

**Book Review of Barry Strayer**  
***Canada's Constitutional Revolution***  
**(Edmonton: University of Alberta Press, 2013)**

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The story of the patriation of Canada's constitution is a familiar one. Its characters and plot are well-known: the charismatic Prime Minister Pierre Trudeau, determined to entrench constitutional protection of language rights; the acrimonious battle between the federal and provincial governments; the federal attempt to patriate the constitution unilaterally; the late-night drafting of the "Kitchen Accord", which, in Québec, has become known as the "Night of the Long Knives". The story has been the subject of numerous books, academic articles, documentaries, and other commentary.<sup>1</sup> One might be forgiven for thinking that nothing new can be said on the matter. Nevertheless, Barry L Strayer manages to do just that in his new book *Canada's Constitutional Reform*.

Strayer's book recounts the story of patriation through the lens of his role as a senior federal official. By providing an "insider look" at the events leading up to patriation (such as his take on the controversial Kirby Memorandum, a confidential document which outlined the federal government's action plan for unilateral patriation if negotiations with the provinces failed), Strayer offers compelling insight into the federal government's perspectives and mo-

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1 See e.g. Frédéric Bastien, *La Bataille de Londres* (Montréal: Boréal, 2013); David Milne, *The Canadian Constitution*, 2nd ed (Toronto: Lorimer, 1989); Patriation Negotiations Conference: A Moment of Incalculable Consequences delivered at the University of Alberta, 3-5 November 2011; Gil Remillard, "The Constitution Act, 1982: An Unfinished Compromise" (1984) 32 Am J Comp L 269; Peter Oliver, "The 1982 Patriation of the Canadian Constitution: Reflections on Continuity and Change" (1994) 28 RJT 875; CBC "The Constitution and Charter re-evaluated" (17 April 2002), online: CBC Television <<http://www.cbc.ca>>; Robert Duncan, *The Road to Patriation*, (1982), online: National Film Board of Canada <[http://www.nfb.ca/film/road\\_to\\_patriation/](http://www.nfb.ca/film/road_to_patriation/)>.

tivations during this time. A unique take on a familiar tale, the book makes for an engaging and informative read. Strayer successfully blends memoir, politics, constitutional law, and constitutional theory to create a resource that will undoubtedly be of interest to lawyers, judges, and academics in legal and political fields, as well as people generally interested in the constitution or Canadian politics (though his assumption of some legal, historical, and political knowledge on the part of readers may limit the appeal of the book to the general public at large).

Strayer's book contributes to the ongoing discussion occurring in Canadian academic and public spheres on what patriation and the constitution mean to Canadian law and Canadian identity. Strayer touches on numerous different themes in his thorough examination of the patriation process, generating a wealth of different issues to explore. I will confine myself to considering only a few of these issues below, with the hope of also contributing to this important discussion.

First, an overview of Strayer's book is in order. Divided into three parts, the first chronicles his involvement in the patriation process, from attending the constitutional conferences in 1960 and 1961 as a junior member of the team from Saskatchewan to his role as Assistant Deputy Minister for Public Law in the federal Department of Justice in the early 1980s.<sup>2</sup> While the first part is largely descriptive, the second part is reflective, as Strayer ruminates over the influences and forces behind the constitution and patriation, as well as the emerging implications for Canadians and Canada's legal and political institutions. In the third and concluding part, Strayer recounts several *Charter* cases that came before him during his time on the Federal Court, and, later, the Federal Court of Appeal, and uses that opportunity to reflect more generally on the legacy of the *Charter* and the constitution.

While Strayer discusses the constitutional conferences of 1960-1961 and 1971 as well as other events over the course of his career (including his work on the ratification of international conventions and on the development of the *Canadian Human Rights Act*), it is his role in the patriation process which

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2 Throughout his career, Strayer worked with heavyweights in Canadian law and politics: University of Saskatchewan Dean FC Cronkite, McGill professor Frank Scott, Saskatchewan Premier Tommy Douglas, and, of course, Prime Minister Pierre Trudeau and (then) Minister of Justice Jean Chrétien. We meet many of these key figures in positions they held early in their careers: Allan Blakeney is first introduced to us as Education Minister (Blakeney later became Premier of Saskatchewan); Clyde Wells is counsel in the patriation reference at the Newfoundland Court of Appeal (Wells later served as Premier and, following that, Chief Justice, of Newfoundland); Gérard La Forest and Jean Beetz are legislative drafters (Pigeon and Beetz, of course, were later appointed to the Supreme Court of Canada).

forms the most compelling part of the narrative.<sup>3</sup> For example, Strayer spends considerable time justifying the unilateral action of the federal government (as detailed in the Kirby Memorandum). While acknowledging that the memo was controversial, Strayer is unapologetic, arguing that the failure to obtain provincial consensus — despite attempts going back to 1927 — justified proceeding unilaterally.<sup>4</sup>

