere in Canada should be available to all Canadians.



Premier René Lévesque condemns the new constitution.

In spite of the polarisation between federal and provincial opinions during the patriation campaign, most Canadians expressed a steadily increasing confidence that confederation would not break up and that the differences between the various parts of Canada will be resolved. In January 1945 only 63 percent of Canadians shared this confidence; by March 1981, 80 percent of those willing to voice an opinion were convinced.

The bottom line in public opinion polls throughout 1980 and 1981, however, never varied. Although individually the great majority of Canadians sided with the federal government in its constitutional objectives, two out of three were consistently opposed to the federal government asking the British Parliament to enshrine these objectives without the consent of a substantial majority of the provincial governments. Canadian generosity of spirit obviously included a paradoxical insistence on the virtues of compromise. It was this consistent public opinion on the question, perhaps even more than the threat of British parliamentary opposition or the Supreme Court's verdict, that probably persuaded the federal government to make its one last determined attempt in November 1981 to seek a majority approval from provincial governments.

Indian dissent



Grand Chief Solomon Sanderson, flanked by two other chiefs, presents the Saskatchewan Indians' case in London.

(UPI photo)

The final version of the patriation proposals won almost all Canadians' approval with two notable exceptions: the Government of Quebec, and a substantial proportion of Canada's native Indian population. Of the two, the Indian case was the harder to understand and certainly prompted the greater sympathy among British parliamentarians.

While Canadian Indians were the earliest inhabitants of the country, their numbers seem unlikely to have exceeded 150,000 even before the coming of the European. The 1920 population has more than trebled to some 320,000 today, but even this figure constitutes less than 1.3 percent of Canada's total population.

Although this small minority has, for many complex and sound reasons, received special privileges not accorded to other Canadians, it did not seem appropriate to either the federal or provincial governments to accede to the extensive demands for expansion of these privileges the Indians were currently demanding. It would be difficult to justify what would appear to most Canadians as iniquitous discrimination against other ethnic minorities.

An additional problem facing the federal government was the complete absence of any agreement among the Indian groups themselves as to what Indian rights should encompass. It became obvious that obtaining such agreement would require prolonged negotiations.

The federal government accordingly undertook to guarantee existing Indian rights in the constitution and to begin within one year of the constitution's proclamation the negotiations which would lead to a resolution of the whole Indian rights' question.

Far from forming a single nation with common customs and tongues, Canadian Indians are divided into ten language groups speaking 58 dialects and comprising 573 widely scattered bands. Culturally and linguistically they differ among themselves as much as do Europeans.

The figure of 320,000 refers to 'status' Indians — those claiming the special privileges accorded Canada's native people. An indeterminate number of full-blooded Indians and métis, or people of mixed Indian and European descent, have abandoned special status and for the most part blended into Canadian society, particularly in the cities. There are also some 22,000 Inuit (Eskimo) people in the Arctic, but for the most part they have expressed satisfaction with the constitutional proposals.

Respect for Indian rights in Canada was given force in law by a Royal Proclamation in 1763, which decreed that no lands occupied or used by Indians should be intruded upon by white men without the specific agreement of, and a formal treaty with, the Indians concerned, and the setting aside of quality land reserved for their permanent and exclusive use.

Outstanding business

There had of course been European settlement in Quebec and the Atlantic provinces prior to 1763, and treaties have yet to be signed with Indians in many areas of Northern Quebec, British Columbia, Yukon and the Northwest Territories not yet extensively settled by white men. It is largely in these latter areas that Indian claims are being vigorously pressed. The federal government has recognised the continuing validity of the 1763 Royal Proclamation, and in a 1973 'Statement on Claims' announced programmes to encourage Indian groups to research and pursue both claims based on aboriginal title and on perceived lawful obligations. Between 1970 and 1982 a total of \$16.7 million has been provided to Indian organisations for this purpose and as of December 1981, 250 specific claims had been presented. Cash payments of \$2.3 million have been made in the case of twelve claims, and of the 250 only 17 have been rejected as unsubstantiated. The federal government has commenced

an accelerated programme of claims settlement and has set aside several hundred million dollars for possible awards.

