

A Tempest in a Transatlantic Teapot: A Legal Historian's Critical Analysis of Frédéric Bastien's *La Bataille de Londres*

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Citation Information

Girard, Philip. "A Tempest in a Transatlantic Teapot: A Legal Historian's Critical Analysis of Frédéric Bastien's *La Bataille de Londres*." *Osgoode Hall Law Journal* 51.2 (2014) : 673-699.
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Abstract

This review discussed the allegations in Frederic Bastien's book *La Bataille de Londres*, to the effect that two Supreme Court of Canada judges had improper communications with British and Canadian authorities before and after the hearing of the Patriation Reference. It analyzes in detail the five incidents upon which the allegations are based, and finds that the author's interpretation cannot be supported in four of them because of faulty interpretation of the evidence or incomplete research. The fifth incident, in which Chief Justice Laskin met with the English attorney general, is found to have been arguably inappropriate judicial behaviour, but to have no effect in law on the ultimate decision in the Patriation Reference. In addition, more recent evidence tends to confirm that no "leaks" to the Canadian government occurred while the Court was writing its decision.

Review Essay

A TEMPEST IN A TRANSATLANTIC TEAPOT: A LEGAL HISTORIAN'S CRITICAL ANALYSIS of Frédéric Bastien's *La Bataille de Londres*¹

PHILIP GIRARD *

This review discussed the allegations in Frederic Bastien's book *La Bataille de Londres*, to the effect that two Supreme Court of Canada judges had improper communications with British and Canadian authorities before and after the hearing of the Patriation Reference. It analyzes in detail the five incidents upon which the allegations are based, and finds that the author's interpretation cannot be supported in four of them because of faulty interpretation of the evidence or incomplete research. The fifth incident, in which Chief Justice Laskin met with the English attorney general, is found to have been arguably inappropriate judicial behaviour, but to have no effect in law on the ultimate decision in the *Patriation Reference*. In addition, more recent evidence tends to confirm that no "leaks" to the Canadian government occurred while the Court was writing its decision.

Cet article aborde les allégations de l'ouvrage *La bataille de Londres*, de Frédéric Bastien, qui affirme que deux juges de la Cour suprême du Canada ont communiqué illégalement avec les autorités britanniques et canadiennes avant et après l'audition du renvoi relatif au rapatriement de la Constitution canadienne. Il analyse en détail les cinq incidents sur lesquels reposent ces allégations et découvre que quatre d'entre eux n'appuient pas la thèse de l'auteur en raison d'une interprétation fautive de la preuve ou d'une recherche incomplète. Le cinquième incident, au cours duquel le juge en chef Laskin a rencontré le procureur général de Grande-Bretagne, pourrait sans doute être considéré comme un comportement

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1. *La Bataille de Londres: Dessous, secrets, et coulisses du rapatriement constitutionnel* (Montreal: Les Éditions du Boréal, 2013) [Bastien, *La Bataille de Londres*].

judiciaire inapproprié, mais n'aurait eu aucune incidence juridique sur la décision finale de l'avis de rapatriement. De plus, des éléments plus récents tendent à confirmer qu'aucune « fuite » au bénéfice du gouvernement canadien n'est survenue pendant que la Cour rédigeait son jugement.

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ON 8 APRIL 2013, Les Éditions du Boréal released a book by Frédéric Bastien entitled *La Bataille de Londres: Dessous, secrets, et coulisses du rapatriement constitutionnel*. In it, Bastien retells the patriation saga of 1978–1982 using new evidence from the United Kingdom, mainly British diplomatic correspondence obtained through freedom of information requests. While the book sheds new light on the politics of the patriation process, especially on the British side, it was Bastien's allegations about the activities of two former judges on the Supreme Court of Canada (the Court) that immediately garnered front-page headlines in the English- and French-language Canadian media.² Bastien alleges that Chief Justice Bora Laskin and Justice Willard Z. “Bud” Estey had back-channel communications with federal and British authorities before the hearing and during the writing of the *Patriation Reference*³—improprieties that, in his view, render the opinion null and void and the constitutional deal of 1981–1982 illegitimate. For Bastien, the actions of Prime Minister Pierre Trudeau coupled with those of the judges amounted to nothing less than a *coup d'état* that aimed to overturn the existing constitutional order.⁴ The purpose of this review essay is to argue that, with one exception, Bastien is mistaken in his interpretation of the two judges' conduct, and that in the one case in which there is some cause for concern, any impropriety would have had no effect on the validity of either the *Patriation Reference* or the constitutional accord arrived at in the fall of 1981.

