

## The Coford Lecture

# Patriation and Patrimony: The Path to the Charter

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The privilege of giving this Coford Lecture allows me to recount for the first time the opportunity I had to participate in the making, for better or worse, of Canadian history and destiny in the unique event of the patriation of your country's Constitution—and of its transformation, in the very same process, by the engrafting onto it of the Charter of Rights and Freedoms. This account may happen to be the first time that any non-Canadian involved in these events and processes as they unfolded in London between October/November 1980 and February 1982 has given an ordered account of them<sup>1</sup>—and I do not expect that many or perhaps any more accounts will be given by those involved non-Canadians who have survived the intervening three decades.

### I

Patriation was the transferring to Canada—to persons, institutions and processes in Canada—of all the powers of legislating for Canada that had remained with the United Kingdom (“UK”) Parliament in and after 1931. The Statute of Westminster, 1931, enabled Canada (and other Dominions such as South Africa, New Zealand and, with qualifications, Australia) to make laws prevailing over UK statutes, and eliminated or severely qualified the power of the UK Parliament to make laws changing a Dominion's law. To those general empowerments of the Dominions there were exceptions, some in relation to Australia, to preserve its six States from being absorbed without their consent into a more unitary structure by legislation of the Australian Parliament alone or of the UK Parliament acting alone or at the behest of the Australian Government; and a further exception, s. 7(1), to preserve the exclusive authority of the UK Parliament to amend the key provisions of the statute by and under which Canada had been constituted and ruled since 1867, the British North America Act, 1867 (as amended) (“BNA”). This retention of legislative authority by the UK Parliament was not in any sense or way whatsoever an expression of some British desire to retain some hold over

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This Coford Lecture was given at the University of Western Ontario on 6 April 2014. I have retained its lecture style, but with annotations.

1. Frédéric Bastien, *La Bataille de Londres: Dessous, secrets et coulisses du rapatriement constitutionnel* (Montreal: Boréal, 2013), [Bastien, *French Edition*] at 459-60, names half a dozen non-Canadians who gave recollections and/or information to its author. I consulted this edition in preparing this lecture, but the book says rather little about the elements of the affair with which I am here primarily concerned. The subsequent English edition usefully reproduces or quotes in English from a good many documents: see Frédéric Bastien, *The Battle of London: Trudeau, Thatcher and the Fight for Canada's Constitution*, translated by Jacob Homel (Toronto: Dundurn, 2014) [Bastien, *English Edition*].

or influence in Canada. On the contrary, s. 7 was insisted upon by all political players in Canada, and its terms were drafted in Canada and (as the Canadian Parliament's request for its enactment recited) were approved unanimously by all the provincial governments at a conference assembled in Ottawa for that purpose (eight months before the enactment of the Statute of Westminster in December 1931). Everyone at the time expected that within a few years it would be possible for the federal and provincial governments in Canada to agree on some intra-Canadian method of amending Canada's constitution, whereupon that method would be given statutory form and authority by a final UK statute which would itself also enact that the powers of the UK Parliament to make laws for Canada were terminated. Such a statute, with these two elements and effects—terminating the powers of the UK Parliament to amend the Canadian constitution and creating an intra-Canadian method for amending it—would be a statute patriating the Canadian constitution, or rather, as people said in the 1930s, indeed until the 1960s, it would be a statute repatriating it.

As things turned out, however, over 50 years went by before this was achieved. Patriation was accomplished by the Canada Act 1982, the UK Parliament's final statute for Canada, and one that included not only those two elements but also a third, the Charter of Rights and Freedoms. All three elements had been requested of, and drafted for, the UK Government and Parliament by joint resolution of the two houses of the Canadian Parliament. After the failure of inter-governmental conferences in the summer and September of 1980, the Canadian Government announced such a resolution on 2 October, and tabled it in Parliament on 6 October. Mr. Trudeau's announcement was opposed within three weeks by six and eventually by eight of the provinces—all except Ontario and New Brunswick. The provincial objections concerned two of the three key elements of patriation: the formula for post-patriation amendments of the Constitution, and the inclusion of a Charter of Rights judicially enforceable against not only the federal authorities but also the government and legislature of each Province.

On the day the patriation package was announced, the Canadian Government also published a "Background Paper" entitled *Patriation of the British North America Act*.<sup>2</sup> In twenty-five meaty and (in a literary sense) lucid paragraphs, it offered "to explain the relationship between the Canadian and United Kingdom Parliaments in connection with the patriation of the Constitution of Canada". It purported to have been prepared by the Department of External Affairs, but probably was in fact prepared by the Ministry of Justice team headed, at officers'

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2. This is now perhaps most easily accessible as reprinted in *First Report from the Foreign Affairs Committee, Session 1980-81: British North America Acts: The Role of Parliament together with appendices thereto; part of the proceedings of the committee relating to the report; and the minutes of evidence taken before the committee, vol. II, Minutes of Evidence and Appendices* HC 42 I and II (London: HMSO, 1981) [cited hereafter as *Vol. II*] at 43-48, online: PrimaryDocuments.ca <https://primarydocuments.ca/documents/1stReportFAComUKBNAV2> 1981.Jan21. (See further *infra* note 4.) The Background Paper is dated 2 October 1980 and the covering note by the Department of External Affairs, Canada, states that it "has been prepared by the Department of External Affairs", and adds: "The purpose of the paper is to explain the relationship between the Canadian and United Kingdom Parliaments in connection with the patriation of the Constitution of Canada." (*Ibid* at 43).

level, by Professor Barry Strayer. He had been working on patriation off and on for about twenty years, first for the Government of Saskatchewan but since early 1967 for the Government of Canada, not least for Pierre Trudeau the Minister for Justice. Subsequently he served for over two decades in the federal judiciary, and last year he published a notable book, *Canada's Constitutional Revolution*. This describes Canada's path to patriation and the Charter since 1960 and indeed before, with much revealing detail about Strayer's own involvement in that process, an involvement beginning not long after his return from studying law in Oxford for two years in the late 1950s. He describes his visit to London in the last week of September 1980, the week before the announcement of the Joint Resolution, and Prime Minister Trudeau's address to the nation, on 2 October. The four-man Canadian team in these discussions with the Foreign and Commonwealth Office [FCO] and with Britain's principal parliamentary draftsman, consisted of the Deputy Minister of Justice and three officials: Strayer and another Justice Department official, and the Legal Adviser to the Department of External Affairs (as it was then called). Strayer tells us that he had objected to the inclusion of this External Affairs official

on the ground that this was not a matter of "external" affairs since in this respect the Parliament of the United Kingdom was acting as our domestic legislator. The law applicable was not international law but domestic law, on which the Department of Justice was the authorized source of advice.<sup>3</sup>

Although this view did not prevail in the picking of that Canadian team, and although it is a view to which Strayer himself, unfortunately, did not then and does not now consistently adhere, his expressing of it on that occasion powerfully suggests that the Background Paper came from the Justice stable, not External Affairs.<sup>4</sup> Be that as it may, the Background Paper's general line of argument moved plausibly towards its firmly stated and reiterated conclusions:

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3. Barry L Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 142.

4. No one, including Strayer (whose large and detailed 2013 book avoids mentioning even its existence), seems to have come forward to claim authorship, perhaps because a few weeks after its publication and distribution in London, the Canadian High Commission had to issue an erratum notice admitting that the document's sole quotation of a British "government spokesman," addressing the British House of Commons in 1943, was in fact the remark of a mere back bencher: see *Vol II, supra* note 2 at 83 (undated corrigendum to Section E of Canadian "Background Paper", annexed to the FCO Memorandum to the Foreign Affairs Committee dated 4 November 1980). It is convenient to mention here that the misleading numbering of *Vol II* (as "HC 42 I and II") is perhaps the reason why the actual *First Report* itself, entitled *First Report from the Foreign Affairs Committee, Session 1980-81: The British North America Acts: The Role of Parliament HC 42* (Session 1980-81) [hereafter *First Report*] (which is the real Vol. I) has, regrettably, been omitted from *House of Commons Parliamentary Papers* [HCPP], the major online edition of UK Parliamentary Papers. But it is available online at PrimaryDocuments.ca <https://primarydocuments.ca/documents/1stReportFAComUKBNAV1> 1981Jan21. Since the later printed corrigenda slip for the *First Report* is usually missing, I note here that para 14(10)'s last sentence reads as quoted at *infra* note 66 and accompanying text; in para 69, 17 July 1940 should read 17 July 1943; in para 98 "IV and V" should read "V and VI"; in para 107 the punctuation of the first sentence should be as given at *infra* note 64 and accompanying text; and in para 129 line 5 "regardless of all parts of that system on its own initiative" should be deleted.

At the present time in Canada the degree of provincial concurrence needed on matters of constitutional change has not been finally defined. But whatever the force of different arguments over the proper usage or practice regarding provincial involvement in the amending process, it remains strictly a matter of *internal* concern to Canada ... of no concern to either the U.K. Government or the U.K. Parliament. The British Government and Parliament must accept the constitutional validity of a request coming from the Canadian Parliament and not look behind the request or question it in any manner. To do otherwise would amount to second-guessing the views of a sister parliament within the British Commonwealth and would constitute interference in internal Canadian affairs.

