A British View of Canada's Repatriation Efforts

This paper comprised the Seventh Annual Viscount Bennett Memorial Lecture read at Ludlow Hall on October 28th, 1983 by Mr. Jonathan W.P. Aitken, M.P. It was read to a general audience and was prepared by the author as a concise description of the responses of members of the British House of Commons to the repatriation package rather than as an exhaustive, academic essay. The paper is valuable in that it presents the views of one of the leaders of opinion in the United Kingdom at the time of the formulation of the fundamental law of this country.

My lecture is about a parliamentary voyage of exploration into unknown territory. We were launched onto it very reluctantly and in the early stages we carried out our responsibilities, I am bound to say, somewhat ignorantly. It all began at the British House of Commons early in 1980 as a result of the wish of the Government of Canada to patriate the Canadian Constitution and to bring home from its nineteenth century Westminster resting place, the *British North America Act* of 1867.

If in early 1980 one had asked each member of the British Parliament to write down what he or she knew about the *British North America Act* of 1867, the few who might even have dared to reply would probably have comfortably fitted their answers onto the back of a postage stamp.

The Government of Canada, on October 2nd, 1980, produced a definitive background paper explaining the relationships between the Ottawa and Westminster Parliaments on the patriation issue. This background paper contained two crucial paragraphs which I think should be quoted as follows.

Paragraph (d) said:

> By constitutional convention by reason of Canada's sovereign status the British Parliament is bound to act in accordance with a proper request from the Federal Government and cannot refuse to do so.

paragraph (e) said:

> The British Parliament or Government may not look behind any Federal request for amendment, including a request for patriation on 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.

In plain language, what the Government of Canada was saying was that the U.K. Parliament should in effect be no more than a rubber stamp once the Canadian Parliament had sent over a proper request for patriation legislation.

Although that was the expectation in Ottawa, it was not to be the outcome at Westminster for gradually a rising tide of interest, awareness,

concern and ultimately acute anxiety crept through the British Parliament on the patriation issue.

The first manifestation of this growing awareness came in the form of a trickle of correspondence, usually emanating from Canadians living west of the Rockies, whose letters to British M.P.'s tended to include simplistic slogans such as "STOP TRUDEAU", "SAVE CONFEDERATION", or "WESTMINSTER MUST SEE FAIR PLAY FOR CANADA". The British Members of Parliament who received these communications were baffled and perplexed. But as the trickle grew into a stream and we received more and more of these communications we gradually began to think it was our job to look into the subject of the patriation controversy in greater detail.

The second manifestation of awareness was the activity of the Agents-General of the Canadian Provinces in London. Hitherto, the Agents-General, distinguished figures though they are, have never been thought to be in the forefront of diplomatic matters. Led by the energetic and affable Agent-General from Quebec, Mr. Giles Loisette, the provincial representatives in 1980 hurled themselves into a very effective lobbying campaign among British Parliamentarians. The object of their campaign was to convince us that the *British North America Act* could not be amended without a substantial measure of provincial consent and that a unilateral request for patriation by the Federal Government was unconstitutional. This view was, of course, respectfully listened to. It captured perhaps rather more than its fair share of attention and support from its listeners among backbenchers if only because at the same time the Government of Canada deliberately refrained from putting the opposite point of view to British Members of Parliament—at least in this stage in the unfolding saga. The Government of Canada maintained that it should carry out its communications on patriation with the Government of Britain rather than with the Parliament of Britain. There was some basis for that stance, for in June, 1980, Mr. Trudeau had met with Mrs. Thatcher at a Head of Government meeting to discuss the issue and Mr. Trudeau said subsequently that he had received from Mrs. Thatcher clear assurances that her government would ensure that Westminster would pass the Government of Canada's legislative request as expeditously as possible. There are good reasons for believing that Mr. Trudeau came away from that meeting with Mrs. Thatcher believing that he had in fact received a firm guarantee that the legislation would be passed in the form requested by the Federal Government of Canada. Perhaps that was why Mr. Trudeau later let slip the inelegant remark at a press conference that in his view Westminster Members of Parliament had no choice other than to "hold their noses and vote the legislation through". But in fact, far from "holding our noses", British legislators by this stage were sniffing harder and harder at the scent of a constitutional controversy which the Agents-General and the Canadian contributors to their post bags were trailing before them. Editorial writers in Fleet Street's serious newspapers also took up the same scent and a learned correspondence on the constitutional arguments of patriation developed in the letter pages of the *London Times* and other papers.