Opposition to patriation

Many Indian groups consider progress in claims settlement inadequate however, and contending that the British Monarch and government continue to retain responsibility for Indian welfare in Canada, mounted an extensive lobbying campaign among British parliamentarians, in an attempt to have patriation of the constitution blocked or at least have its guarantees on native rights substantially strengthened.

The Indians demanded a clear delineation of aboriginal and treaty rights and of the right to virtually independent self-government, explicit guarantees of the distinct cultural, economic and linguistic identities of Canadian native peoples, and a much more substantial role in the constitutional amendment process. Many Indians believed that native peoples in Canada as a whole should be considered a separate and distinct nation and dealt with by the federal government on the same basis of equality that the federal government would accord a foreign country.

In the absence of these guarantees many Indian leaders contended that patriation would 'lead to the final destruction of the ways of life' of their peoples. The federal government replied that the concept of aboriginal rights was so vague and the variations of the definitions of these rights so wide among the various Indian bands themselves, that their resolution would take years of negotiations, and should properly be isolated from the more urgent question of constitutional patriation.

Moreover, some resource-rich provinces refused to consider an 'open-ended' endorsement of native rights in the Constitution lest these rights be interpreted to substantiate Indian claims to lands not occupied by Indians but discovered to be rich in petroleum or mineral resources. A final compromise was reached which includes in the declaration of rights a confirmation that all existing treaty and other rights or freedoms of the aboriginal people of Canada are recognised, including those established by Royal Proclamation, or which may be acquired in future by way of land claims settlement.

Where this provision conflicts with other provisions in the Bill of Rights it will override them, eg the guarantee of mobility rights will not allow other Canadians to move on to reserves, education rights will not alter established Indian rights to have their children educated in their own language, and hunting and fishing rights will be safeguarded, which accord special privileges to Indians not granted to other Canadians.

Indian social conditions

Behind Indian complaints are social conditions which in spite of the federal government's efforts trail badly behind national standards. Federal government efforts to improve these conditions have assumed herculean proportions, particularly

in the last twenty years. In the 1981-82 fiscal year expenditures on Indian programmes reached \$926.8 million (£410 million). Increased government spending has been accompanied by an increased determination to avoid past practice, whether conscious or unconscious, of expecting Indians to accommodate to white man's ways. Determined efforts are being made to pass as high a proportion as possible of these federal funds to the Indians themselves to administer, as fast as they can acquire the education and ability to do so.

Indians of potential talent are being sought out and their education assured to the highest levels which they are capable of attaining. Indians' attendance at universities, for example, has increased ten times in the last ten years. Indians now occupy important positions in virtually every profession in Canada; one has recently served as a provincial Lieutenant-governor, another as a cabinet minister.

Within the last fifteen years a concerted effort has been made to train Indian teachers, not only to teach in Indian schools but to teach modern courses in Indian Languages, such that the proportion able to speak, write and express themselves in their own Indian Language has at least remained stable. Various Indian programmes designed to re-inforce traditional cultures have been initiated and government assistance has been offered to bring manifestations of Indian artistic expression to international standards and attention (Britain has recently seen three touring exhibits of Indian art, and two visits of Indian dance and folklore groups).

Although much remains to be done, Indian living conditions are steadily improving in most material ways. Financial assistance alone, however, will not provide the answers to Indian problems any more than it would to the problems of developing countries. Lifestyles and values remain the vital consideration, coupled with a willingness to accept education and an appreciation of the virtues of training and experience.

Canadian Indians and the British Courts

The Canadian Indians took their plea for British intervention in the constitutional debate all the way to the British Court of Appeal. The Royal Proclamation of 1763 was like a Magna Carta for the Indians, Lord Denning, the Master of the Rolls, declared in passing judgement on 28 January 1982, and promises given to the Indians over their land rights and freedoms must be honoured 'so long as the sun rises and the river flows'. But he added, the obligations of the crown were divisible between those owed by the Queen of Britain and those owed by the Queen of Canada, and responsibility for the Indians of Canada clearly rested with the government of Canada. The British parliament could not therefore pass judgement.

Lord Denning noted that the Canada Bill contained a charter of rights and freedoms which would in itself guarantee aboriginal rights, and that the constitution also provided for the initiation of a conference within one year to begin consideration of Indian concerns 'including the identification and definition of the rights of those peoples'.