### Conclusions

(d) ...by constitutional convention and by reason of Canada's sovereign status:

(i) the British Parliament cannot act to amend the Canadian constitution except when requested to do so by the federal authorities....

(ii) the British Parliament is bound to act in accordance with a proper request from the federal government and cannot refuse to do so.

(e) The British Parliament or Government may not look behind any federal request for amendment, including a request for patriation of the Canadian constitution. Whatever role the Canadian provinces might play in constitutional amendments is a matter of no consequence as far as the U.K. Government and Parliament are concerned.<sup>5</sup>

And these conclusions were in line with the views of British Governments, Labour and Conservative alike, during the previous decade at least. The formula settled on and used by British ministers in Parliament, for example in 1976 and 1979, was:

If a request to effect such a [constitutional] change were to be received from the Parliament of Canada it would be in accordance with precedent for the United Kingdom Government to introduce in Parliament, and for Parliament to enact, appropriate legislation in compliance with the request.<sup>6</sup>

Indeed, by December 1980, British ministerial statements in the Westminster Parliament were employing, without openly quoting, the Canadian Background Paper's closing formulae:

...the British Parliament ... is bound to act in accordance with a proper request from the federal government and cannot refuse to do so. The British Parliament or Government may not look behind any federal request for amendment, including a request for patriation of the Canadian constitution.<sup>7</sup>

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5. *Vol II*, *supra* note 2 at 48. Conclusion (d) comprises the last two sentences of the paper.  
 6. *Ibid* at 54 (1976, 1979), 57 (12 November 1980), 59-60 (27 October 1980). For the circumstances of the first use of this formula, in 1976, see Bastien, *French Edition*, *supra* note 1 at 31-32 and Bastien, *English Edition*, *supra* note 1 at ch 1, nn 8-10. For the Attorney-General's later critique of the formula, in the light of the *First Report*, see *infra* note 34.  
 7. *First Report*, *supra* note 4 at viii, n 2 (quoting the Lord Privy Seal addressing the House of Commons on 19 December 1980).

In giving this detailed, not fully and publicly admitted support to the Canadian Government's position, Mrs. Thatcher's ministers were carrying out the policy she had settled upon in late June 1980, on the occasion of Mr. Trudeau's visit to her to state his intention to patriate the Constitution within the year. She adhered to that policy even though she came to feel imposed upon by Trudeau's failure, at that 25 June meeting,<sup>8</sup> to tell her that the Canadian formal request, when it came, might be strongly opposed by *many* provinces, and that it would include not only patriation as such but also an entrenched Charter of Rights (a constitutional innovation of a kind that she was opposed to introducing in and for Britain itself). We can now study her policy through the collection of confidential and secret government papers declassified in 2011 and 2012 and marvellously accessible on the website of the Margaret Thatcher Foundation.<sup>9</sup> She regarded it as strongly in the interests of the UK to accede to the Canadian Government's requests, and had as her guiding intention, at all relevant times, to push the whole Canadian patriation package through the British Parliament, regardless of opposition to it in Canada.<sup>10</sup>

But matters did not unfold quite as Trudeau and Thatcher intended and their officials and advisers on the whole expected. After the Conservatives had won the British general election in 1978, they introduced an innovation into the House of Commons: standing select committees of backbenchers from each major party, appointed under a Standing Order of the House to examine the expenditure, administration and policy of major government departments. One of those, of course, is the Foreign and Commonwealth Office (FCO). So there was established in 1979 a Foreign Affairs Committee of six Conservative and five Labour members, with power to call for persons, papers and records and to appoint as special adviser for any particular enquiry someone "with technical knowledge either to supply information which is not readily available or to elucidate matters of complexity within the Committee's terms of reference".<sup>11</sup> In 1980, for example, it conducted a major enquiry into Western policy responses to the Soviet

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8. The crucial paragraph of the British minute of the 25 June meeting (in 10 Downing Street) (online: Margaret Thatcher Foundation <http://www.margaretthatcher.org/document/118151>) reads:

The Prime Minister said that her line would be that whether or not the request was with the agreement of all the provinces, a request to patriate would be agreed if it was the wish of the Government of Canada. Mr. Trudeau agreed and expressed the view that HMG [the British Government] would have no choice in the matter.... He could foresee that Quebec, and perhaps other provinces, would not go along with what he wanted.

A little later Trudeau added (according to the minute):

If provinces tried to get access to HMG, they had no *locus standi*.... He intended to proceed on the basis that unanimity would be achieved.

9. Fifty-eight relevant documents from 25 June 1980 to 18 December 1981 are available through the Margaret Thatcher Foundation, online: <http://www.margaretthatcher.org/archive/results.asp?w=%22patriation%22&pg=1>. Other searches would turn up further relevant documents in this online archive.
10. A quick way to an understanding of the UK Government's policy and problems in the whole matter is to read the eight-page typed briefing note to Prime Minister Thatcher by the Cabinet Secretary Sir Robert Armstrong on 20 February 1981, online: Margaret Thatcher Foundation <http://www.margaretthatcher.org/document/125556>, and his eight-page briefing note to her on 4 October 1981, online: <http://www.margaretthatcher.org/document/125518>.
11. *First Report*, *supra* note 4 at ii.

invasion of Afghanistan, and when it recessed in August until 29 October it was intending a new enquiry, into British policy about Cyprus. During the recess, the FCO persuaded the Committee's chairman, Sir Anthony Kershaw (who had been a junior FCO minister in an earlier Conservative government),<sup>12</sup> that stirring the pot in Cyprus would be unhelpful. So he was on the lookout for another subject for his Committee's attention when both he and a lively former legal academic among the Labour party committee-members, Kevin McNamara, whose parents had once lived "for many years" in Quebec,<sup>13</sup> were approached by the Agent-General in London for Quebec. M. Giles Loisselle's campaign in Britain against the patriation package had begun on 3 October with a letter to Mrs. Thatcher, and through October he was steadily and agreeably entertaining MPs at excellent tables. On Wednesday 29 October the Committee resumed its work, and resolved to postpone Cyprus and to investigate—in the words of its minute—"the role Parliament in relation to the British North America Acts".<sup>14</sup> The following morning, the Clerk of the Committee did two things: he wrote to the FCO asking for a memorandum dealing with "the legal and constitutional issues involved and with HMG's [Her Majesty's Government's] advice to Parliament"; and he drew up a short list of people who might serve as special adviser for this new enquiry. He phoned the first and second persons on his list, but they did not answer. I was third. I got the call in my teaching room in University College Oxford, agreed to be considered, and noted in my diary that on 30 October I did one hour's work on the BNA. After another couple of hours work on Tuesday the 4th, I showed up at the House of Commons, Westminster, at 9.30 on 5th November—a resonant date, as we see looking back to Guy Fawkes under the House in 1605 and forward to 5th November 1981 in Ottawa.

I was interviewed by nine members of the Committee, which later that morning appointed me to assist it as "special adviser".<sup>15</sup> I will have told them that I had been since 1972 the Rhodes Reader in the Laws of the British Commonwealth and the United States in the University of Oxford, that I am an Australian whose

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12. For an interesting obituary of this patrician lawyer and decorated cavalry officer, see "Sir Anthony Kershaw", Obituary, *The Telegraph* (30 April 2008), online: <http://web.archive.org/web/20080504072040/http://www.telegraph.co.uk/news/obituaries/1915379/Sir-Anthony-Kershaw.html>.

13. See UK, HC, *Parliamentary Debates*, 6th ser, vol 18, col 325 (17 February 1982) (Kevin McNamara speech on the Second Reading of the Canada Bill). At cols 324-325 McNamara indicates that it was he who in the autumn of 1980 suggested that the Committee take up the Patriation issue:

I asked my colleagues on the Committee to examine the role of the British Parliament in relation to any changes in the constitution of Canada that it might be invited to pass not because I felt that this Parliament had a right to nit-pick about what Canada wanted or did not want for its citizens—that is a matter for Canada, and we cannot properly intervene—but because we had a right and a duty to protest when it appeared that the Canadian Government sought to rubber stamp proposals through this Parliament which they could not get through their own Parliament and provinces under their own procedures. Instead of the British Parliament intervening in Canadian internal affairs, the Canadian Government sought to use our procedures to legitimise what they could not get through in their own country. That was an abuse of their position.

