COMMENTARIES: AMENDMENT AND PATRIATION

In the following commentaries, Peter W. Hogg and W. R. Lederman discuss different aspects of Geoffrey Marshall's presentation on amendment and patriation. Professor Hogg's topic is more specifically the role of the United Kingdom Parliament, while Professor Lederman comments upon the positions of the Supreme Court of Canada and the British Government and Parliament.

PETER W. HOGG*

This comment deals with the role of the United Kingdom Parliament, which is Professor Marshall's third topic. I should say at the outset that I am an adherent of the "no sniffing at the package" theory.

We should start with a proposition that we can probably all agree on, although it has been denied rather frequently. It is that the United Kingdom Parliament cannot take any initiative with respect to Canada. That is to say the United Kingdom cannot do anything that has not been requested by Canada, because there is a convention that the United Kingdom Parliament will not legislate for Canada except at the request and with the consent of Canada. That convention applies to the amendment of the British North America Act even though the Statute of Westminster does not apply to the amendment of the British North America Act. Now that convention precludes a lot of the suggestions which have been made, both in Canada and the United Kingdom, for resolution of the present crisis. For example, the United Kingdom cannot simply repeal section 7 of the Statute of Westminster. The United Kingdom cannot sever the Bill of Rights and pass the rest of the package. The United Kingdom cannot do any of those things because Canada has not requested them. Any unrequested initiative would be entirely contrary to the principle of Canadian independence.

We therefore arrive at the proposition that the United Kingdom Parliament's options come down to three things. Its first choice is to comply with the request which has been made by the federal government in precisely the terms in which it has been requested. A second option is to refuse the request, and a third is to delay in dealing with the request. There are no other choices open to the United Kingdom Parliament.

My comments deal with each of those three choices, and firstly with the possibility that the United Kingdom Parliament might refuse the request. In my view, that is not a proper course for the United Kingdom Parliament to follow. To refuse the request that will be made in the form of a joint address of the Senate and the House of Commons of Canada is for the United Kingdom Parliament to presume to decide who speaks for Canada. That decision, in my view, involves an unacceptable interference by the United Kingdom in Canada's internal affairs. Consider what it entails. It would involve the United Kingdom Parliament entering into an inquiry as to whether there is a convention in Canada binding the federal government to secure the consent of the provinces before requesting an amendment which would affect the powers of the provinces. That is an inquiry that the Kershaw Committee

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embarked upon. As Professor Marshall said, they found it possible to reach their conclusions without consulting any Canadian constitutional lawyers. If they had consulted Canadian constitutional lawyers and Canadian political scientists, they would have found that opinion within Canada was quite mixed.

About a year ago I tried to survey all the sources of statements as to whether there was or was not a convention requiring provincial consent. To give you some idea of the kind of difference of opinion that does exist, let me provide some illustrations. Professor Lederman has consistently argued that there is a convention. Dr. Gérin-Lajoie, the author of the major study on the amendment of the Canadian constitution[1] agrees, saying there is such a convention. The 1965 White Paper[2] is also offered as evidence of the existence of a convention. However, I do not find the White Paper at all conclusive. The White Paper enunciates four famous principles, but makes it clear that they are "not constitutionally binding" in any strict sense. It is not entirely clear whether the authors intended to enunciate a convention. I think that it is likely that the White Paper demonstrates no such intention. In any event, Professor Lederman and Dr. Gérin-Lajoie, and possibly the 1965 White Paper, may be placed in the "Yes, there is a convention" camp.

Considering some other works, one of the principal textbooks on Canadian government by R. MacGregor Dawson[3] states emphatically that there is no convention. The other principal textbook on Canadian government by Professor Mallory of McGill[4] also states that there is no convention. Mallory and Dawson are as fine authorities, with respect, as those on the other side. In Professor Laskin's casebook,[5] he studiously avoids saying anything at all about whether there is or is not a convention. However, I think it is fair to say that if he had at that time thought that there was a convention, he would have included statements to that effect in a book on constitutional law.

The conclusion I reached at the time of my survey three years ago was that the most that could be said was this: it is possible that the practice of securing provincial consents has hardened into a binding convention. It is possible, but it is quite unclear. Is that an issue to be decided by the United Kingdom Parliament? Look at what else is involved. Once the United Kingdom Parliament has made its decision as to whether or not we do have a convention in Canada requiring the prior consent of the provinces before a request for amendment comes forward, they then have to embark upon an inquiry as to what has happened in Canada. Has the necessary consultation occurred? Have the required consents been given?