Premier Lévesque's objections

The Premier of Quebec, René Lévesque gave three specific reasons for not signing the agreement. One was what he saw as a gap in the formula for amending the Constitution and the other two involved provisions of the Charter.

Federal authorities had offered to discuss these points with M. Lévesque, but he had declined.

His first point concerned the Charter clause guaranteeing Canadians free movement within Canada. He feared that the immigration of non-French-speaking Canadians into Quebec could alter its linguistic balance. The

federal government points out that the provisions of Quebec Bill 101 that established French as the language of work in the province are and will remain constitutional, and it seems unlikely that many citizens who cannot qualify will migrate.

M. Lévesque's second point concerned minority language education rights, which would limit the powers of the Quebec legislature. The government noted that Quebec was willing to offer a right in Bill 101 on the basis of reciprocity with the other provinces. Since all other provinces agreed to this

right in November – based on the language of primary education in Canada of the parents – it will now apply throughout Canada.

A supplementary provision provides that persons in a minority group may have their children educated in the minority language where it is the first language learned and still understood. This was accepted in November by nine provinces and it applies only to them. With their agreement, it will not apply to Quebec until Quebec's National Assembly approves it.

M. Lévesque also objected to the amending formula as adopted in November. He and seven other provincial Premiers had agreed on the basic formula in April, 1981, and had urged its adoption by the federal government. In November one provision was dropped. It provided that a province which "opted out" of an amendment impinging on its rights or powers (as it is entitled to do) would receive appropriate financial compensation. The Premier argued that financial compensation was a critical factor in his acceptance of the formula in April. With the agreement of the other

nine provinces, the federal government reintroduced the obligation to pay financial compensation, but only in the areas of education and other cultural matters – that is, in areas of special concern to Quebec.

A Gallup Poll released on 10 December 1981 indicated that most Quebecers did not endorse their Premier's opposition. Of those polled 80 percent had a firm opinion and to these 58 percent were against that of M. Lévesque. On the federal scene Quebec voters had returned liberal candidates from 74 out of 75 constituencies and of



Cartoon by Franklin.

these 74, only two had voted against the new constitutional resolution.

At the proclamation ceremony for the new constitution, Prime Minister Trudeau, declared that 'One need look at the results of the referendum in May 1980 to realize how strong is the attachment to Canada among the people of Quebec. By definition, the silent majority does not make a lot of noise; it is content to make history. History will show that nothing essential to the originality of Quebec has been lost.'

COURTESY OF THE GLOBE AND MAIL, TORONTO

The Charter of Rights



The Charter of Rights is now an integral 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 the then Prime Minister John Diefenbaker in 1960, but it applied only in areas of federal jurisdiction and could be repealed by Parliament at any time. The Charter is entrenched. It can be amended only through the united action of the federal government and at least seven provinces, which together have at least half the country's 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 during 267 hours of parliamentary time, amended and reshaped. 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.

Most sections spell out rights long established under British (and Canadian) common law, but occasionally strained in the past. For example, the sixth section 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 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.

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 programmes such as priority for some jobs being given to the physically or mentally handicapped.

The sixteenth to the twenty-second are among the most vital sections. They deal with language rights, including the rights of linguistic minorities to education in their own language.

Section twenty-five assures that the rights of native peoples of Canada will not be diminished by the Charter.

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 homogenous. Canada pursued a different image, a 'mosaic' in which distinct cultures – French, English, Ukrainian, German, Scottish, Irish and many others – remained distinctive but harmonious. This section assures its citizens that Canada is still committed to the mosaic.

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

How many times have people said to me, why can't you settle all your problems at home and then come here? and how many times have I tried to explain that in a federation it doesn't work that way, that there is, in Canada, no totally sovereign Westminster to make final disposition of the great matters of state. Federations live and thrive on tension. The federal form of government does not create the tension. Fundamental differences in interest characterize the country. The federal form of government exists to manage and control tensions.

REEVES HAGGAN *Canadian Constitutional Advisor*

Le dénouement

Once agreement had been obtained with nine out of ten provinces and simultaneously with the two federal opposition parties, the patriation proposals gathered momentum towards the final showdown at Westminster. On 2 December 1981, after some lively last-minute debate, the Canadian House of Commons voted 246 to 24 to approve the resolution that beseeched 'the Lords Spiritual and Temporal and the Commons [of Britain]' to sever the colonial cord.