2. See e.g. *The Globe and Mail* (9 April 2013); *Le Devoir* (9 April 2013).

3. *Reference re Resolution to amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1 [*Patriation Reference*].

4. *La Bataille de Londres*, *supra* note 1 at 352. Moreover, chapter fourteen of Bastien's book is titled “Coup d'État à la Cour suprême” (*ibid* at 313).

Bastien's publisher couldn't have timed matters better. The book's release coincided not only with the date of Margaret Thatcher's death but also with the selection of Trudeau's son Justin Trudeau as leader of the federal Liberal Party. A photo of Thatcher and Pierre Trudeau adorns the cover of *La Bataille de Londres*, and the Iron Lady plays a key role in the book and in Bastien's interpretation of events. But even without the coincidence of Thatcher's death and Justin Trudeau's victory, the story clearly had legs. The francophone media in Quebec treated the 'revelations' as the Canadian equivalent of the WikiLeaks scandal, casting Bastien in the role of Julian Assange. For weeks, scarcely a day went by without some print coverage in Quebec, numerous letters to the editor, and hundreds of reactions, mostly angry (*i.e.*, sharing Bastien's outrage), on newspaper websites, radio and television shows, internet discussion forums, and so on.

The Court immediately stated it would conduct its own investigation and on 26 April 2013 announced the result. The Court said, somewhat anti-climactically, that "it does not have any documents relevant to the alleged communications...".⁵ That is probably all the Court could or should have done, but its response was not likely to satisfy those who still had questions about the matter. Meanwhile, on 16 April, barely a week after the release of Bastien's book, Quebec's legislature, the *Assemblée nationale du Québec*, unanimously resolved to demand that the federal government release all papers in its custody relating to the matter.⁶ Maxime Bernier, the minister of state for Small Business and Tourism, responded that the Harper government planned to concentrate on the economy.⁷ The federal government's response more or less tracked that in English Canada: lack of interest after the initial day or two of headlines. The Quebec government subsequently made a freedom of information request to Ottawa regarding all documents from the year 1981 relevant to the patriation process possessed by the Privy Council Office or the Ministry of External Affairs. Those documents were released to the Quebec government on 29 November 2013 and made public in early December.⁸ Their content is considered in the

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5. Supreme Court of Canada, News Release, (26 April 2013), online: <<http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/news/en/item/4289/index.do>>.
 6. Robert Dutrisac & Marie Vastel, "Unanimité pour la vérité," *Le Devoir* (17 April 2013) A1, A8.
 7. Alexandre Robillard, "Constitution - Motion unanime de l'Assemblée nationale pour qu'Ottawa ouvre ses archives," *Le Devoir* (16 April 2013), online: <<http://www.ledevoir.com/politique/quebec/375821/constitution-marais-rencontre-l-opposition-pour-un-projet-de-motion>>.
 8. Joël-Denis Bellavance, "Rapatriement de la Constitution: Trudeau n'aurait pas reçu d'infos privilégiées," *La Presse* (8 December 2013), online: <<http://www.lapresse.ca/actualites/politique/politique-canadienne/201312/07/01-4718657-rapatriement-de-la-constitution-trudeau-naurait-pas-recu-dinfos-privilegiees.php>>.

concluding section of this review essay, below, but (spoiler alert) nothing in them supports the allegations made by Bastien in *La Bataille de Londres*.

The reaction in Quebec to Bastien's allegations is not terribly surprising. The accord leading to the *Constitution Act, 1982*,⁹ an accord that the Quebec government did not join, has always been seen as illegitimate and as a source of grievance in some circles, whatever its legality. The decade of negotiations post-1982, which attempted to secure Quebec's endorsement of a new constitutional package, only made matters worse, ending with the defeat of the Charlottetown Accord and the 1995 Quebec referendum. The subsequent two decades of constitutional 'peace' have been in some sense artificial. English Canada hoped that time would heal past wounds and that demographic change would weaken the sovereigntist cause. To some extent that has occurred, as shown by the decimation of the Bloc Québécois in the 2011 federal election, the weak minority government achieved by the Parti Québécois in September 2012, after nine years out of power, and most recently, the resounding defeat of that government in the election of 7 April 2014. But the controversy created by Bastien's book demonstrates that the wounds opened in the constitutional battles of 1980–1982 remain far from healed. It is important that his charges be examined in a careful and dispassionate fashion.