It might be said in the present case that those facts are quite uncontroversial. We do know the attitude of at least most of the provinces. Perhaps we know the attitude of all the provinces. But in principle, it is simply objectionable for the British government to take upon itself an inquiry into the extent of consultation and agreement within Canada before a request for

1. P. Gérin-Lajoie, *Constitutional Amendment in Canada* (1950).
2. *The Amendment of the Constitution of Canada,* A White Paper of the Government of Canada (Ottawa, 1965).
3. R. MacGregor Dawson, *The Government of Canada* (5th ed. 1970).
4. J. R. Mallory, *The Structure of Canadian Government* (1971).
5. *Laskin's Constitutional Law* (4th rev. ed. A.S. Abel ed. 1975).

amendment goes forward. I appreciate that one can go further, as Professor Lederman does in his writings, and say not merely that there is a convention requiring prior provincial consents to an amendment of the constitution affecting the provinces, but that there is an actual rule of law imposing that requirement which would make it illegal for the federal Parliament to request an amendment without those prior consents. Surely the United Kingdom Parliament should not do anything illegal. But to me it is quite objectionable for the British government to presume to decide that difficult question of legality. Only the courts can decide that question — the courts here in Canada, and ultimately the Supreme Court of Canada. I agree that if the Supreme Court of Canada were to decide that the request for an amendment was illegal the United Kingdom Parliament should not comply with it.

Therefore, I conclude that one option — the simple refusal of the request, at least before any ruling of illegality has been obtained — is not a proper choice for the United Kingdom Parliament. I conclude that the United Kingdom Parliament should not refuse the request. Provided the request has been made by the Senate and House of Commons in the accustomed way, provided it is not illegal, then the role of the British Parliament is simply to act on the request, closing its eyes to whatever events or controversies have occurred within Canada. That is the "no sniffing at the package" theory.

As I said, one could contemplate a third possibility, the possibility of delay. In the present situation we do have a complicating factor, and that is the fact that there is litigation in Canada concerning the legality of the request. I might say, as an aside, that I do interpret the questions which are being put to the courts as inviting a ruling on the legality of the request and not merely whether it is in compliance with convention or not. I do think that the United Kingdom Parliament is entitled to take notice of the fact that this litigation is in place. The litigation could bear on the legality of what the British Parliament is about to do, and I have conceded that they do not have to do anything that is illegal. I am inclined to believe that it is a proper course for the United Kingdom Parliament to delay its consideration of the request until a forthright decision has been reached by the courts in Canada as to the legality of the request. If the courts were to say that the request is legal, then the United Kingdom Parliament should comply with it immediately.

In other words, the United Kingdom Parliament should not be deterred by expressions of disapproval by the courts, or even by a statement in the Supreme Court of Canada, if it should occur, that what has happened is in breach of a convention. The Supreme Court of Canada would not be so unwise, in my view, as to make expressions of opinion as to the propriety of what has happened, or even as to whether a convention has been breached. I do not think the courts will give such rulings because that is not their function. If they were to do so, then in my view the United Kingdom Parliament should pay no attention to those statements by the courts. The thrust of my argument has been that the United Kingdom Parliament is not bound by any convention that exists in Canada. Only the federal Parliament within Canada is bound by it. I conclude, therefore, that the United Kingdom Parliament could delay the request pending a ruling as to legality by the Supreme Court of Canada.

W. R. LEDERMAN*

What has been said by Dr. Marshall and by Professor Hogg brings to mind a quotation from someone who has been mentioned here — Professor James Mallory of McGill. If I can recall it correctly, the substance of it was something like this: "In the United States, if something is unconstitutional it is illegal, even though it may be something desirable. In Britain, if something is unconstitutional it is wrong, even though it may be legal." That points up the dilemma which is confronting us. I want to comment primarily on two things that are related both to what has been said and to the topic: firstly, the position of the Supreme Court of Canada, and secondly, the position of the British government and Parliament and the Kershaw Report.

I sense considerable agreement on the panel in favour of turning to the Supreme Court of Canada. I would like to point out what may be a rather obvious thing, although perhaps it has not really been put this way before. The final judicial authority for Canada on all subjects and in all respects has been fully patriated. It resides at the moment in the hands of the Supreme Court of Canada as presently constituted. Because of section 7 of the Statute of Westminster and everything that stands behind it and accounts for it, there are uncertainties about what the government and Parliament of Canada can do on its own in the field of amendment. As well there are uncertainties about what the government and legislature of each province can do in amending the basics of the federal union on their own motion. There are uncertainties about what kind of a combination of these authorities is required. But there is no uncertainty about the final authority of the Supreme Court of Canada. There is no other judicial authority. Thanks to the *Privy Council Appeals* case[1] in 1947 and the amendments of the Supreme Court Act in 1949, the final judicial authority on all subjects and all matters for Canada is the Supreme Court of Canada.