Strayer also examines the forces that brought about the Constitution, noting that the document was, in large part, the result of political compromise, rather than philosophical fidelity. A discussion of the Constitution's underpinnings would not be complete without mentioning Trudeau's political beliefs and philosophies; Strayer obliges, providing a description of the numerous events and people that influenced Trudeau's thinking. However, the section is brief — much fuller accounts of Trudeau's life and political philosophies have been provided elsewhere.<sup>5</sup>

Strayer's perspective as a federal official is both the book's strength and weakness: it contributes to the freshness of the re-telling, but it also makes the tale one-sided. For example, Strayer seems to view the provinces' motivations in constitutional negotiations narrowly, leaving the impression that the provinces (particularly Québec) were chiefly concerned with the expansion of provincial jurisdiction or, in some instances, did not genuinely seek to reach agreement on patriation. This portrait of Québec does not do justice to the complex issue of Québec's motives and goals as well as the related and embedded question of what patriation means for Quebecers. Patriation, it has been argued, is not a matter of asking "[w]hat does Quebec want?", but rather acknowledging that Québec is "a historically self-determining entity, already constituted", which then requires that the constitution "be the result of an evolving set of agreements that are acceptable to all parties."<sup>6</sup>

Other scholars have pointed out that Québec is a strong supporter of federalism, as it provides Québec with space to maintain a "distinct society

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3 *Canadian Human Rights Act*, RSC 1985, c H-6.

4 The issue of whether the federal government's unilateral action was justified remains controversial. Peter Oliver, "Canada, Quebec, and Constitutional Amendment" (1999) 49 UTLJ 519 at 521.

5 See e.g. Claude Couture, *Paddling with the Current: Pierre Elliott Trudeau, Étienne Parent, Liberalism and Nationalism in Canada* (Edmonton: University of Alberta Press, 1998); John English, *Citizen of the World: The Life of Pierre Elliott Trudeau, Volume One: 1919-1968* (Toronto: Vintage Canada, 2007); John English, *Just Watch Me: The Life of Pierre Elliott Trudeau, Volume Two: 1968-2000* (Toronto: Vintage Canada, 2010); BW Powe, *Mystic Trudeau: The Fire and the Rose* (Toronto: Thomas Allen Publishers, 2007).

6 Alain-G Gagnon & Raffaele Iacovino, *Federalism, Citizenship, and Quebec: Debating Multinationalism* (Toronto: University of Toronto Press, 2007) at 27.

within Canada”.<sup>7</sup> Québec did not reject patriation in principle; rather, these scholars argue, it rejected patriation because the Constitution “totally ignored Québec as a people.”<sup>8</sup> According to these scholars, Québec residents have two identities — as both Canadians and Quebecers — which give rise to a need to maintain and protect that dual character through recognition of special status and extension of self-determination to matters touching on that identity.<sup>9</sup> While Strayer mentions these considerations in his discussion, he never thoroughly explores them, and the reader may be left with a feeling that the discussion, so far as Québec is concerned, is incomplete. As a further example, Strayer dismisses the notion that Québec had a veto on constitutional amendments, but the question is not an easy one. Other authors have argued that Québec historically had a veto, or that asymmetrical federalism may be justified by virtue of Québec’s unique status within Canada.<sup>10</sup>

Strayer downplays the resentment stemming from Québec’s failure to sign on to the patriation accord. He disputes the conventional view that Québec was “humiliated” and cites statistics that Quebecers have in fact embraced the *Charter*. However, while the *Charter* and the constitution does seem to poll very highly in Québec (a 2002 poll found that 91% of Quebecers approve the *Charter* and a 2011 poll found that 80% of surveyed Quebecers believe that patriation “was a good thing”),<sup>11</sup> other polls have suggested that discontentment with the failure to include Québec in the 1982 agreement continues (a 2012 survey found that 44.5% of respondents from Québec favoured separation if Québec was not brought into the constitutional fold

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7 Louis Balthazar, “Quebec and the Ideal of Federalism” (1995) 538 *Annals of the American Academy of Political and Social Science* 40 at 41.

8 *Ibid* at 40; *supra* note 6 at 38-44.

9 *Ibid* at 41; *supra* note 6 at 21, 20-60.

10 Gagnon & Iacovino, *ibid*; *supra* note 7 at 45; Alain-G Gagnon, “The Moral Foundations of Asymmetrical Federalism: A Normative Exploration of the Case of Quebec and Canada” in Alain-G Gagnon & James Tully, eds, *Multinational Democracies* (Cambridge: Cambridge University Press, 2001) 319; Simone Chambers, “Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis” (1998) 26 *Politics & Society* 143 at 147.