14. UK, HC, *Minutes of the Proceedings of the Foreign Affairs Committee*, HC 843 (1979-80) at xxxvi.

15. There were never any other advisers or staff, besides the Committee's permanent Clerk.

Oxford doctoral thesis was half on Australian federal constitutional law, that I had written much of the chapter on constitutional law in each of the volumes entitled *Annual Survey of Commonwealth Law* published from Oxford between 1968 and 1976, with a good many pages on Canada, and had written up the constitution of Canada, including the most major Canadian constitutional cases since 1867, for the 275-page chapter on Commonwealth constitutions for the practitioners' 45-volume textbook *Halsbury's Laws of England*, a chapter published in 1974 and updated by me annually since then—and that I had once had occasion to study the extensive proceedings of a joint committee of the House of Lords and House of Commons appointed in 1935 to consider the petition of the State of Western Australia to the British Parliament to arrange for that State's secession from the Australian federation.<sup>16</sup> The Committee seemed content to leave its enquiry into me pretty much there.<sup>17</sup> Anyway, the Clerk gave me, to take back to Oxford, the FCO Memorandum dated 4 November 1980 laying out for the Committee the basic parameters of the history of amendments of the BNA Acts, some notes recording Canadian approaches to the British Government since the Quebec referendum of May 1980, the text of the Joint Resolution of 2 October and of the addresses to Canadians by Mr. Trudeau and Mr. Clark, and of recent British ministerial statements to Parliament, whose content I summarized and quoted a few minutes ago, and annexing the Department of External Affairs background paper of 2 October 1980. The four FCO lawyers and researchers responsible for this memorandum would appear before the Committee at 10.15 the following Wednesday, 12 November, and I would prepare questions to be addressed to them by the Chairman (other members devising their own questions and cross-examination). Meanwhile, perhaps that evening, I drafted 15 questions which were sent to the FCO, who replied in writing to eleven of them the day before their 12 November examination.<sup>18</sup>

As their memorandum had foreshadowed, the FCO lawyers, when they came, showed themselves to be well prepared.<sup>19</sup> They were unwilling to accept that any Canadian conventions, practices, or usages about Provincial consent were relevant to Britain's obligations or rights. They also would not—and were not pressed to—address in any way the question what the Government's policy would be once the patriation package, the Joint Resolution, was actually sent over—if it was—to Britain by the Canadian Parliament. At that time, in mid-November, the Canadian government's timetable still envisaged that that would be on or about 10 December. But by the time our first independent witness appeared before the

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16. On that committee and its work, see *First Report*, *supra* note 4 at ix, para 8.

17. I told the Chairman and the Clerk that I was in practice at the English Bar and had recently been retained to advise the State of Queensland on federal constitutional matters. I had studied the 1935 committee while advising several Australian State governments in London in 1974. See Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Sydney: Federation Press, 2010); Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Sydney: Federation Press, 2006). I did not become a UK citizen until 2006, soon after Australian law was amended to permit dual citizenship. On the telling differences between Canadian and Australian federalism, see the text after *infra* note 63.

18. *Vol II*, *supra* note 2 at 60-63.

19. See *ibid* at 66-82 for their examination by the Committee.

Committee on 3 December, it had been announced that the Joint Committee of the Canadian Houses of Parliament would extend its detailed consideration of the Resolution—especially of the draft Charter—until 6 February: a relief for the Foreign Affairs Committee and for me.

On 26 November the Committee resolved to hear only British expert witnesses and otherwise to receive only written submissions.<sup>20</sup> Five Canadian provinces sent such submissions; three of them were quite elaborate, above all British Columbia's, but also Newfoundland's, and to a lesser extent Quebec's. But the High Commissioner for Canada wrote to the Chairman on 3 December to decline the invitation, adding the suggestion that 'whatever questions you may have in regard to the October 2, 1980 Background Paper be considered in light' of the fact that 'the position of the Government of Canada on the correct procedures regarding the enactment of the Canadian Parliament [sic] has not changed *and will not change*.'<sup>21</sup>

That same day we examined our first and perhaps most impressive witness. (Drafting some of the questions put to Geoffrey Marshall was an agreeable experience; the first time I met him was when he was the lead examiner and principal cross-examiner at the oral examination of my doctoral thesis fifteen years earlier.) Marshall had sent in, or brought with him, a finely constructed memorandum which anticipates a good deal of the general direction of our eventual Report and outlines, at a general level, the vulnerability of the Canadian Government's claim to have a unilateral right to demand an automatic UK enactment of whatever amendments of the BNA Acts the Canadian Parliament might request, regardless of Provincial opposition. Marshall taught Politics, not Law, at Oxford, but constitutional politics with a special eye to the politics of the former Dominions. Not long after the patriation affair, and perhaps inspired by it, he wrote an excellent book on constitutional conventions, which I shall quote from near the end of this lecture.<sup>22</sup>

A week later, on 10 December, the Committee examined Professor H.W.R. Wade QC, perhaps Britain's most prominent academic public lawyer and for most of its existence the general editor of the *Annual Survey of Commonwealth Law* and a senior colleague of mine in Oxford University's Law Faculty. I rarely saw quite eye to eye with him on constitutional matters, often thinking him dogmatic, and his evidence to us pushed to a slightly rigid conclusion the general argument developed by Marshall. Still, Wade's was a powerful analysis; to quote a small fragment of it:

The "compact" theory may or may not be fallacious. But that in no way alters or weakens the more limited principle ... that the division of powers between federal

20. *First Report*, *supra* note 4 at lxxiii.

21. See *ibid* at xlix, n 4 [emphasis added].

22. See *infra* at note 59. Marshall's evidence is given special emphasis in the Cabinet Secretary's briefing for the Prime Minister on 20 February 1981 (see *supra* note 10), partly on the basis that the other witnesses were not as fully independent, having been consulted (as they disclosed to the Committee) by one or more Provincial governments, though speaking, as they said, on their own behalf as scholars.



and provincial governments is something which the federal government ought not have power to alter unilaterally. In fact it is the basic principle of federalism, rather than any contractual or consensual arrangement between the various governments, which is the issue in the present controversy. It is a matter not of “the federal compact” but of “the federal principle”.

9. Section 7 of the Statute of Westminster 1931 was inserted at the instance of the Provinces expressly for the purpose of preserving the federal principle.<sup>23</sup>

And so forth. These were crisp formulations, though not free from a touch of over-simplification.

Our third and final expert witness was from Cambridge University (where Wade by then was, too)<sup>24</sup> and like Wade a Queen’s Counsel. Elihu Lauterpacht, a practitioner in international law, testified—that same day, 10 December—that in enquiring whether a proposal for amendment of the Canadian Constitution had “an appropriate degree of Provincial consent”, the UK Parliament would not be interfering in the domestic affairs of Canada. He explicitly took for granted that any underlying convention about the appropriate degree of Provincial consent to any amendment such as the patriation package of 2 October must either be non-existent or demand unanimity. And “if provincial unanimity is a necessary precondition of the application to the United Kingdom Parliament, then all concerned in the application are entitled to know the relevant facts.”<sup>25</sup> Moreover (his memorandum said):

When all is said and done, the amendment of the Canadian constitution is a matter of Canadian constitutional law in which there are three participants: the federal Parliament, the Provinces and the United Kingdom Parliament (here acting, in effect, as an organ of Canadian constitutional machinery). . . . There is but one constitution of Canada and the United Kingdom Parliament is, for a limited purpose, an essential part of it. There is, therefore, no element of interference in the domestic affairs of Canada when the United Kingdom Parliament does just what the domestic law and convention of Canada require of it, namely, to ask whether there are conditions precedent to be satisfied and whether they have, in fact, been satisfied.<sup>26</sup>

Mr Lauterpacht’s examination was immediately followed by a second examination of the FCO. But this time the three FCO legal advisers accompanied a Minister of State, Mr. Ridley, not a Cabinet minister, but a senior and experienced politician nonetheless.<sup>27</sup> I did not know—perhaps none of us did—that

23. *Vol II, supra* note 2 at 103. For the examination of witnesses on 10 December 1980, see UK, HC, *Foreign Affairs Committee: British North America Acts: the Role of Parliament: Minutes of Evidence 10 December 1980*, HC 42-ii (1980-81), online: PrimaryDocuments.ca <https://primarydocuments.ca/documents/MinsEvFAComUKBNA1980Dec10>.

24. He was then Professor of English Law in the University of Cambridge, and Master of Gonville and Caius College, Cambridge (where Mr. Stephen Coxford, benefactor of the Coxford Lectures, was at that time a graduate student, as I was pleased to learn an hour or so before giving this lecture).

25. *Vol II, supra* note 2 at 115.

26. *Ibid* at 116.

27. Bastien, *French Edition, supra* note 1 at 251; Bastien, *English Edition, supra* note 1 ch 11, text after n 19) errs in saying that the Foreign Secretary Lord Carrington appeared before the Committee.

he had been at the 25 June meeting with Mr. Trudeau and had there expressed even more strongly than Mrs. Thatcher the view that the British “if asked, would have no choice but to enact the required legislation”<sup>28</sup> (his words, before Trudeau adopted them). His goal on 10 December, of course, was to say as little as possible while professing the most expansive willingness to answer any and every question.<sup>29</sup> He held to the formula (rather deceptive as we now know) that the Government was “unable to say” what it would do with a Canadian request—or indeed what views it had about any Canadian request—until the request had been officially and definitively made by resolution of the Canadian Houses of Parliament and transmitted to the Queen. He also held to the well-tryed formula, repeated in Parliament only the day before by Mrs. Thatcher, that it would be in accordance with precedent for the Government, on receipt of the eventual request, to introduce it into the UK Parliament and seek its enactment; in every case in the past it had done so. But the first of a set of questions which we sent him a few days earlier obliged him to make the admission that those precedents “have not included one where the request reduces provincial powers or/and is opposed by all the provinces”.<sup>30</sup> He would not, however, make the wider admission that “provincial powers have never once been reduced without provincial consent”.<sup>31</sup> To justify that non-admission, he referred us to the factums (written submissions) made by the two sides in the Court of Appeal of Manitoba, the first of the three references to the courts that the Premiers of six Provinces had agreed in mid-October to launch in Manitoba, Quebec, and Newfoundland. This non-admission, I considered, obliged me to delve into the records of every incident of which it might be said that provincial powers had been reduced without provincial consent.