The political and diplomatic dangers of all this were quite considerable because it gradually became evident that the Agents-General had done their jobs sufficiently well to ensure that a small but significant minority of British parliamentarians were now moving towards opposing, albeit with the support of eight out of ten provinces, the impending unilateral patriation request from the Government of Canada. In a one man effort, to head off this looming crisis in Anglo/Canadian parliamentary relations I sent a letter to the *Times*, which they published on October 31st, 1980. I think this was a reasonably accurate summary of the political position on that date. After a short outline of the patriation request, the contents of my letter continued:

> Having now created this mine field of foreign constitutional controversy Prime Minister Trudeau wants British M.P.s to walk silently into the Division Office in support of it. Some provincial leaders, on the other hand, hope that the Westminster Parliament will don the mantle of a reactivated Colonial umpire and will adjudicate on every single difficult point. Already intense lobbying is going on behind the scenes to achieve just this result. One Agent General, representing a Canadian province in London, told me yesterday that he had a list of overy fifty recruits of British M.P.s sympathetic to his cause. Those of us who visited Canada on a Commonwealth Parliamentary delegation last summer know that there are many other interested parties from Indian Chiefs to provincial Premiers who have plans to come to Westminster to put their case. All of this activity envisages the prospect of interminable late nights in the House of Commons' next session with devolution-style debates on a sovereign state's constitutional arrangements. Under normal conditions such a spectacle would surely look humiliating to Canada and unseemly for British Members of Parliament. Yet, however extraordinary at this early state that Mr. Trudeau's unilateral decision to export Canada's constitutional crisis to Westminster is likely to create this impossible situation. Is there a way out? Much the best solution is of course for the Federal and Provincial Governments of Canada to go back to the drawing board and to produce an agreed amending formula to accompany the patriation of the *British North America Act*. Under such conditions Canada's legislative request would surely be granted on the nod by the United Kingdom Parliament.

This letter of mine to the *Times* met with a fate which befalls many similar epistles to that great journal. Nobody took the slightest notice of it whatever. The Government of Canada continued in championing the view that patriation should and would take place without any provincial consent and it seemed that Mr. Trudeau was pressing with great haste to get the Constitution back to Canada by Canada Day, 1981.

Eight out of the ten provinces were saying exactly the opposite and they continued to lobby vociferously for what some of them called the "compact theory" of Confederation, according to which the original and subsequently acceding provinces had entered into a constitutional compact or treaty which could not be altered without the agreement of the parties affected.

Against this background of conflicting opinions being transmitted to Westminster, British M.P.'s took refuge in a time honoured parliamentary

device—they set up a committee, or to be precise, they set up two committees. The first, and much less important, of these two committees was called, "The All Party Committee on the Canadian Constitution" which in shorthand terms became known as the "Aitken Committee' since I was appointed as Chairman. The Aitken Committee was intended to dispell some of the clouds of confusion, ignorance and misunderstanding that definitely existed among British M.P.s on patriation. There were plenty of such clouds around at the beginning. I haven't forgotten the first meeting of our committee when somebody said very firmly: "Well the first thing I want to know is what is the Canadian Constitution and where is the Canadian Constitution?" Actually this is a very basic and fundamental question and the best definition that we ever found after taking a great deal of advice was contained on page 131 of a very good book called *The Canadian Political System* by R.J. Van Loom and M.S. Whittington which said:

> The Canadian Constitution is a conglomeration of British, Canadian and Provincial Statutes, the British common law, Canadian judicial decisions and a number of real but invisible conventions, customs, values and assumptions all clustering rather loosely and haphazardly around the central kernel of the *British North America Act* of 1867.

Well as you can imagine with such a wide definition, hearings on all these loose component parts and aspects of the Canadian Constitution took some time. We had visits from Provincial Premiers, Ministers, constitutional lawyers, judges, newspaper publishers and we ourselves visited Canada. By the time we were somewhere near finished, at least one hundred Members of Parliament had attended at least some, or part, of these educative and instructive hearings and deliberations. The main effect of this committee was simply to increase awareness among British parliamentarians on the patriation issue. We had no preconceived point of view. Our only starting point and it was also our ending point. I am happy to say, was that Westminster must not interfere in Canada's internal affairs. However the problem was finding where the path of non-interference lay, because many provincial voices told us that if we did rubber stamp the Federal Government's unilateral request, it would be an act of outrageous interference in that we would be altering Federal/Provincial relationships in a way that the Federal Parliament in Ottawa could not legally do of its own motion. If, on the other hand, Westminster was to do nothing and effectively decline Ottawa's request, this refusal to legislate might well seem no less an outrageous act of interference because we were obstructing Canada's internal affairs. After several months of listening to conflicting testimony on these themes I personally began to feel like the rather over-advised Centurion in McCaulay's *Lays of Ancient Rome* to whom those behind cried "forward" and those in front cried "back". Fortunately, perhaps for my own piece of mind, the Aitken Committee was effectively superseded by the Kershaw Committee, or to give you the full title, "The House of Commons Select Committee on Foreign Affairs and Its Inquiry into the Role of the U.K. Parliament in Relation to the *British North America Act*". This Committee, under the chairmanship of Sir Anthony Kershaw, M.P., took over where