2 December 1981: The constitutional resolution passes with an overwhelming majority, and the House of Commons in Ottawa rises to its feet in a spontaneous singing of the Canadian national anthem.

Canadian Senate approval followed suit and the patriation proposals were brought to London on 9 December where Esmond Butler, Secretary to the Governor General of Canada, accompanied by Mrs. Jean Casselman Wadds, the Canadian High Commissioner in London, went to Buckingham Palace for the formal submission of the request.

Quebec Premier René Lévesque took a last-ditch stand with a letter to Prime Minister Thatcher, asking her not to approve the patriation request. House leader Francis Pym replied in a letter to the Premier:



Jean Chrétien, Minister of Justice, and the Rt. Hon. Humphrey Atkins MP, at that time Lord Privy Seal, following a discussion of the Canada Bill at Westminster. (AP photo)

'While we naturally regret that the present proposals do not enjoy the unanimous support of the Provinces, we have given weight to the decision of the Supreme Court of Canada of 28 September 1981. We believe that the agreement of nine out of the ten Provinces constitutes a substantial measure of support for the proposals and we therefore feel we would not be justified in declining to act upon the request by the Federal Government and Parliament. Similarly, our view is that it would not be proper for the United Kingdom Parliament to amend the Canada Bill, because to do so would introduce an element which had not been requested by the Parliament of Canada and would thus be inconsistent with the convention recited in the Statute of Westminster.'

In a letter to the Times, Sir Anthony Kershaw added that 'to give Quebec and Quebec only a veto seems to the House of Commons Select Committee on Foreign Affairs to be politically unreasonable; nor could we find any legal basis for such a veto.'

Undeterred, M. Lévesque asked the Quebec Court of Appeal whether the province did not in fact have a veto power, established by tradition, over legislation affecting it. The unanimous 5 to 0 verdict was 'no'. The issue has subsequently been appealed to the Canadian Supreme Court.

Debate on the Bill in the Commons at Westminster became at times ascerbic during the five hours of the second reading, before members voted 154 to 42 to reject the first series of amendments which would have strengthened native rights. The reading was completed on 3 March and third reading was achieved 8 March, appropriately enough Commonwealth Day, with a majority of 144, 177 for and 33 against.

Final reading in the House of Lords on 25 March was enlivened by a determined effort on the part of an independent earl to speak at length on the Indian rights issue, until at last a majority of 147 to 15 peers voted that he be 'no longer heard'. A protester in the Strangers Gallery attempted to finish the earl's speech for him, but in the end was given barely time to hurl to the floor below what turned out to be a copy of the European Convention on Human Rights.

Royal Assent followed and Her Majesty the Queen accompanied by Prince Philip journeyed to Canada for the final proclamation on 17 April 1982. In her speech on that historic occasion Her Majesty observed that '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.'

Prime Minister Trudeau added: 'After 50 years of

Whether Canadian politics – and Canada – were dull was the question posed rhetorically by *The Economist* in March 1982, at the height of the Canada Bill debate at Westminster. The answer is a resounding No.

Is Canada boring?



A lot of readers won't like this

Many British members of parliament find it bizarre that they should be debating Canadian affairs. Some of them explain that Canada is boring. Well, it must be a bit of a bore to listen to speeches about a country for whose government you are not responsible. . . . In the debates on Canada, however, the keynote has been bafflement rather than boredom. Thus, on the one hand, the MPs have been warned that the bill is opposed by the Quebec assembly. On the other, they have learnt that it is backed by the votes of 72 of the 75 Quebec representatives in Canada's house of commons.

This sort of thing may baffle the British, but Canadians find it quite normal. And not just French Canadians. In Ontario, many people habitually vote Liberal in federal elections and Conservative in provincial ones; and throughout the constitutional tussle Ontario's Tory government (unlike the Quebec Liberal party) has sided with Canada's Liberal government. To read these riddles, you need some experience of a federal system, and the British have none. It was this that originally got them into Canada's constitutional tanglewoods. Back in 1867 they did not see it was asking for trouble to create a federation and fail to equip it with a means of amending its constitution.