This I did, in the fine branch of Oxford’s university library dealing with Imperial and post-Imperial history, Rhodes House, during the weeks up to and after Christmas. As the sixty close-printed pages and 135 paragraphs of the *First Report* began to take shape, the full Committee met to consider it on 17 December; six members attended for a further consideration the following day, four on Tuesday 13 January, nine on 14th, six late on 15th, and nine for the decisive meeting on 21 January, at which the whole report was read through, formal amendments were moved and voted on, and the Committee’s conclusions, which are enumerated summarily and crisply in the twelve sub-paragraphs of paragraph 14 and are more discursively and reflectively articulated in paragraphs 111 to 115, were given their final shape, and the whole document ordered to be published forthwith. The Clerk and I spent the following day making that possible and the printed version was delivered to interested parties, governments and news agencies on 30 January 1981.<sup>32</sup>

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28. See Meeting between Thatcher and Trudeau, *supra* note 8 at 2.

29. See *Vol II*, *supra* note 2 at 121-33.

30. *Ibid* at 123.

31. *Ibid* at 124.

32. *Vol II* did not appear until about 20 March 1981; the printing and binding were complex tasks involving, amongst other things, the folding and insertion of copies of early twentieth century correspondence unearthed in the Public Records Office by FCO researchers.

I will summarise the *First Report's* essential conclusions in barest outline, and discuss them in the final part of my lecture. Paragraph 111:

...the UK Parliament is not bound, even conventionally, either by the supposed requirement of automatic action on Federal requests, or by the supposed requirement of unanimous Provincial consent to amendments altering Provincial powers. Instead the UK Parliament retains the role of deciding whether or not a request for amendment or patriation of the BNA Acts conveys the clearly expressed wish of Canada as a whole, bearing in mind the federal nature of that community's constitutional system. In all ordinary circumstances, the request of the Canadian Government and Parliament will suffice to convey that wish. But where the requested amendment or patriation directly affects the *federal* structure of Canada, and the opposition of Provincial governments and legislatures is officially represented to the UK authorities, something more is required.<sup>33</sup>

Paragraph 113, four lines of which are italicized:

The role involves a responsibility in relation to Canada as a federally structured whole. It is not a *general* responsibility for the welfare of Canada or of its Provinces and peoples. It is simply the responsibility of exercising the UK Parliament's residual powers in a manner consistent with the federal character of Canada's constitutional system, *inasmuch as that federal character affects the way in which the wishes of Canada, on the subject of constitutional change, are to be expressed. It would be quite improper for the UK Parliament to deliberate about the suitability of requested amendments or methods of patriation, or about the effects of those amendments on the welfare of Canada or any of its communities or peoples.*<sup>34</sup>

And the truth is that the suitability or unsuitability of the Charter, or of having any Charter, played no part whatsoever in our deliberations or in the development of our arguments and conclusion.

33. *First Report*, *supra* note 4 at lv-lvi.

34. *First Report*, *supra* note 4 at lvi. For reactions to the *First Report* inside the British Government, see the contrasting views of the Attorney-General (broadly favourable, but with reservations about its political sustainability) and the Lord Chancellor (broadly unfavourable, on grounds similar to those he had expressed to me in his capacity as Editor-in-Chief of *Halsbury's Laws of England*, summoning me to his room in the House of Lords to object to a footnote in my draft because it did not sufficiently take into account the fact that constitutional conventions alive in the 1930s regarding relations between the Australian federal Government, Australian State governments, and the United Kingdom Government were by now (1974) a "rotten beam"). See Memorandum from the Attorney-General (18 February 1981), online: Margaret Thatcher Foundation <http://www.margaretthatcher.org/document/117016>, which concludes:

11. I think that if, in describing our attitude to a Canadian request, we continue to use the formula that "it would be in accordance with precedent for the Government and Parliament to comply with it", we should be careful not to give the impression of implying that precedent constrains us to do so. The Foreign Affairs Committee has demonstrated—convincingly, in my view—that there is no *relevant* precedent, i.e., a precedent for our putting through an amendment of the kind now likely to be requested in the teeth of Provincial opposition of the kind now being exhibited—opposition which has been taken as far as litigation by a number of Provinces but is certain to end up in the Supreme Court [emphasis in the original].

In a Letter to the Prime Minister from the Lord Chancellor, Lord Hailsham (23 February 1981), online: Margaret Thatcher Foundation <http://www.margaretthatcher.org/document/125557>, argues (i) that the *First Report* was "quite wrong" to say that it could be constitutionally proper to reject a Bill requested by Canada, and (ii) that "I cannot conceive what justiciable issue can exist for the Canadian Courts to decide."

## II

In his memoirs carefully written up before his death in 1998, and published in 2002, the Canadian Minister of External Affairs, Mark MacGuigan, who as a former professor of constitutional law had taken very close interest in the patriation process, wrote:

The work and report of the Select Committee on Foreign Affairs of 30 January 1981 was an unmitigated disaster for the federal government.<sup>35</sup>

He does not say whether the government took steps to mitigate it. But it did, and the steps it took are recounted—in a fashion—by Barry Strayer’s book, which tells how he, Strayer, had prepared for this day by commissioning, on 9 January, a written response, to be composed in the first instance by Professor Dale Gibson, fresh from arguing the government’s case in the Manitoba Court of Appeal. Gibson and Strayer arrived in London on 18 February to discuss (with FCO officials) the draft response which already, recalls Strayer, “had been reviewed in Ottawa by many players and ... sent to the [FCO] in London for their reactions.”<sup>36</sup> The FCO “generally had few problems with our draft. We returned home, got ministerial approvals, and sent it for translation. It was published in early summer.”<sup>37</sup> Early summer? When is that? Two pages later Strayer describes a seminar of important Canadian and British patriation players held at All Souls College, Oxford, on 8 and 9 May; he and Professor Gibson were there and described, he says, “our pending publication, *The Role of the United Kingdom in the Amendment of the Canadian Constitution*”.<sup>38</sup> So he represents that document’s publication as occurring some time in May or June. About its reception or impact he says nothing at all, save this: “I am not sure the paper ever received much attention [in Britain] except from those who were already favourably disposed to our project...”<sup>39</sup>

In reality, the paper, *The Role of The United Kingdom in the Amendment of the Canadian Constitution*, received intense attention from the Foreign Affairs Committee the moment it was published. That was not in June, not in May, nor even April, but on 30 March; the front page says simply March 1981. Mrs. Thatcher was sent a copy by the Canadian High Commissioner on Tuesday 31 March;<sup>40</sup> I must have received my copy from the Committee Clerk on Monday

35. P Whitney Lackenbauer, ed, *An Inside Look at External Affairs During the Trudeau Years: The Memoirs of Mark MacGuigan* (Calgary: University of Calgary Press, 2002) at 95.

36. Strayer, *supra* note 3 at 185. I was not aware until I read Strayer’s book that there had been collaboration between the UK and Canadian Governments in the preparation of the Canadian reply to our *First Report*.

37. *Ibid* at 185. On that page he also quotes from para 82 of the Paper, to which he gives the correct citation at 303, n 46.

38. *Ibid* at 188.

39. *Ibid* at 185. Strayer’s misdating of the Chrétien-Strayer-Gibson Paper helps make possible the entire omission in his book of any reference to the Foreign Affairs Committee’s published response to that Paper.

40. Letter from High Commissioner Wadds to Prime Minister Thatcher (31 March 1981), online: Margaret Thatcher Foundation <http://www.margareththatcher.org/document/125499>. The High Commissioner’s letter states that the paper, which was “prepared for the information of

30th.<sup>41</sup> I met the Committee on Wednesday, April Fools' Day. The members were dismayed and depressed, and looked reproachful. The fifty-four pages in the Canadian response, published in English and French under the name of and with a Preface by Jean Chrétien, Minister of Justice,<sup>42</sup> scathingly denounced the Committee's Report for its "regrettable misunderstandings" and its misconstruing of the Canadian constitutional situation both internally and in relation to the United Kingdom. The Committee had heard only one side of the argument, and had been greatly influenced by witnesses guilty of "errors of fact"; consequently, given the "crucial shortcoming" that its members had no personal experience of Canadian law, history or constitutional practice, "every major component of the Committee's position can be shown to be mistaken." What do we do now?