we had left off and after hearing and sifting through a mass of more evidence, it produced a blockbuster of a report. The fundamental question that the Kershaw Committee examined with great scholarship and in great depth was this: "Is the U.K. Parliament bound by convention or principle to act automatically on any requests from the Canadian Parliament for amendment or patriation of the *British North America Act*"? The Kershaw Committee's findings on this vital point are worth quoting. Paragraph six of its conclusions said:

> It would not be in accord with the established constitutional position of the U.K. Government and Parliament to accept unconditionally the constitutional propriety of every request coming from the Canadian Parliament.

Paragraph seven of Kershaw's conclusions said:

> There is no rule or principle or convention that the U.K. Parliament, when requested to enact constitutional amendments directly affecting Canadian Federal/Provincial relations, should accede to that request only if it is concurred in by all the provinces directly affected.

And paragraph eight said:

> The U.K. Parliament's fundamental role in these matters is to decide whether or not a request conveys the clearly expressed wishes of Canada as a whole, bearing in mind the Federal character of the Canadian constitutional system.

I call that report a blockbuster because for the first time an authoritative body in an authoritative way denied the line that both the Canadian and British Governments were sticking to—namely that the U.K. Parliament must be a rubber stamp to any proper request from the Canadian Parliament. The Kershaw Report thus had a massive impact on backbench opinion. In effect, once it published its findings all bets were off. Both the Conservative backbenchers committee known as the "1922 Committee", and the "Parliamentary Labour Party backbenchers committee", indicated a considerable degree of support for the findings of Kershaw. That support, and the controversy it created, meant that a significant number of M.P.s (probably around fifty) were determined in the light of Kershaw to oppose any unilateral request for patriation. In addition, a much larger number were now alerted to, and were anxious about, the patriation controversy. Many of these, even if they were sitting on the fence about the issues, were now keen to debate the constitutional arguments that were set out at such great length by Kershaw.

At this point there came a new diversion. I think that is the right word to describe the lobbying activities of the Indian peoples and the Native peoples of Canada who, apparently financed with generous grants of Federal money to pay their hotel bills, arrived in considerable numbers in London. Despite what Kershaw had very sensibly said about the Indian peoples—namely that their position, whatever it might be or whatever the Constitution might say about it, was no matter for the British Parliament to be involved with. Nevertheless, these Indian and Native peoples in their

very colourful way captured a great deal of attention—particularly from left wing politicians anxious to champion what they saw as an oppressed minority in Canada. Our committee held several sessions on the position of the Native peoples. I have never forgotten the testimony of one elderly Chief from the Iroquois Indians called Chief Many Fingers who ended up his speech with these resounding words: "Finally", he said, "ladies and gentlemen of the British Parliament I must assure you that Her Majesty The Queen will disapprove fiercely of any action to go along with this request, and by The Queen I do, of course, mean Queen Victoria".

But all of this activity that was going on was gradually bringing home to the Government of Canada a point that I think they had initially tended to overlook. This was that although the patriation legislation would be proposed by the British Government, nevertheless it was the British Parliament who would dispose of the legislation. Now Parliament and Government can be two very different animals, particularly when it comes to constitutional questions. For a start, it is our tradition that a constitutional Bill must be taken in its committee stages on the floor of the House of Commons and cannot be pushed upstairs to committee rooms. Secondly, it is traditional in our system that the party Whips, who generally exercise quite tight discipline (although I think less tight than in Canada under the caucus system) do not traditionally interfere with Members' rights to speak and vote against the party line on constitutional issues. An additional problem was the probability that there would have to be an enormous amount of Parliamentary time given over to the Canadian patriation legislation if all these various groups—constitutional experts, people sympathizing with the Indians, people who agreed strongly or indeed disagreed strongly with Kershaw and his findings—were determined to exercise their rights to speak to the Bill.