That is why a British parliament in 1982 faces, for the last time, the embarrassment of having to legislate for another sovereign state. The niceties of the process may seem tedious, but the change itself is important. The same can be said about Canada. The notion that it is boring mainly reflects simple ignorance about the world's second largest country.

Where did these Icelanders come from?

Every traveller knows, one hopes, that Canada has two official languages; but how many know that its kaleidoscopic diversity goes much farther than that? There are more Italians in Toronto than there are in Taranto. A community of Icelanders is established in Manitoba, more than 1,000 miles from either ocean. The governor-general is of German and Ukrainian ancestry; there are Sikh temples in Vancouver and

onion-dome Orthodox churches on the prairies; in Cape Breton you may switch on the radio and find it is talking Scots Gaelic (and where else could one meet black speakers of that?). Stephen Leacock's sunshiny Mariposa, where they wore the green for St Patrick's and the orange for the Twelfth, sported thistles on St Andrew's day and flew the stars and stripes on July 4th with equal enthusiasm, pictured the rich Canadian mix.

Jonathan Swift shrewdly sited his Brobdingnag in this giant land whose vastness embraces thriving vineyards (the Norsemen who built houses in Newfoundland 1,000 years ago guessed right about that) as well as igloos. Contrasts abound between such long-settled rural areas as the "Anne of Green Gables" country; the big cities – now particularly notable for the way they have met the challenge of winter by building spectacular underground precincts; and the northern wilderness. It is a far cry from the Yukon of Robert Service's songs to the oilmen's city, Calgary, or the Okanagan apple country; much farther to Ste Anne de Beaupré, which has been famed as a healing shrine 200 years longer than Lourdes, or to Fredericton, where they revere the late Lord Beaverbrook and hold a spring festival for fiddleheads (tasty little things culled from ostrich ferns by boatmen).

Diversity and immensity create stimulating strains. Canada is rich in these too. There is always a row of some kind going on: environmentalists and defenders of Indian rights versus resource developers; Alberta versus Ottawa on oil pricing; the press versus Mr Tom Kent's commission; and so many manifestations of the unfinished struggle about Canadian unity, which has lain behind the whole constitutional reform battle. The creation of a united Canada was an impressive defiance of both geography and history. More such defiance will be needed if it is to be preserved. (Don't think Quebec is the only problem; a separatist has just won a by-election in Alberta.) Among outside observers of this complex and lively scene, bafflement may often be excusable. Boredom is not.



The Queen of Canada proclaims the country's new constitution. (photo: J Merrithew)

discussion we have finally decided to retrieve what is properly ours. It is with happy hearts, and with gratitude for the patience displayed by Great Britain, that we are preparing to acquire today our complete national sovereignty. It is my deepest hope that Canada will match its new legal maturity with that degree of political maturity which will allow us all to make a total commitment to the Canadian ideal...

'It is true that our will to live together has sometimes appeared to be in deep hibernation; but it is there nevertheless, living and tenacious, in the hearts of Canadians of every province and territory. I simply wish 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. What we are celebrating today is not so much the completion of our task, but the renewal of our hope – not so much an ending, but a fresh beginning.'



The proclamation ceremonies on Parliament Hill. (photo: R Vroom)



The proclamation of the new Canadian constitution.

The proclamation ceremonies on Parliament Hill were marked with a Royal Parade, a 21-gun salute and, almost the precise moment when the Queen signed the proclamation, a torrential downpour. After the deluge the Queen insisted on a 20-minute walk-about on Parliament Hill to meet and talk to some of the 32,000 spectators. The Canadian forces Sunbirds, an aerial acrobatic team, performed a series of hair-raising swoops and formation pyrotechnics, almost removing the top of the Peace Tower. The party continued until the late hours, with state banquets in Ottawa and celebrations throughout the nation.

As to the worth of the new Constitution itself the Canadian people also had strong opinions. No less than 80.3 percent of those declaring themselves in a Gallup Poll on 19 June were certain that the Constitution would be a 'good thing' for Canada. Even in Quebec, fully 75.4 percent agreed.



A sudden shower didn't stop the Queen from making a 'walk-about' among the thousands of participants at the proclamation ceremonies in Ottawa. (AP photo)

International comment on patriation was extensive, but perhaps none was more perceptive and elegant than that of *The Times* of 17 April 1982.