As I said to the members in response, we were actually in good shape; our Report had gone unscathed; the Canadian Paper had found no error of fact, law or history in any of the many things *we* said; every one of that Paper's own arguments could be not merely parried but refuted, for it had everywhere *overlooked*, entirely, the two fundamental and indubitable distinctions on which our Report explicitly rested: (i) between amendments which affect the powers, rights or privileges of Provincial authorities and those which do not, and (ii) between reviewing the suitability for Canada of Canadian requests and reviewing the compliance or non-compliance of *the making of* the request with constitutional convention or principle relating to *the process of* making requests for amendment. And the Paper's theory that in these matters the UK authorities were *nothing but* part of "the outside world" with which Canada has relations through its national government was incoherent and indefensible. So the Committee could easily and quickly produce, I said, a Supplementary Report devoted to refuting the Paper and reiterating and reinforcing all of its own *First Report's* main arguments and conclusions. The members' demeanour changed and they greeted the prospect with some relish; they met to review the draft Supplementary or *Second Report* on 8 April and on 15 April approved it for publication.<sup>43</sup> An article about

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members of the Parliament of Canada, and for Canadians generally, includes a commentary upon the report of the U.K. Select Committee on Foreign Affairs...". Cf *supra* note 37 and accompanying text.

41. I arrived back in England from Milwaukee and Chicago (where I had been discussing legal and philosophical topics far removed from the Foreign Affairs Committee's work) at about 9.00 that morning, and my diary for that Monday records an hour's work on "BNA" (and then 7.5 hours on Tuesday 31 March).

42. The title page of the pamphlet reads:

The Role of The United Kingdom in the Amendment of the Canadian Constitution  
/ Background Paper / Published by the Government of Canada / Honourable Jean  
Chrétien / Minister of Justice of Canada / March 1981.

The Preface by the Minister is also dated March 1981. On the verso of the Preface we read: "This is the English version of a document printed in Canada in English and French. The bilingual version is available on request from: The Canadian High Commission, 1 Grosvenor Square, London, W1X 0AB." I infer that the copies from which we in the Committee worked were printed not least (if not exclusively) for the monoglot British. Cf *supra* note 37 and accompanying text.

43. UK, HC, *Second Report from the Foreign Affairs Committee, Session 1980-81: Supplementary Report on the British North America Acts: The Role of Parliament*, HC 295 in HCPP (1980-81), online: House of Commons Parliamentary Papers <http://parlipapers.chadwyck.co.uk/mar-keting/index.jsp> [*Second Report*].

its publication in the *Times* of Saturday 25 April stated in its two-column headline one of the main messages of our response's twenty-two close-printed pages: the Canadian federal government's position about automatic compliance with requests was "inherently unreasonable".

From what the MacGuigan memoirs do not say, and from the misrecollections of Professor Strayer, we might conclude that this little second-round bout between legal academics (publishing under other names) helped to suggest the intensifying adjective in MacGuigan's phrase "unmitigated catastrophe". In his account of the All Souls seminar in early May (at which I was not present), Strayer says he had the "dubious pleasure" of meeting Sir Anthony Kershaw, and found Kevin McNamara unrestrained, "vehement" and "vociferous"; Strayer adds, at this point, that "the whole British scene made me angry as a Canadian—seeing British politicians and academics occupying themselves with matters on which they had little information and nothing at stake".<sup>44</sup> We can be quite sure that McNamara had repeatedly pointed to (if not waved and/or distributed) the comprehensive answer with which the Gibson-Strayer-Chrétien document had been met, only a fortnight before.

But all this need not be taken too seriously; the London-Oxford end of the patriation exercise had by this time been left rather becalmed, a backwater. For between sending our supplementary report to the Government printer and getting it back, the Canadian Cabinet—which even on 16 April was resolved to have the Joint Resolution passed and sent to London before the Supreme Court had given judgment or if possible before completion of oral arguments in Court<sup>45</sup>—changed course. All proceedings in Parliament in Ottawa were adjourned pending the decision of the Supreme Court. As the week-long hearing of the appeals and cross-appeals from Manitoba, Quebec and Newfoundland began on 28 April, everyone's attention rightly shifted away from side-shows like ours and onto the Supreme Court. The final words of our own *Second Report* to the House of Commons in Westminster were: "Any judgment of the Supreme Court of Canada, to the extent that it deals with the matters we have canvassed, is bound to weigh heavily with your Committee and with the House."<sup>46</sup> The federal government's change of course on or about 23 April was the final defeat of a tactical policy and plan that Strayer's memoirs describe and endorse with amazing frankness. Referring to a memorandum of legal advice composed by him and his Justice Department colleagues in consultation with leading practitioners and with Professor Peter Hogg of Osgoode Hall, in August 1980,<sup>47</sup> Strayer says:

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44. Strayer, *supra* note 3 at 190.

45. *Ibid* at 165.

46. *Second Report*, *supra* note 43 at para 36.

47. Strayer, *supra* note 3 at 131. Describing the contents of the advice, Strayer says:

The paper [of 13 August 1980] ... reported our opinion that unilateral action would be legal. But ... [a] unilateral process breaching [what some would argue were] constitutional conventions could be described as "unconstitutional"—even if legal. We argued that at best the conventions were debatable, that there was no precise precedent for amendment of the kind we would be seeking from Westminster, and that at most the alleged breach of conventions would not affect the legality of the measure once adopted there. We therefore advised against the federal government taking a reference to the Supreme Court... (*ibid* at 133).

Another reason for speed [in October/November 1980] was given by the government's legal advisers: specifically, that it would be best to have the measure through Westminster before Canadian courts had the opportunity to rule on any questions raised about the constitutional conventions. Nothing would persuade a court more that we were pursuing an acceptable route than Westminster's acknowledgement of its ability and obligation to accede to Canada's request.<sup>48</sup>

Or, as he also says:

It was a premise of our advice that the chances of getting a favourable decision from the Supreme Court would be greatly enhanced if the UK Parliament had already acted on a request from the Parliament of Canada and legislated the patriation package.... My advice in effect was, borrowing from Shakespeare, "If it were done when 'tis done, then 'twere well / It were done quickly."<sup>49</sup>

The borrowing, as you know, was from Macbeth's advice to himself, to get on with his unilateral though joint resolution to assassinate the blameless king, Duncan. Had British MP's been aware just how far they were expected to be unwittingly complicit in an ice cold strategy of *fait accompli*, of both upending Canadian constitutional conventions and circumventing the courts, they might have been more indignant than they were at the demand that they be the hitmen, and more ironical than they were about the federal Government's declaration, in its Background Paper of 2 October, aimed at them, that constitutional conventions consist of

customs, practices, maxims or precepts which, although not enforceable by the courts, *nonetheless govern the workings of the constitution* ... it is clear that by constitutional convention provincial authorities ... have not standing to directly request on their own behalf that the U.K. government ... refuse to pass an amendment to the Constitution. The British Government, in accordance with correct constitutional convention, will decline to act on any such provincial requests....<sup>50</sup>

But as things turned out, the British select committee's very different assessment of the conventions, in both its *First Report* and its *Second Report*, was in the hands of the Supreme Court Justices by the end of oral argument on 4 May.

### III

As I do not need to tell you, the Supreme Court of Canada gave judgment on 28 September, with three rulings: (1) unanimously, that the patriation package affected Federal-Provincial relationships and the powers of the Provincial

48. *Ibid* at 152.

49. *Ibid* at 134. As late as early April 1981, when attending as the federal government's representative at a meeting with the Chief Justice to schedule the patriation reference appeals, Strayer and the government were still hoping precisely that "the joint resolution would be passed by Parliament and sent to London before the Supreme Court could pronounce upon the matter" (*ibid* at 173).

50. *Vol II, supra* note 2 at 44, 46 [emphasis added]. The last sentence of this passage on page 46 ends with the words "for constitutional amendment", leaving hanging, broken-backed, the previous sentence's reference to provincial requests to the British government "to pass an amendment or refuse to pass an amendment".

legislatures and governments; (2) by 7:2, that the agreement of the Provinces is not legally required for such amendments; but (3) by 6:3, that there is a constitutional convention, which is a “rule of the Canadian constitution”, that no request will be made to the UK Parliament without “at least a substantial measure of provincial consent”, a measure or degree that need not amount to unanimity but is not achieved by a request which—like the patriation package then—eight Provinces oppose.<sup>51</sup> On Monday 5 October Mr. Trudeau met Mrs. Thatcher for 35 minutes at the British consulate in Melbourne, Australia, and she undertook (in the words of the minute signed by the Foreign Secretary Lord Carrington and telexed on 5/6 October to London and Ottawa) that her Government “would do what they were asked by the Canadian Government and Parliament to do; and their object would be to get the measure through with the greatest possible degree of support.... The British Government would want to deal with it as soon as they could, and to deal with it effectively.”<sup>52</sup> The minute reports that Mr. Trudeau said he would negotiate with the Provincial premiers, offering to weaken or narrow the Bill of Rights, but would be rebuffed by Quebec and Manitoba and expected then to get the Joint Resolution through his Parliament and off to London by about 20 October. Mrs. Thatcher said her Government’s “first task would be to revise the draft reply to the Report by the Select Committee on Foreign Affairs.”<sup>53</sup> The telexed minute ends:

15. Mr Trudeau said that, when one was going to do something that was right, there was nothing to be gained by procrastination. The fight could not get worse and, therefore, it had better be brought to a conclusion. Canada had poured decades of mental and physical energy into this question, which had been under consideration for 54 years. The time had come to get it behind them, so as to liberate the energies of Canada to make the most of its potentials for the future.<sup>54</sup>

A pre-prepared joint press statement by the two Prime Ministers gave a slightly less stark version of this agreement, referring (as indeed Mrs. Thatcher did in her

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51. *Reference re Amendment of the Canadian Constitution*, [1982] 2 SCR 793. For my analysis of the decision, see *Third Report*, *infra* note 57 at xi-xvi.
  52. Telegram of Minutes of Meeting between Prime Minister Thatcher and Prime Minister Trudeau (6 October 1981) at para 10, online: Margaret Thatcher Foundation <http://www.margaretthatcher.org/document/125519> [6 October 1981 Meeting Between Thatcher and Trudeau]. The whole minute is of interest.
  53. *Ibid* at para 13. That reply was not published until 11 December 1981 in UK, HC, Miscellaneous no 26 (1980-81): *First Report from the Foreign Affairs Committee: British North America Acts: the role of Parliament: Observations by the Secretary of State for Foreign and Commonwealth Affairs*, Cmnd 8450, online: House of Commons Parliamentary Papers <http://parlipapers.chadwyck.co.uk/marketing/index.jsp>. By that time, of course, it had been completely transformed, and was an anodyne piece. During the phases of the affair down to 5 November 1981, it will have taken various forms, all very different from the final one, and was a significant element in the UK Government’s conduct of the whole matter. See the remarks about it, for example, in the Briefing Note from Cabinet Secretary Sir Robert Armstrong to Prime Minister Thatcher (31 March 1981) at paras 3 and 5, online: Margaret Thatcher Foundation <http://www.margaretthatcher.org/document/125498>; and Minutes from Meeting [of the ad hoc Cabinet subcommittee] in Conference Room C, Cabinet Office on Wednesday 30 September 1981 (1 October 1981) at 1 and 3, online: Margaret Thatcher Foundation <http://www.margaretthatcher.org/document/125516>.
  54. 6 October 1981 Meeting [5 October] between Thatcher and Trudeau, *supra* note 52 at para 15.



opening remarks to Mr. Trudeau) to the likelihood of backbench opposition.<sup>55</sup>

That same Monday and all that week I worked on analysing and summarising the Supreme Court decision and on preparing a draft document for consideration by the Committee when it resumed on 21 October. As was provisionally agreed at a short, 90-minute meeting that day, the Committee would publish a Third Report, and would meet on 9 November to amend and approve it. It would say that the Canada Act Bill should not be passed. The *unconstitutionality* of the making of the request by the Canadian Parliament—against Provincial opposition of the preponderance (8:2) firmly persisting on 21 October—had been affirmed, in terms strikingly similar in appearance, by both the Supreme Court and the Select Committee (though every judgment in the Supreme Court had carefully abstained from saying anything at all about the position of the UK Parliament).

That was our informally resolved position on 21 October. On 22 October the Foreign Secretary Lord Carrington met Mr. MacGuigan by prior arrangement in Mexico. MacGuigan's memoirs record:

Carrington let me know that the British government had reluctantly come to the conclusion that it could not assure the passage of the joint address in the current circumstances; backbench opinion was just too intransigently opposed for even the whips to make a difference.... I passed it on to the prime minister at once as a serious assessment. Carrington's view was later confirmed by a story in *The Guardian* on 30 October to the effect that there was no Commons majority for the measure and that the British government was reconciled to possible defeat. The situation in the British parliament was undoubtedly a significant factor in the PM's willingness to compromise at the Federal Provincial Conference he called for 2 November.<sup>56</sup>

Compromise Mr. Trudeau did, on 5 November. The post-patriation amending formula was changed, eliminating referenda and in other ways, and s. 33 was introduced into the Charter to allow five-year overrides of some of its main provisions. In return, seven of the "Gang of Eight" provinces dropped their opposition to the Charter, even Premier Sterling Lyon of Manitoba, who had consistently, lucidly, and even eloquently opposed the transfer of Canada's polity to the rulership of judges. He signed subject to a reservation, but electoral defeat a fortnight later took matters out his hands. About Quebec I will say something at the end.

So we met on 9 November against a wholly transformed backdrop, and our actual *Third Report*,<sup>57</sup> approved on 22 December, the day (as it happens) that the Bill for a Canada Act was given its formal "first reading" (tabling) in the House of Commons, expressed the judgments that

5. The proposals come before the UK Parliament with a degree and distribution of Provincial concurrence which substantially satisfies the criteria we suggested

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55. For the press statement and related material, see particularly Annex V of Briefing Note to Prime Minister Thatcher from her Press Secretary (6 October 1981), online: Margaret Thatcher Foundation <http://www.margarethatcher.org/document/135294>.

56. Lackenbauer, *supra* note 35 at 101-02. See also *infra* note 60 and accompanying text.

57. UK, HC, *First Report from the Foreign Affairs Committee Session 1981-82: Third Report on the British North America Acts: The Role of Parliament* in HCPP (1981-82), online: House of Commons Parliamentary Papers <http://parlipapers.chadwyck.co.uk/marketing/index.jsp> [*Third Report*].

in our First Report. “Parliament”, we said, “would be justified in regarding as sufficient a level and distribution of Provincial concurrence commensurate with that required by the least demanding of the formulae which have been put forward by the Canadian authorities for a post-patriation amendment (similarly affecting the federal structure).” The relevant post-patriation amendment formula in the present Bill ... requires ... [support by] ... at least seven Provinces which together have at least 50% of the population....

6. ... the Supreme Court has stated, “It will be for the political actors, not this Court, to determine the level of provincial consent required”. The Federal-Provincial Agreement of 5 November 1981 ... appears to us to amount to a determination by the political actors in Canada that the concurrence of nine Provinces is constitutionally sufficient, albeit the dissenting Province be Quebec.

7. In this situation, what we said in our First Report seems applicable: “the UK Parliament is bound to exercise its best judgment in deciding whether the request, in all the circumstances, conveys the clearly expressed wishes of Canada as a federally structured whole”. In our view, the present request does this.<sup>58</sup>

By 25 March the Bill for the Canada Act had passed both Houses and on 29 March, the 115th anniversary of Queen Victoria’s assent to the BNA Act 1867, it received the royal assent. It was proclaimed in effect in Ottawa on 17 April 1982.

#### IV

So the path or road to the Charter had a fork that opened up on 5 November 1981. We know what lay along the road then taken; you are on it still. The other was not taken and where it might have led cannot be known. But it appears to me as to others that if the provincial Premiers or most of them had refused the Trudeau concessions as essentially meagre, his government would have proceeded. The resolution would have arrived in London in late November. The FAC’s projected Third Report would, I think unanimously, have recommended its defeat on constitutional grounds, and—though fierce pressure would have been applied by the whips of a Government then (before the Falklands war and recapture) quite weak, with a slim parliamentary majority reversible by a few defections—I think it is slightly more probable than not that the Canada Bill would have been defeated. As Geoffrey Marshall wrote in his book *Constitutional Conventions*:

It seems reasonable to suppose that no majority could have been found in either House of the British Parliament to enact a measure declared by the Supreme Court of Canada to be in violation of the constitutional practice of Canada.<sup>59</sup>

Indeed, the British Government had been secretly preparing for such a contingency since at latest early October 1981, when the Cabinet Secretary, briefing

58. *Ibid* at vi, paras 5-7 [footnotes omitted]. For the full paragraphs, with some commentary, see *infra* note 69.

59. Geoffrey Marshall, *Constitutional Conventions: the rules and forms of political accountability* (Oxford: Clarendon Press, 1984), 198. Chapter XI of the book (181-200) is a fine account of the patriation problem and its resolution; it supplements, and is supplemented by, the account in the present article.

Mrs. Thatcher for her meeting with Mr. Trudeau the following day in Melbourne, wrote (doubtless encapsulating much internal deliberation within the British Government):

I think that there are two possibilities that we ought to consider: (a) that the Bill gets a second reading, but an amendment at Committee stage to delete the Charter of Rights is successful; (b) that the Bill fails at second (or third) reading. I believe that, if the Charter of Rights is deleted at Committee stage, we had better complete and pass the truncated Bill with the patriation and amending formula provisions. If the Bill fails at Second Reading, I believe that we should then consider the immediate introduction, not on Canadian request but on our own initiative, of another Bill containing only the patriation and amending formula provisions. Either of these courses would be in breach of the constitutional convention that the Westminster Parliament can act only on the request of the Canadian Parliament and cannot vary or modify the provisions requested: but the Canadian government could hardly complain at our breaching that convention, when they were themselves in authoritatively confirmed breach of the convention about obtaining provincial agreement for any measure which altered the federal-provincial balance of powers. And either course would have the great advantage of divesting Westminster of its last vestiges of colonial responsibility in this field and putting responsibility for Canadian constitutional issues where it unquestionably belongs: in Canada.<sup>60</sup>

Leaving aside those contingency plans, or proto-plans, there might even have been a Fourth FAC Report because, at the time of tabling the Canadian-requested Bill, the Government would certainly have delivered its long delayed response to our *First Report*, and would have tried forcefully to do what the Background Paper of October 1980 and the Chrétien-Strayer-Gibson response of March 1981 had unsuccessfully attempted; and the Committee would doubtless have responded, in the thick of what would by then have been a truly fraught situation.