At the end of the day where were we after the full effects of the Kershaw Committee had been felt at Westminster? Well, eight out of ten provinces were pleased. They felt that Kershaw had upheld their views that the U.K. Parliament had a trustee or umpire status laid down by the Statute of Westminster in 1931 to see fair play in maintaining a balance between federal and provincial powers. Ottawa was, of course, displeased. The Government of Canada promptly issued a rebuttal to the Kershaw Committee. It was at this time that Mr. Trudeau advised us to pass the Bill holding our noses. However since the nose-holding was not over the contents of the Bill, it was not our political nostrils but our constitutional consciences which were uneasy at this time so that advice did not help very much.

Meanwhile, the Government of Britain was confused. Mrs. Thatcher stuck rigidly to the formula when answering Parliamentary questions that when the Canadian request came, the House of Commons must pass it "as expeditously as possible in accordance with precedent". However since the precedents were so contradictory this was not entirely helpful advice either.

At this point in the story the people who started to have the real influence were the Government's business managers or Whips, who behind the scenes were getting distinctly nervous. The Whips had no particular interest or disinterest in the Canadian Constitution. What they cared about was getting the Government's basic programme through. The House of Commons timetable in 1982 was a tight one. The Budget, the Finance Bill, the Industrial Relations Bill and other key pieces of legislation had a strictly limited number of days of Parliamentary time allotted to them. A modest amount of Parliamentary time had been provisionally allotted to the Canadian Constitution Bill on the basis that it was likely to go through quickly and without major controversy, but this was now fast becoming a most improbable scenario. For if a large number of M.P.'s began airing their differing views about the Canadian Constitution on the floor of the House of Commons, then the legislation would certainly not pass quickly or easily. Some experts predicted that vital items in the Government's programme could be put at risk by such a development on the patriation legislation. They recalled that, in the past, controversial constitutional measures such as House of Lords reform, or devolution for Scotland and Wales, had deteriorated into an oratorical quicksand finally ending in legislative stalemate. With such a prospect in view it was hardly surprising that the Whips were getting edgy.

Another complicating factor was the role of the British Law Officers (The Attorney General and The Solicitor General), who were asked to advise the Government on the question of whether the House of Commons should deal with the Canadian Constitution Bill before the Supreme Court of Canada had pronounced its judgment on the questions which eight of the dissenting provinces had been arguing before the Provincial Courts of Appeal. The Kershaw Committee had of course, provided answers to similar questions, but the Law Officers advised privately that the Supreme Court should also give its answers before the British House of Commons debated the patriation request. This advice, although undoubtedly correct, caused some irritation in Ottawa at the consequent delay in Westminster's willingness to handle the patriation legislation.

The Supreme Court's verdict, when it came in September 1982, did in fact vindicate the findings of the Kershaw Committee because, without repeating all the judgments that were handed down on that historic occasion, I hope it is more or less accurate to summarize the central findings of the Supreme Court by saying that, although as a matter of strict law the Court said that provincial consent was not necessary for patriation, the conventions of the Canadian Constitution nevertheless demanded that a substantial measure of provincial consent was necessary. I was here in Canada on the very day the Supreme Court's judgment was handed down. As the leader of a delegation of British M.P.s, I must say to all of us from Westminster the atmosphere immediately following the judgment was rather like the Dodo race in *Alice in Wonderland* in which as Alice said "Everyone has won, and everyone must have prizes"!

One of the first spectacles that struck us was the sight of Justice Minister Jean Chretien going on television claiming that the Federal Government had won a great victory because of that part of the judgment which said that in strict law, provincial consent was not necessary. Mr. Trudeau then popped up on the television screens from Korea saying much the same thing. However, all the other parts of the judgment actually seemed to be a considerable defeat for the line that the Federal Government had been upholding for the last two years. The provinces immediately claimed the Court was saying that a unilateral request for patriation was contrary to the conventions of the Constitution and therefore unconstitutional.

During the first few weeks immediately after the Supreme Court's decision this confusion deepened. The Federal Government continued to insist that it had won while the dissenting provinces continued to insist that the victory was really theirs. But we were aware that whatever verbal slings and arrows might be being exchanged between the tweedle dums and the tweedle dees of these two factions, the battlefield on which the competing claims would actually have to be put to the test would be the floor of the British House of Commons. Unless there was an eleventh hour agreement between the provinces and the Federal Government then the decision on whether to grant the unilateral request would definitely come to Westminster.

