

Aboriginals and the Patriation of Canada's Constitution

Presentation for Peter Russell's "Canada in Question – a Country Founded on
Incomplete Conquests"

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Two questions

- How come patriation was more favourable to aboriginal nationalism than to Quebec nationalism?
- Was patriation a substantial step towards decolonising relations with aboriginal peoples?

1- How come Patriation was more favourable to aboriginal nationalism than to Quebec nationalism?

- Is aboriginal 'nationalism' the right term to use here?
Distinct from the interests of aboriginal people
- As with concepts like land ownership, it is questionable whether the European state-centric notion of 'nationalism' applies neatly for aboriginal groups - though there is a minority among aboriginal people who aspire to Westphalian-style statehood
- There is also a risk that talking about 'aboriginal nationalism' creates a false perception of unity - it may be better to speak of the 'nationalisms' of aboriginal groups that share a sense of history and culture

Summary: aboriginal nationalism v. Quebec

- What was Quebec's experience of patriation?
Largely one of 'betrayal' by the rest of Canada
 - "Night of the Long Knives" and "Gang of Eight"
 - Facilitated by the Supreme Court, via the *Quebec Secession Reference* and the determination that only 'substantial degree' of provincial consent was required for constitutional patriation by the federal government

Quebec's response

- November 25, 1981 - Decree of the Quebec National Assembly rejecting patriation 78-38
- Unsuccessful efforts at the Quebec Court of Appeal and the Supreme Court of Canada
- Subsequent feelings of resentment and hostility toward the constitution - such as during the Meech Lake negotiations
- 1995 secession referendum
- “Mega-constitutional” attempts to bring Quebec in subsequently

- “The Constitution Act, 1982 *restricts* the powers of the Legislature and government of Quebec and was brought into being by a procedure that *was opposed* by that Legislature and government”
 - Donald Smiley in Banting and Simeon (75)
- Smiley makes a fairly convincing case that this strengthened the secession movement, specifically by encouraging the Parti Quebecois to equate electoral success with support for secession (77-8)
- Daniel Latouche in B&S is even more critical

The aboriginal experience

- In the lead-up to patriation - engagement with the process as one of many 'interest groups' in the televised hearings of the joint parliamentary committee on Trudeau's repatriation package (Russell Odyssey 114) (Douglas Sanders in Banting and Simeon)(Smiley in B&S 81) -Alan Cairns calls these groups 'Charter Canadians'
 - Secured three promises (Romanow et al 121-2)
 - a section of the constitution recognizing aboriginal and treaty rights
 - a section of the Charter protecting the rights and freedoms of Aboriginal peoples recognized in the 1763 Royal Proclamation and subsequent treaties from being abrogated or derogated by other rights and freedoms in the Charter
 - another section of the Constitution requiring a first ministers conference involving aboriginal representatives within a year to discuss constitutional matters affecting aboriginal peoples

“Existing” rights

- At a first ministers’ conference in November 1981, agreement was reached to drop the recognition of aboriginal rights from the constitution
- One specific cause of provincial concern - lack of treaties in B.C. (Romanow et al 209) - Also, confusion about exactly what aboriginal groups wanted and about their campaign in the U.K. (Ibid 212-3)
- Reversed ‘through public agitation’ (Russell Odyssey 122) (Johnston 135)
- Final version of the *Constitution Act* (1982): “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” -Lougheed

The aboriginal experience

- Direct appeal to the United Kingdom (Russell Odyssey 117) (Sanders in B&S 305,311,317,321)
- Argument: the sovereignty of aboriginal groups meant their consent was required for the U.K. parliament to pass control of constitutional provisions concerning them to the Canadian government
- Given a hearing, but ultimately failed to convince Lord Denning in the High Court or U.K. parliamentarians that this argument had merit
 - Denning came up with a rationale for how responsibility had transferred from the British to the Canadian Crown (Sanders 322)

The aboriginal experience

- Following the Denning decision, the British parliament considered the bill to patriate Canada's constitution
- Of 30 hours of total debate, 27 spent on "Indian matters" (Sanders 323)
- London strategy was costly, and arguably undermined federal government support for aboriginal claims (fed gov't arguably more likely to be supportive than provinces)

The aboriginal experience

- Ultimately, most aboriginal groups opposed the patriation package:
 - Failure to recognize their inherent sovereignty
 - Failed to provide an obligation to consult them on amendments affecting their constitutional rights

The aboriginal experience

- Consequences of patriation:
 - Russell: aboriginals ‘secured constitutional resources’ in a way largely unintended by the main drafters of the patriation package
 - Section 25 of the *Charter* protects rights granted by the Royal Proclamation of 1763 and any rights and freedoms granted by prior or subsequent land claims
 - Section 52 provides enforcement: “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect” (Romanow et al 268)

March 1983 conference

- 1982 *Constitution Act* required a conference within one year to identify and define the rights of aboriginals (Russell *Odyssey* 130) (Romanow et al 269)
- First amendment to patriated constitution - ratified by all provinces but Quebec (in protest of earlier patriation process)
- New section 35(3) gave constitutional recognition to rights granted through new land claims
- Also - constitutional conference including aboriginal representatives necessary before further constitutional changes affecting them

Further conferences

- Further conferences in 1984, 1985, 1987 - focused on issue of aboriginal self-government (Russell *Odyssey* 131)
- Highlighted different perspectives on aboriginal sovereignty - which aboriginal groups saw as unrelinquished in the span since European contact and colonization