11 Centre for Research and Information on Canada (CRIC), *The Charter: Dividing or Uniting Canadians?*, vol 5 (Montréal: Centre for Research and Information on Canada, 2002) [CRIC]; CROP, *The Federal Idea, A Study on the Occasion of the 30<sup>th</sup> Anniversary of the Patriation of the Constitution* (Montréal: CROP, 2011), online: The Federal Idea <<http://ideefederale.ca/documents/if-poll-patriation-final.pdf>>; The Canadian Press, “30 years later, vast majority polled in Quebec back patriation of Constitution, Charter,” *Macleans* (13 October 2011), online: [Macleans](http://www.macleans.ca) <<http://www.macleans.ca>>. However, the results of the 2011 survey should not be over-stated. The Federal Idea is a “pro-federalist think tank” (The Canadian Press, *ibid.*) and the question was phrased to emphasize the severing of British ties, which may have created greater support than other possible phrasings. The question reads: “In 1982, Canada patriated its constitution, which until then had been tied to the British Parliament. In your opinion, was this ...[e.g. a good thing]”: The Federal Idea, *ibid.*

via constitutional amendment and, in the same survey, 54.1% of respondents from Québec indicated that the federal government acted without “good reason” in patriating the constitution without Québec on board).<sup>12</sup> There appears to be real division between Québec and the rest of Canada on the matter, as underscored by the fact that 51.3% of non-Québec respondents believed the federal government’s action was justified and only 9.2% supported recognizing special status or increased powers for Québec (versus the 69.1% within Québec who supported increased powers).<sup>13</sup>

Québec’s continued dissatisfaction with the patriation process was recently highlighted by the anger in Québec over allegations that Chief Justice Laskin inappropriately communicated with governments of Canada and the United Kingdom at the time of the *Patriation Reference*.<sup>14</sup> Strayer, in introducing the topic of constitutional amendment at the beginning of his book, refers to the writing of Hans Kelsen and notes that, for a constitution to be legitimate, it must have both legal and political legitimacy. He writes: “A constitution is politically legitimate if it is perceived as having been made by processes acceptable to those governed by it.”<sup>15</sup> Having made this assertion, it would seem that whether the patriation process was(/is) accepted in Quebec is relevant to the question of the ultimate legitimacy of the Canadian constitution and it is disappointing that Strayer does not address this matter in more depth.

Another theme in Strayer’s book — and the final theme I will discuss — is his perception and negative assessment of the tendency of some judges in *Charter* cases to set or interfere with the country’s social policy agenda. Strayer notes that the *Charter* has had “unintended consequences”,<sup>16</sup> one of which has been judicial intervention into matters such as policy setting, which is properly a matter for the executive and legislative branches. However, by entrenching the *Charter*, the country has accepted judicial review of government action, including judicial supervision of decisions that may involve policy implications (indeed, a wide and diverse range of both judicial and legislative action could be characterized as affecting “policy” as no bright line separates “policy” from

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12 Andy Blatchford, “Appetite for independence endures in Quebec, suggests poll on constitution” (26 March 2012), online: <<http://www.stalbertgazette.com/article/GB/20120326/CP02/303269908/-1/SAG08/appetite-for-independence-endures-in-quebec-suggests-poll-on&template=cpArt>>.

13 *Ibid.*

14 *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753; Cristin Schmitz, “Patriation allegations: ‘a tempest in a teapot’” *The Lawyers Weekly* (26 April 2013), online: [The Lawyers Weekly](http://www.lawyersweekly.ca) <<http://www.lawyersweekly.ca>>.

15 Barry L Strayer, *Canada’s Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 32. See also Chambers, *supra* note 10 at 143 (“a constitution is legitimate only when it can be endorsed or agreed to by the various and diverse groups within the nation”).

16 Strayer, *ibid* at 291.

“non-policy” ).<sup>17</sup> As noted by former Chief Justice of Saskatchewan E.D. Bayda, very often the “issue under scrutiny in a s. 1 matter is Parliament’s choice of policy.”<sup>18</sup> Though Strayer is wary of this particular “unintended consequence” of patriation, others have supported such judicial activity on the grounds that it leads to innovative decision-making, provides flexibility to ensure justice is done on a case-by-case basis, and protects the individual from overreaches by the state.<sup>19</sup>

Strayer’s unique perspective and lengthy involvement with the patriation process make his book both an informative and engaging read. On some issues, more analysis — such as exploring contrary and complementary literature — would have added to the book (though, admittedly, perhaps at the cost of it being an accessible memoir). However, the book is, overall, a thorough examination of the process of patriation and a thoughtful reflection on the unfolding consequences.

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17 See e.g. The Honourable ED Bayda, “Judicial Activism” (2007) 70 Sask L Rev 225 at 227-33.

18 *Ibid* at 232. See also Lorraine Eisenstat Weinrib, “The Activist Constitution” in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen’s University Press, 2001) 80 at 80-83. Importantly, the Canadian public is largely supportive of judges — rather than Parliament or the Legislatures — making decisions and fashioning remedies under the constitution, CRIC, *supra* note 11 at 20; Andrew Parkin, “The Charter and Judicial Activism: An Analysis of Public Opinion” (2002) 21 Windsor YB Access Just 361.

19 Bayda, *ibid*; Weinrib, *ibid*; James B Kelly & Michael Murphy, “Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada’s Legal Rights Jurisprudence” (2001) 16 CJLS 3; Margit Cohn & Mordechai Kremnitzer, “Judicial Activism: A Multidimensional Model” (2005) 18 CJLJ 333. But see Greg Craven, “Judicial Activism in the High Court - A Response to John Toohey” (1999) 28 UWA L Rev 214.