During this crucial period many British M.P.'s were involved in important behind-the-scenes talks. I recall, and I think it was characteristic of many meetings that were going on, seeing Premier Lougheed of Alberta in a hotel in London. He asked me not only all the questions about the numbers that would be likely to go into the division lobbies but finally, for my view on what would happen. My answer, which I think reflected the prevailing view at the time, was that there would be a stalemate; and that weeks and weeks of parliamentary time would be wasted going nowhere as all the constitutional experts and champions of the Indians and those who had one point of view or another simply argued it out as they were fully entitled to do. I said at the end of the day, the House of Commons will not pass what both the Kershaw Committee and the Supreme Court seem to have deemed to be unconstitutional, namely a unilateral request for patriation. I believed, although no one seemed to be saying it publicly, that sooner or later the provinces and Mr. Trudeau would have to go back to the negotiating table.

That indeed was what happened because by November 1982 Mr. Trudeau (who for so long had insisted with passion and impatience that the patriation request did not require provincial agreement) suddenly discovered (what I think has always been part of his formidable political character) an enormous capacity for compromise. On November 5th, nine provincial Premiers and Mr. Trudeau reached an agreement for a new amending formula and a new Charter of Rights. So at least we could see from Westminster that there was a broad measure of provincial consent despite the refusal, controversial as it was, of Quebec to be part of that consent. When

a few weeks later the Canada Bill actually reached the House of Commons, most British M.P.'s gave a huge sigh of relief that they could, with good conscience, support a measure that now had been broadly agreed in Canada. We felt we were doing what most Canadians wanted to do, and therefore we could vote for the legislation with a good conscience. It was "all over, bar the shouting".

In fact, however, there really was quite some shouting still to come, although it was only a shadow of what the shouting might have been had the provinces and the Federal Government not reached agreement. We did have some thirty hours of debate on the floor of the House of Commons in which there were two main issues. First was the position of Quebec, and the question of whether its refusal to join in the consent of the other provinces meant that the people of Canada as a whole were not in favour of this request. Here I think we accepted Mr. Trudeau's fine phrase about the need to beware of "the tyranny of unanimity" in Canada when trying to reach decisions of this kind. We took the view that despite the opposition of the Parti Québeçois, there were plenty of people, and their legislative representatives in Quebec, who did support the patriation legislation in the form that it came to us. Therefore there was no serious opposition at Westminster to the legislation on the grounds that Quebec was not part of the consent.

Secondly, there was the position of the Indian peoples. Although I persist in regarding those of my colleagues who wished to debate these matters as having been somewhat impertinent towards the Canadian Government's constitutional arrangements (because it was none of our business) this impertinence was costly as it took up a colossal amount of parliamentary time and a huge quantity of argument. But at the end of the day it was apparent that the position of the Indian people was not our business; nor were any of the other matters to do with the contents of the Bill, such as the *Charter of Rights and Freedoms*; and so the Bill went through completely unamended. Patriation had been granted and the Canadian Constitution was on its way back home.

In conclusion, if I attempt to summarize the role of the British House of Commons in this saga, I would say that at the end of the day it exercised, albeit it in a muddled way, a beneficial and ultimately helpful and responsible influence. First, the deliberations of the committees did add considerably to the quality of the debate on the Constitution and the constitutional arrangements. The speakers who came to those hearings definitely enlivened and enhanced the quality of those argument.

Second, I think that if it had not been for the work of the two committees, particularly Kershaw, the House of Commons might have been bounced into granting a unilateral request for patriation very quickly and therefore without provincial consent. I am sorry to say these days, that the British House of Commons and its members are sometimes increasingly parochial, and I think it was always possible to push the request through

with people saying in effect: "the Canadian Constitution is a faraway matter of which we know nothing—we should just let it go because the British Government says so". I think that would have been regrettable because if it was possible (and it ultimately was) to get provincial consent, that was much better from Canada's point of view, as well as in terms of the constitutional proprieties.

Third, I think without the argument that took place following the findings of Kershaw, it is just possible that the patriation legislation might have come to us before the Supreme Court had ruled on the questions which the dissenting provinces had been arguing in the Provincial Appeal Courts. I think that that judgment was enormously welcome in terms of the constitutional history of Canada and it would have been a great pity if we had debated the patriation issue prior to that judgment.

Finally, of course, it has to be said that even in the immediate aftermath of the Supreme Court's judgment, it still took a very clear signal from the British House of Commons that the Bill would not go through without provincial consent before the Government of Canada came back to the negotiating table to get the eventual settlements that everybody wanted. Furthermore, the patriation issue was very much a minority interest restricted to lawyers, politicians and civil servants; but it did revive many dormant relationships, common interests, and shared values among concerned individuals and parliamentarians on both sides of the Atlantic.

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