## V

Let me conclude with a few reflections on the central intellectual issue involved. We can start with Mr. Trudeau's famous diatribe against the six Justices who found against him on conventions. Opening the Bora Laskin Library in 1992, when one of the most prominent and successful of the six was sitting disconcerted in front of him, the former Prime Minister repeatedly referred to that

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60. Briefing Note from Sir Robert Armstrong for Prime Minister Thatcher (4 October 1981), online: Margaret Thatcher Foundation <http://www.margaretthatcher.org/document/125518>. See Bastien, *French Edition*, *supra* note 1 at 394-95; Bastien, *English Edition*, *supra* note 1 at ch 17, nn12-13), where the author plausibly says that this line of thought had been floated by Lord Carrington, Minister of State Ridley and others, and was discussed in various versions throughout the feverish days of October 1981. The factual premise for the search for solutions can be seen in the summing up by the Home Secretary as chairman of the meeting of the powerful ad hoc Cabinet sub-committee on 30 September, *supra* note 53, which included: "But the meeting, which included all the Ministers with a responsibility of advising on the legal, constitutional and Parliamentary aspects, was in no doubt that if Mr Trudeau persisted with his proposals without obtaining a greater degree of consensus within Canada, there would be great difficulty in passing them through Parliament." This was not something said to put pressure on the Canadian government; it was the UK government's own secret assessment of the situation.

majority's finding—of a convention of substantial provincial concurrence in amendments affecting provincial powers—as a “blatant” invention.<sup>61</sup> Reluctant as I am to say so, there seems to me some truth in that accusation (without the intensifying adjective).

But, you will say, surely the Foreign Affairs Committee, too, concluded that there need not be unanimity but must be substantial provincial concurrence? It did. But it did so on a basis, and from a perspective, quite different from the Court's. Our *First Report* said (I now summarise six pages of argumentation):

98. We do not wish to express any settled view on the question whether there is a convention or principle that the *Canadian* Government and Parliament should not make such a request without unanimous Provincial concurrence.... We think that the UK Parliament would be properly exercising its responsibility if it took into account the evidence for such a principle or convention, and if it took full notice of the ... outcome of the relevant Canadian litigation.... But we do not think that that principle, if it exists, *determines* the responsibilities of *the UK Parliament*....

102. ...We agree that there is, in a relevant sense, a single Canadian constitutional system within which the UK Parliament plays a responsible role. But we are not persuaded that that unique role is altogether determined by the conventions and principles applicable to other “parties” to the system, such as the Canadian Government or Parliament....

103. ...It may well be that, by convention, the Provinces have acquired a right that the Canadian Parliament shall not request certain sorts of amendments without their unanimous consent. *But it does not follow that the Provinces have also acquired a right that the UK Parliament should not enact those amendments without their consent.* It seems to us that all Canadians (and thus the governments of the Provinces too) have, and have always had, a right to expect the UK Parliament to exercise its amending powers in a manner consistent with the federal nature of the Canadian constitutional system.... We think that, even if there is a convention of unanimous consent binding the Canadian Government and Parliament, and the UK authorities are confronted with a request made in violation of that convention, the UK authorities are not *bound* to reject that request. This is not to say that the UK authorities, in such circumstances, would have a discretion to act as they please. Rather they should act on the constitutional principle which seems to us to be the guiding thread through this labyrinth of history and politics. We state that principle in paragraph 106 below.<sup>62</sup>

The intervening two paragraphs sought to explain why the UK Government and Parliament were not “guardians or trustees of the rights of the Provinces precisely as Provinces”.<sup>63</sup> The six Australian States, on the other hand, retained (by provisions in the Statute of Westminster 1931) the right to request UK legislation without the concurrence of the Australian Federal Parliament or Government;

61. See Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at 277-79. Trudeau's speech used the term “blatant” at least twice in this connection. The retired Chief Justice, Brian Dickson (a member of both the majorities in the *Patriation Reference*), then and there told the former Prime Minister that he rejected the charge: *ibid* at 279).

62. *First Report*, *supra* note 4 at l-iii.

63. *Ibid* at lii, para 104.

moreover, the 1935 Joint Committee considering Western Australian secession affirmed that in matters pertaining to a State's powers the UK Parliament could not—by constitutional convention—legislate without the request of the State authorities. And so we reach paragraph 106, which begins by pointing to the significance of the fact that the Australian federal Constitution can be remodelled in Australia by legislation and referendum without involving Westminster. This

means that the UK authorities can insist ... on unanimous governmental concurrence in requests from Australia which affect any constitutional interest beyond the interests of the government or legislature making the request; and this insistence on unanimity will not result in constitutional paralysis of the Australian community. This often stated requirement of unanimity will not frustrate what the Joint Committee of 1935 called the “clearly expressed wish of the Australian people as a whole”, since on almost all matters there is available to the Australian people an alternative and workable procedure for giving effect to their clearly expressed wishes. *The same cannot be said of Canada.*

107. We do not believe it has ever been the policy of the UK Government and Parliament, in their dealings with territories for which they retain a responsibility, to recognize unconditionally any convention or principle which could indefinitely deprive the peoples or communities of those territories of the opportunity of giving legal effect to constitutional changes clearly desired by those peoples. It goes without saying that, where a community is federally structured, the expression of that “clear desire” (in relation to some matters) involves more than simply the resolution of majorities in the Federal legislature....<sup>64</sup>

In reading this, we should bear in mind that this talk of peoples, their territories and their desires is not simply the language of modern mass democracies; it is equally the language of St. Thomas Aquinas, and of the fifteenth-century English political theorist and leading judge, Sir John Fortescue, who expressly adopted some of Aquinas's concepts, and rearticulated them in works which inspired Chief Justice Coke, nearly 150 years later, to establish the separation of legislative from executive, and executive from judicial power and thereby give decisive shape to modern constitutions and constitutionalism.<sup>65</sup>

From paragraph 107 the argument moves on to the scraps of evidence from within Canada that the provincial governments and constitutional experts who had promoted the convention of unanimity might now be regarding that as excessively rigid, and be moving towards a notion that “substantial compliance with the requirements for provincial consents” would suffice. The conclusions follow in paragraphs 111 and 113 (quoted at notes 33-34 above), and then in paragraph 114, which itself is summarized in paragraph 14(10) in the Conclusions and Recommendation of the *First Report*:

...it would be proper for the UK Parliament to decide that the request [of the Canadian Government and Parliament] did not convey the clearly expressed

64. *Ibid* at liii-liv [footnotes omitted].

65. See John Finnis, “Reflections and Responses” in John Keown & Robert P George, eds, *Reason, Morality and Law: The Philosophy of John Finnis* (Oxford: Oxford University Press, 2013) 459 at 560-63.

wishes of Canada as a federally structured whole because it did not enjoy a sufficient level and distribution of Provincial concurrence. But Parliament would be justified in regarding as sufficient a level and distribution of Provincial concurrence commensurate with that required by the least demanding of the formulae for a post-patriation amendment (similarly affecting that federal structure) which have been put forward by the Canadian authorities.<sup>66</sup>

Let me interrupt my reflections on the British Parliament's responsibilities to say that at this point in paragraph 114's version of our position we put a footnote quoting Mr. Trudeau's statement of 7 November 1980, a statement which incidentally reveals what seems to have been his basic motivation for having a Charter, as well as, more transparently, his motivation for having the British enact it as quasi-robotic, "no choice" agents of the Canadian Parliament:

I am convinced that there would never be an entrenched Charter of Rights—particularly, there would never be entrenched educational language rights—if it weren't done now by the national Parliament the last time, as it were, that we had a possibility of proceeding in this way to amend the Constitution. In other words, once we have a Constitution in Canada, whether it be with the Victoria formula, or any other formula, we will never get anything saying that all Canadians are equal.... Therefore, I think in this last time of going to Britain, with the authority of the House of Commons and Senate, I think it is important ... that we put it [the Charter] in, and it is in.<sup>67</sup>

Back to responsibilities. One of the propositions most important to me in my book *Natural Law and Natural Rights*—first published at the beginning of 1980—is tucked away as the tail end of a longer sentence in a footnote in the chapter on authority: "authority is (in reason, as in modern British constitutional draftsmanship) responsibility".<sup>68</sup> That equivalence has been asserted or implied by me, and by Sir Robert Armstrong and others, over a dozen times in this lecture. Authority

66. *First Report*, *supra* note 4 at xii, para 14(10). Para 114 itself reads [italics in the original]:

114. Is there any available criterion for measuring whether a request accords with the wishes of the Canadian people as a federally structured community? We do not think the UK Parliament should invent a criterion of its own; what is needed is a criterion with a basis in the constitutional history and politics of Canada. Such a criterion seems to us to be available. We think it would not be inappropriate for the UK Parliament to expect that a request for patriation by an enactment significantly affecting the federal structure of Canada should be conveyed to it with *at least that degree of Provincial concurrence* (expressed by governments, legislatures or referendum majorities) *which would be required for a post-patriation amendment* affecting the federal structure in a similar way [fn. 1 (see text at *infra* note 69)]. For example a federal request that had the support of the two largest Provinces and of Provinces containing 50 per cent of the Western and 50 per cent of the Atlantic populations would be one that could be said to correspond to the wishes of the Canadian peoples as a whole. This criterion has roots in the historic structure of Canadian federalism as reflected in the Divisions of Canada for the purposes of Provincial representation in the Senate of Canada; and it broadly accords both with the last (if not the only) clear consensus of Canadian Federal and Provincial governments (at Victoria in 1971) and with the present proposals (see para 109) of the Canadian Government in relation to post-patriation amendment.

