The recent flurry about patriating the Canadian constitution has brought back a flood of memories, and some reflections. Patriation was not an exercise in partisanship. Neither was the Charter. The origins of the desire to "bring the Constitution home" go back decades.
The recent flurry about patriating the Canadian constitution has brought back a flood of memories, and some reflections.

Pierre Trudeau, Frank Scott and Bora Laskin were friends in the 1950s and '60s, all three law professors and advocates of the need for a bill of rights, and for Canada to have its own constitution. All took a dim view of how poorly civil rights were protected in Canadian law, and the consequences of allowing the Constitution to remain a British act of parliament. They took an even dimmer view of how the British law lords had interpreted the Canadian constitution, and to what extent the powers of the federal government had been eroded by what
they all saw as a perverse reading of the Canadian experience. In one of his poems Frank Scott accused the Privy Council of "worshiping at the altar of divided jurisdiction."

Patriation happened after an exhaustive national discussion. A separatist government in Quebec was never going to support bringing the constitution home, with or without a Charter. It would have meant admitting a federal Canada had a real existence.

Patriation was not an exercise in partisanship. Neither was the Charter. The origins of the desire to "bring the Constitution home" go back decades. The quest for a better protection for individual and group rights can be traced to all three major parties of the day -- the NDP, the Progressive Conservatives and the Liberals. John Diefenbaker, Ellen Fairclough, Gordon Fairweather, Tommy Douglas, David Lewis, and Ed Broadbent were just as much authors of the Charter as Pierre Trudeau and Jean Chrétien. I was proud to fight for it then, I am proud to fight for it now.

The draft that Mr. Trudeau presented to Parliament was changed in many fundamental respects by the Special Committee of Parliament -- by aboriginal groups, by women, by those representing multicultural communities and the disabled, by the legal community and many individual presenters. It was improved as a result. Let's give credit where credit is due. No one fought harder for these changes than Ed Broadbent and the NDP.
Two Progressive Conservative Premiers -- Bill Davis and Richard Hatfield -- were early supporters of the Charter and Patriation. Once the Supreme Court of Canada told Parliament that more consensus was required to respect the federal principle, long and protracted negotiations brought the other seven Premiers onside.

Bora Laskin was appointed to the Ontario Court of Appeal by Pierre Trudeau in the 1960s, and in the '70s to the Supreme Court. He became Chief Justice, and yet was as well known for his dissents as his majority opinions. He was a brilliant, tough minded man, whose rugged integrity and gruff manner became legendary.

Bud Estey was one of the most brilliant legal minds of his day. The son of a distinguished jurist, he served as Chief Justice of Ontario before joining the Supreme Court. Like Laskin, he did not suffer fools gladly, and in conversation was remarkably direct, funny and candid.

John Ford, the British High Commissioner in the years of the patriation debate, was indiscreet rather than candid, and never hid his own personal opposition to Mr. Trudeau's effort to bring the constitution home to Canada. As an opposition MP I encountered the High Commissioner a number of times, and found him to be as opinionated as he was ill informed. It is Ford's accounts of alleged conversations with Laskin and Estey that form the basis of yet another argument that the judges were part of some nefarious federal plot.
What is missing from the argument of Frederic Bastien, the author of "La Bataille de Londres," and others who have decided to take up the cudgels, is one simple fact. Laskin and Estey were not able to persuade their colleagues on the bench that the federal government's legal power to move forward gave it the constitutional authority to do so.

Some conspiracy, some plot.

That Laskin and Estey held strong views on the federal power and the importance of an entrenched bill of rights would hardly be a state secret. All John Ford would have had to do was crack open a copy of Laskin's book on constitutional law, or read any number of articles Laskin wrote over the years as a professor of constitutional law at the University of Toronto.

So there's no plot, no conspiracy, and no surprise. Both Laskin and Estey have passed away, and the reputation of both these extraordinary men will long survive this controversy.

Mr. Trudeau never liked the decision that forced him to compromise, and made that clear when he spoke at the dedication of the Bora Laskin Library in 1990.

Mr. Trudeau once joked that John Ford's boss Margaret Thatcher would have to "hold her nose" and make patriation happen. But in reality it was Mr. Trudeau
who had to hold his nose. The Court’s majority decision to draw a distinction between what was "the law" and what was "constitutional convention" forced Mr Trudeau back to the table of negotiation. Both Bill Davis and Ed Broadbent, to my knowledge, argued strongly that a greater effort to find a consensus had to be made. Once the Premiers were brought together, it was Mr. Davis once again who was critical in Mr. Trudeau's decision to accept the "notwithstanding clause" as the concept that would bring seven more Premiers to accept patriation and the entrenched charter. Mr. Trudeau could not afford to lose the support of Ontario, New Brunswick, or the federal NDP. At many steps of the way he compromised to broaden support for the package. Some "coup d'etat."

Mr. Bastien's new conspiracy theory -- apparently endorsed by the NDP leader Tom Mulcair -- unfortunately joins a long list.

The mythology of the "night of the long knives" is a separatist concoction designed to discredit the idea of Canada itself. It bears no relation to reality. The notion that one province had a veto over Patriation or the acceptance of the Charter was specifically rejected by the Supreme Court of Canada when Quebec appealed unsuccessfully right after Patriation. The so-called "compact theory" of the country has never received endorsement from the Supreme Court of Canada.

Another myth that should be blown to smithereens is that the Charter is a "centralizing" document. Canada today is the most decentralized federation in
the world, and the Charter does not give any additional powers to the federal government. Rather, it limits the powers of all governments.

This has been reaffirmed countless times by the Supreme Court of Canada in countless cases since 1982. If parliament or provincial legislatures aren’t prepared to recognize individual rights, the courts will step in, not in the name of either level of government, but in the name of freedom.

Another myth floating around is that Quebec has the unilateral right to secede from the country on the basis of a question controlled by the provincial assembly, in an election controlled by the assembly, and with the support of 50 per cent plus one of the population voting.

This approach has been specifically rejected by the Supreme Court of Canada. Quebec is not an oppressed minority, Canada is not a dictatorship, Canadian federalism, democracy, and the protection of minorities are all real things. A “clear vote on a clear question” would trigger discussions, not secession. The fantasies on this issue, now being fueled not just by the Parti Quebecois but by the NDP in their “Sherbrooke Declaration,” have to be understood as pandering, an appeasement defies logic and constitutional reason. A new NDP private member’s bill, which further clouds the issue, only shows the confusion and double-talk which now racks that party.
Constitutional change has proved extraordinarily difficult in Canada. But we remain a country deeply committed to both the rule of law and constitutional convention. Facile attempts to prove conspiracies, or to attack the integrity of two distinguished jurists who can’t tell their side of conversations, hardly adds to our understanding.