The Supreme Court of Canada is in a unique position and a very powerful position on that account. And to some extent, of course, the Courts of Appeal of the provinces, indeed all of the superior courts in the country, are in the same position. We have a unified judicial system. We have a federal country, but because of the separation of powers in favour of the independence of the judiciary we are able to operate and we do operate (by virtue of the original provision of the British North America Act) a unified judicial system, unified on all subjects. The superior courts, including the provincial Courts of Appeal and the Supreme Court of Canada, try all kinds of legal issues arising under federal statutes, provincial statutes, or a mixture of the two. And I suggest that so far as federal constitutional issues are concerned, issues touching the essentials of the Canadian federal union, no provincial legislature can by statute deprive the courts of this final power — the power to decide the basic federal constitutional issues as they arise. No provincial legislature can block them from doing this, and neither can the Parliament of Canada.

A further point that concerns us is the status of the convention. If you concede that there is some kind of a convention, and that there must be the consent of most or all of the provinces when the government and Parliament of

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1. [1947] A.C. 127.

Canada propose basic constitutional change affecting the basics of the federal union, there remains the problem that my two predecessors on the panel have raised. Is this a convention that is politically and morally obligatory only and not a matter of law, or has it hardened into a matter of law? Again, on the matter of the position of the Supreme Court of Canada, I would point out that the Supreme Court of Canada has the last word on that issue. Issues of this kind ought to go to the Supreme Court of Canada. As far as constitutional customs, conventions, principles, practices, and precedents are concerned, the Supreme Court of Canada has the last word on which of these, if any, are obligatory in the sense that they are part of the constitutional law. I would not presume to attempt to predict what the Supreme Court of Canada is going to say on these issues. But I do say that they have the last word on these issues as a matter of the constitutional law of Canada and, further, of the constitutional law of the Commonwealth. Again this is because judicial power is fully patriated, as it has been since 1949.

Incidentally, in this connection the draftsmen of the federal proposals (the Canada Act 1981) have amended section 52 and subsection 52(1). The amendment includes the addition of a supremacy clause to the effect that the constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the constitution is to the extent of the inconsistency of no force or effect. There had been a supremacy clause for the Charter (section 25), but no general clause for the whole constitution. Now, quite properly, they are proposing that there should be a supremacy clause for the whole constitution. This supremacy clause depends on, and points to, final authority of the Supreme Court of Canada. A supremacy clause means that the last word on these issues is placed in the hands of the final court, in our case, the Supreme Court of Canada. And, further, I would say that section 52 is not original, but is declaratory of the present situation.

As far as the position of the British government and Parliament are concerned, I have read with great care the Kershaw Report. It is an absolutely first rate piece of work. It is a remarkable analysis of the problems that necessarily confront the British government and Parliament. Suggestions that the British government and Parliament do not have to concern themselves with the substance of their position are distressing. I believe the proper analysis of their position to be that they are in the position of trustees. They are trustees of the amending power for the whole of federal Canada on basic federal union matters. We put them in that position by asking for section 7 of the Statute of Westminster and by virtue of a federal/provincial conference in which every province agreed with the federal government and Parliament that this was to be so. It makes sense to say that the transfer of the paramountcy of the British Parliament to the overseas parliaments of the Dominions was modified, in the case of Canada, to ensure that the Parliament of Canada could not on its own motion amend the division of powers and other basics of the federal system. It makes no sense to say that section 7 was put in to make sure that that did not happen, and then to say on the other hand that both before and after 1931 the Westminster Parliament had to give the Canadian Parliament exactly what was asked and could not "open up the package".

I am diametrically opposed to the position my learned friend Peter Hogg is taking. The British government and Parliament do have to look at their position. It is humiliating for us and obviously most embarrassing for the United Kingdom government and Parliament for us to go to London in this state of local disarray in Canada. We are being most unfair to the British. We ought to draw back, and we should not send anything to London until it is sufficiently agreed upon in Canada, so that it will be proper for them to respond positively to what the Canadian government and Parliament are requesting. And requesting, I would say, with the consent of nearly all if not all of the provinces.

There are two ways of proceeding in order to accomplish this result. One is the political route of reopening federal-provincial negotiations. The government of Canada should draw back and reopen federal-provincial negotiations and summon the First Ministers' Conference again. That would have the added advantage of giving the western provinces a very real voice in what is going on. They would be speaking once again, through their elected provincial premiers, to what is happening in the realm of constitutional change.

The final point is Professor Hogg's point about delay. I hope I have strengthened the notion that there ought to be delay, at least until the Supreme Court of Canada has spoken. I would not presume to attempt to predict what that Court will say, but as a matter of constitutional due process I do accept the authority of the final court.