67. See *First Report*, *supra* note 4 at lvi, para 114, n 1.

68. John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, [1980] 2011) at 249, n 11. See also John Finnis, "Freedom, Benefit and Understanding: Reflections on Laurence Claus's Critique of Authority" (2014) 51 San Diego L Rev 893, esp. sec III.

is responsibility. And what the line of thought I have been reporting and developing over the last few minutes amounts to is this: the UK Parliament had, back then in 1980-82 (not now), a responsibility to act within the framework of the Canadian constitutional order as defined by law and by presumptively binding conventions; but if it was to that extent an organ of the Canadian constitution it was in that position *as part of the patrimony* of British imperial authority over and responsibility for the territory and peoples of Canada; and one last remaining aspect of that part of the patrimony shared by the two now (in 1980) independent countries was that Britain could act to liberate Canada from its constitutional impasse if Britain's responsible authorities—intending to fulfil a residual responsibility for the Canadian people as a constitutionally structured whole—responsibly judged that there was indeed such an impasse and that it could responsibly be resolved, once and for all, by an act of equipping Canada with the means of, promptly thereafter, internally resolving its impasse consistently with the wishes of the Canadian people as a federally structured whole.

Is that what happened, in the event? The obvious broadbrush answer is: No, what was done was done in line with and in compliance with a Canadian request that was itself made in line with the conventions.

But is that answer quite right? Certainly, what was done was nothing like what Armstrong's briefing note of 4 October 1981 envisaged—unilateral British termination of UK powers (and responsibilities) and enactment of a post-patriation amending formula desired by the federal Parliament but still (by hypothesis) being resisted by most of the Provinces. But a closer look discloses, I think, that there was indeed an element of resort to the imperial patrimony of responsibility to exercise authority. For if it is true, as I believe it is, that (1) the Canadian Supreme Court's majority had *made up* a convention of substantial provincial concurrence to replace the actual convention of unanimous concurrence, and if it is true, as it certainly is, that (2) the degree of provincial concurrence on and after 5 November 1981 *did not quite meet* the criterion discerned by the Foreign Affairs Committee in its *First Report*—namely, that there be as much concurrence as in the least demanding of the post-patriation formulas accepted by Canadian players—a criterion not met because even the least demanding of such formulas required either the concurrence of Quebec or an opt-out facility for any non-concurring Province—it follows that *the following* is also true: (3) the UK Parliament in enacting the Canada Act 1982 was acting outside (just outside) the true Canadian constitutional rules relating to its action and thus was drawing for one last time on the residual, overriding imperial authority on which it had not had to draw since the 1860s or 1870s and in fact had not drawn in any of the many twentieth century amendments it had enacted (except perhaps in 1907, when the responsible minister overseeing the amendment was, as our *First Report* extensively illustrates, Winston Churchill). This third truth is buried, more in plain sight than hidden, in the paragraph of our *Third Report* certifying the post 5 November package as one that “substantially satisfies” the criteria.... That paragraph deliberately noted, but without any comment on the issue at stake, that the Quebec assembly had expressed its dissent and that *in the*

*post-patriation amendment formulae* such dissent would entail the non-application of the amendment to Quebec.<sup>69</sup>

There is another, alternative, reasonable way of understanding the resolution of the whole matter. For many would say that the line of thought in the preceding paragraph is too scrupulous, and that instead the real position is this: the British were entitled, in and after November 1981, to take the Supreme Court's rulings on conventions at face value; and they did.

Either way: you therefore have the Charter—the Charter that, as Pierre Trudeau's remarks at his press conference of 7 November 1980<sup>70</sup> assure us (when taken in concert with predictions and assessments such as those of Lord Carrington and Geoffrey Marshall), you *would not have* if the provincial

69. *Third Report*, *supra* note 57 at vi, para 5:

5. The proposals come before the UK Parliament with a degree and distribution of Provincial concurrence which substantially satisfies the criteria we suggested in our First Report. "Parliament", we said, "would be justified in regarding as sufficient a level and distribution of Provincial concurrence commensurate with that required by the least demanding of the formulae which have been put forward by the Canadian authorities for a post-patriation amendment (similarly affecting the federal structure)" [fn. *First Report* para 14(10)]. The relevant post-patriation amendment formula in the present Bill is embodied in section 38(1) and (2) of the "Constitution Act" scheduled thereto. That formula requires that amendments affecting Provincial powers must be supported by a majority of the members of the legislative assembly in at least seven Provinces which together have at least 50% of the population of all the Provinces. We note section 38(3), which provides that such an amendment shall not have effect in a Province whose assembly has expressed its dissent by resolution of a majority of its members; the Quebec assembly has expressed its dissent from the present proposals [fn. Motion of the National Assembly of Quebec, adopted 70-38 on 1 December 1981]. We also note section 41(e), which will require that amendments to the post-patriation amendment provisions will require the concurrence of every Provincial legislature.

The first sentence is on its face a fudge, the extent of which is substantially disclosed in the rest of the paragraph, and the justification for which is then worked through at vi-vii, paras 6-7:

6. The criteria suggested in our First Report for assessing the appropriate level of Provincial support were put forward, not as minima required in any existing constitutional rule or convention, but rather as indications of what "Parliament would be justified in regarding as sufficient" [fn. *First Report* para 14(10)] or of what "it would not be inappropriate for the UK Parliament to expect" [fn. *First Report* para 114]. Since then, the Supreme Court of Canada has determined that what is constitutionally required is "at least a substantial measure of Provincial consent". The Court decided that unanimity is not required, but did not define or quantify "a substantial measure". The Government of Quebec have, we understand, commenced litigation to establish whether their concurrence is constitutionally required [fn. Quebec Order in Council No. 3367-81, dated 9 December 1981]. So it is important to observe that the Supreme Court has stated, "It will be for the political actors, not this Court, to determine the degree of provincial consent required" [fn. Majority Judgment II (see Appendix para 3, below), page 106)]. The Federal-Provincial Agreement of 5 November 1981, made in the wake of the Supreme Court's judgment and accepted by nine of the ten Provinces, appears to us to amount to a determination by the political actors in Canada that the concurrence of nine Provinces is constitutionally sufficient, albeit the dissenting Province be Quebec.

7. In this situation, what we said in our First Report [fn. para 14(9)] seems applicable: "the UK Parliament is bound to exercise its best judgment in deciding whether the request, in all the circumstances, conveys the clearly expressed wishes of Canada as a federally structured whole". In our view, the present request does this.

The *Third Report* then turned to two paragraphs on Indians, Inuit and other native peoples (para 9 observes: "For at least fifty years, the UK Government and Parliament have lacked even residual constitutional authority to intervene in relation to those rights or affairs."), followed by five paragraphs of concluding reflections.

70. See text at *supra* note 67.



Premiers, representing real elements in the complex desires of the Canadian people, had held firm on 4 and 5 November 1981. The act of self-determination made in Ottawa on that 5 November was Canadian. And, bearing in mind the constitution-transforming contents of that act, the last words of the Foreign Affairs Committee's *Third Report*, words drafted by one of the Labour members on 22 December 1981, seemed even then, and more so now, to be less than completely sound, as a matter of substance (leave aside the tinny style):

...our respective nations and peoples ... [will] continue to hold in common the principles, practices, power and potential of Parliamentary democracy.<sup>71</sup>

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71. *Ibid* at ix, para 14. Commendably, Strayer's book ends with a clear-eyed recognition, and expression of regret, that he did not foresee, or appreciate the negative aspects of, the transformation of Canada's constitution by the judicializing of politics and politicizing of adjudication entailed, in practice, by the Charter. For example:

I suppose during the drafting and negotiations leading to the *Charter* I had a mindset that in Canada we would not be turning over to the courts the right to make social policy. This was based on my own research and writings. [He then quotes five sentences from the 3rd edition of his *Judicial Review of Legislation in Canada* (Toronto University Press, 1968, 1988), of which the first reads]:

The danger of legislative power being "transferred to the judiciary" has been much exaggerated....

Even when this was written it was probably too optimistic, and in light of what has followed it seems hopelessly naïve. (Strayer, *supra* note 3 at 282).