April 17, 1982

A CANADIAN CELEBRATION

It would be an impertinence to congratulate Canada on the attainment of its legal independence from the United Kingdom. In reality Canada has been an independent country for 56 years. The importance of today's ceremony in Ottawa, in which the Queen will sign a proclamation ending the constitutional link between the two countries, is not that it will make much difference to the Canadian government's freedom of action, either internally or in the international community, but that it puts an end to more than a half century of paradox. It removes an irritating, anachronistic and anomalous reminder of British colonial supremacy.

Canadian autonomy, and that of the other Dominions, was officially recognised by the Balfour Declaration of 1926, to which the Statute of Westminster of 1931 gave full legal effect. It was because Canada, alone of the Dominions, had been unable to provide for itself a workable machinery—acceptable to both the federal government and the provinces—for amending its own constitution that Westminster retained the sole right, and the obligation, to make amendments to the British North America Act of 1867...

The search for the amending formula, a constitutional Holy Grail, has been pursued intermittently and with varying degrees of vigour for more than a half century. That Mr. Trudeau was finally

able to find that formula, and to tack on a Charter of Rights in addition, is a tribute to his will, tenacity, negotiating skill and, not least, when it mattered most, ability to compromise with the various and varying demands of the provinces. Only Quebec resisted to the end...

It is a question for debate whether Mr Trudeau would have been able to persuade Westminster to pass the required legislation at a time when his scheme was opposed by eight of the ten provinces...

The possibility of a constitutional crisis was averted by allowing the issue to go to the Canadian Supreme Court, whose decision managed to allow both sides to claim victory and also resulted in a new atmosphere of conciliation between the federal and all but one of the provincial governments. Westminster fortunately escaped having to adjudicate between bitterly opposing camps... As it is, Westminster emerged with dignity from a difficult and sensitive episode. The serious attention it gave to the complex legal aspects involved, its reluctance to be used as a rubber stamp, and the interest and compassion which many members of both Houses showed to the cause of the Indian peoples, reflected well in Parliament.

Patriation of its constitution finds Canada in good shape, though not entirely free from problems. There will continue to be

difficulties over Quebec, the rights of the aboriginal peoples, and federal-provincial relations, especially over energy resources... These are all issues which were present before patriation, but Canada's new constitution has given them a new dimension.

Happily, the braking of the constitutional link between Canada and Britain does not bring any other estrangement. The Queen remains Queen of Canada, all the easier for Canadians to accept because she will no longer be burdened by identification with the constitutional issue. Relations between the two governments... have already resumed their traditional warmth. Canada's prompt and active support of Britain over the Falklands dispute is current proof of that.

Canada is important as a friend and ally of Britain, as a senior and influential member of the Commonwealth, and as a democratic country with the same principles of conduct and ideals of freedom as our own. To claim that patriation will usher in a new era in Canadian-British relations would be to suggest that all has not been well between the two, and that would be incorrect. That Canada's constitution has, after 56 years, finally made its journey home, leaving no trail of bitterness behind it, should be a matter of great satisfaction to both countries, and can only cement the friendship between them.

Canada, Britain and the Commonwealth



Will the patriation of the Canadian Constitution from London to Ottawa and the severing of this last colonial link adversely affect Canadian relations with Britain or the Commonwealth? By all accounts quite the contrary. The colonial anachronism had long since lost all significance and become no more than a potential irritant. With its removal the way is clear for even stronger bonds of affection and mutual respect between Canada and Britain, and continued close involvement by Canada in, and support for, the Commonwealth. The Queen of Great Britain remains also the Queen of Canada, fulfilling the desire of the great plurality of Canadians and the unanimous wish of the Prime Minister and all ten provincial premiers.

Had the bonds of affection and esteem between Britain and Canada been strained by the animated debate in Westminster? Public opinion in Canada reflected no such suggestion when the Falklands hostilities broke out. A Gallup Poll of 12 June revealed more than 88 percent of Canadians having an opinion unequivocally backed the British position that the Argentine forces on the islands should be removed. Canada was among the first nations to ban imports from Argentina. Prime Minister Trudeau declared that 'we are one hundred percent behind the British', and after the liberation of the islands on 14 June the Canadian House of Commons sent a unanimous message of congratulations to the British government and people.

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