Subsequent legal history

- *Guerin* case (1984) - aboriginal title and the fiduciary duty of the government
- *Sparrow* case (1990) - aboriginal rights not extinguished by default because of years of federal and provincial policy
 - Can only be extinguished when legislatures are clear about their intention to do so and when a high judiciary standard has been met showing that aboriginal rights have been taken seriously
- *Delgamuukw* (1997) - aboriginal native title has modern consequences, including sub-surface mineral rights - but up to judges to determine which practices and activities are essential to aboriginal societies
- Supreme Court of British Columbia rejection of challenge against the *Nisgaa Final Agreement* on the basis of the 1982 *Constitution Act*

Samuel LaSelva on *Sparrow*

- Aboriginals under the protection of the crown, which includes a fiduciary obligation to protect the rights and interests of aboriginals (141)
- “Governments, courts, and all Canadians” must be sensitive to aboriginal perspectives on their own rights
- Government must take aboriginal rights seriously to uphold the honour of the crown
- Also placed question of Musqueam salmon fishing in the broader context of contemporary Canadian society - aboriginals must “show due regard for the interests of all”

Darlene Johnston on *Sparrow*

- “Aboriginal Rights and the Constitution: A Story Within a Story?” in Denis Magnusson and Daniel Soberman eds. *Canadian Constitutional Dilemmas Revisited*. (Institute of Intergovernmental Relations) 1993
- Section 35 of the *Constitution Act* “represents a remarkable reversal of the group-destructive policy which the federal government had pursued for more than a century” (134)
- Trudeau’s 1969 white paper a “scheme to bring [aboriginal people] into Canadian society as undifferentiated individuals, stripped of... collective rights” (135)
- *Sparrow* case clarified and gave meaning to section 35

Summing up: aboriginals and Quebec

- The legacy of patriation in Quebec is largely a legacy of resentment and feelings of betrayal
 - Also, of subsequent institutional attempts at remedy
 - Contributes to the difficulty of amending Canada's constitution in any way
- Aboriginal legacy consists largely of useful constitutional tools for the meaningful assertion of rights

II- Was patriation a substantial step towards decolonising relations with aboriginal peoples?

— [Decolonization:

— “The withdrawal from its former colonies of a colonial power; the acquisition of political or economic independence by such colonies.”

— [The Canadian state has clearly not withdrawn from colonial lands, or from management of reserves, the *Indian Act*, etc

— [But aboriginal groups have gained greater political and economic independence

— [Samuel LaSelva argues that the most important aspect of aboriginal self-government is preventing non-aboriginals from interfering in the affairs of Aboriginal communities (139)

“Strategies for emancipation”

— [LaSelva (144) - “Self-government is virtually synonymous with dignity because it removes the badge of inferiority and establishes their equality”

— Dispels the legacy of paternalism and allows aboriginals to “heal themselves through participation in their own communities”

— Can be achieved through various routes, including decolonization that produces an outcome analogous to national independence, or the establishment of aboriginal governments with a high degree of autonomy within Canada’s federal structure

— Decolonization strategy could involve “the removal of the colonizer and the re-establishment of a genuine native culture” (148)

Literal decolonization by the United Kingdom

— [Though they provoked significant legal and political discussion, the aboriginal delegation to London failed to argue successfully that the U.K. could not patriate the Canadian constitution without their consent

— [The U.K. concluded that the obligations of the crown had already transferred to the government of Canada (Russell *Odyssey* 123)

— [One less layer of colonialism, perhaps

Joe Dion's ambitious plan

— [Sanders in B&S p.317-8

— [Joe Dion - hired by National Indian Brotherhood to coordinate the lobby

— [Wrote "Indian Statehood" (1981) which proposed consolidating all reserves into an entity like a province: cabinet, departments and ministries, elected legislature, judiciary, civil service, "purely intergovernmental" fiscal relations with Ottawa

— [Abolishment of Indian Affairs and the *Indian Act* - Indians no longer seen as citizens of their provinces, but of this new Indian polity

— [Received with controversy by aboriginal groups; set aside to focus on the patriation fight; never taken up again

Ways the constitution 'fell short' for aboriginal groups

— [Romanow et al. argue that aboriginal groups were disappointed in some significant ways by the way aboriginal rights were enshrined in the constitution

— Danger the word 'existing' would be used to curtail rights not judicially recognized before 1982

— Lack of specific enforcement provisions (beyond section 52)

— Failure to include new rights, especially self-government rights

— [These failures could be especially significant given the difficulty of re-opening substantive discussions on the questions raised in 1982

Opening the door for comprehensive land claims

— [Arguably the most 'decolonising' aspect of patriation and subsequent connected events

— [Section 25 of the *Charter* explicitly protects rights and freedoms granted via land claims, and the 1982 constitution was used to dismiss a challenge against the Nisgaa treaty

— [Amended section 35 of the *Constitution Act* protects rights from new land claims

— [One pre-patriation driver was the 1973 *Calder* case, which first led to the federal government seeking a comprehensive land claims policy (Russell Odyssey 94)

The argument against

— [Romanow et al 277 “[A]boriginal peoples received no constitutional recognition of either the structures or the rights which would allow them to develop societies which are neither subordinate nor marginal”

— [The *Indian Act* persists, along with a federal department charged with managing Canada’s aboriginal peoples

— [Social and economic problems experienced by aboriginals persist -Samuel LaSelva *The Moral Foundations of Canadian Federalism* (1996) p.134

— [It may have been too much to ask patriation to remedy all this, but these problems do show places where colonialism and its legacy persist

Unintended consequences

- The means of patriation deepened the divide between Quebec and the rest of Canada, at the same time as the new amendment formula adopted complicated future constitutional changes
- Aboriginal rights were incorporated into the *Charter* and *Constitution Act* in a way that facilitated future legal and political victories