I suggest that Bastien's interpretation of the documents he obtained is by turns erroneous, exaggerated, and unsupported by the evidence. In some instances, the evidence itself is highly ambiguous, enigmatic, or both, making it unsafe to draw any solid inferences or conclusions. In others, Bastien seriously misapprehends the law or court process and draws incorrect inferences based on mistaken assumptions. In yet others, evidence is easily available that contradicts his interpretations. While I have written a biography of Chief Justice Laskin and served as a clerk to Justice Estey at the Court in 1979–1980, my goal in conducting this review is not to protect either man from attack. The biography was an unauthorized one, unconnected with the Laskin family in any way.¹⁰ While I found much to admire in my study of Chief Justice Laskin, I did not portray him as a flawless hero. The reader may refer in particular to my discussion of the Berger Affair in chapter twenty-three, where I am highly critical of Laskin, and to the conclusion, in which I assess his strengths and weaknesses in what I

9. Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

10. Curiously, in his bibliography, Bastien lists my book as "Girard, Philip et Bora Laskin. *Bringing Law to Life*, Toronto, University of Toronto Press, 2005, 648 p.," as if Laskin and I were joint authors. See *La Bataille de Londres*, *supra* note 1 at 461. Is this a Freudian slip? On the sole occasion that he cites my book in the text, he does so properly (*ibid* at 329, n 26).

hope is a balanced fashion. Historians must always be ready to revise their views in light of new research. If I found Bastien's criticisms to be persuasive and well grounded, I would not hesitate to adopt them and revise my views accordingly. But I do not, and have not, for reasons that will become clear.

Bastien makes no secret of his political and ideological preferences. As a strong Quebec nationalist, he detests the Trudeauvian legacy of the *Canadian Charter of Rights and Freedoms*,¹¹ multiculturalism, and minority language rights.¹² He believes that the Quebec state should have full power over the language of education and should not have its hands tied by appointed judges enforcing *Charter* rights in other areas of state policy. Enamoured of organic approaches to society, he abhors liberalism and embraces Joe Clark's "community of communities" as the appropriate model for the Canadian polity.¹³ Bastien is entitled to his views, and others in Canada on both ends of the political spectrum share his concerns about the arguably anti-democratic nature of the *Charter*.¹⁴ But one is entitled to ask to what extent these views drive and indeed distort the interpretation of the evidence in *La Bataille de Londres*.

In the postface to his book, Bastien rails against what he sees as a negative trend in academic granting agencies, to wit, the tendency to stress theory over empiricism such that

the writing of history consists of deducing a conclusion in advance, through the employment of a theory. This approach is even better demonstrated when the researcher, driven by this initial perspective, necessarily concentrates on documents supporting his original position, while ignoring those that do not conform to the abstract approach that the theory would dictate.¹⁵

It is hard not to turn these words against Bastien himself. Theory did not dictate the documents he sought out, but his relentlessly anti-*Charter* perspective leads him to interpret them with a dogmatic rigidity. In the author's mind there is never any doubt, ambiguity, or nuance. Federal politicians and the impugned judges are always engaged in secret and illicit machinations, sending coded messages that the author believes he can decrypt, and steadily working towards the goal of foisting the hated *Charter* on an innocent and unsuspecting populace.

11. Part I of the *Constitution Act, 1982*, *supra* note 9 [*Charter*].

12. Bastien, *La Bataille de Londres*, *supra* note 1 at 118-20, 223-31, *passim*.

13. *Ibid* at 260-64.

14. Rainer Knopff & FL Morton, *Charter Politics* (Scarborough, Ont: Nelson Canada, 1992); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, revised ed (Toronto: Thompson Educational Publishing, 1994).

15. Bastien, *La Bataille de Londres*, *supra* note 1 at 456 [translated by author].

Aside from anything else, this is simply not good historical practice. Historians are supposed to assess evidence impartially, to be sensitive to multiple meanings, and to pay particular attention to context.

The dozen or so pages taken up with the accusations of impropriety levelled at the two judges is not large considering the size of the book (476 pages). But these accusations are at the very heart of Bastien's project of delegitimization. Any dirty tricks by the politicians involved can be chalked up to, well, politics. Short of actual corruption, violence, or intimidation, it is hard to say that any tactics are off the table in Canadian politics. Bastien would not sway many readers with allegations that federal politicians played dirty pool during the patriation wars, because the conduct of the dissenting premiers at times was hardly above reproach either. Bastien seems to accept, for example, that a career member of the Department of External Affairs was a secret sovereignist and spy for Quebec who leaked many confidential documents to the press in February 1981 in an attempt to derail the federal constitutional project.¹⁶ But allegations that the Chief Justice of Canada conspired secretly with the British and Ottawa to stack the deck against the Gang of Eight¹⁷ would be different. If proven, those allegations could be politically explosive, perhaps even beyond Quebec.

Bastien labels Chief Justice Laskin as a "*grand partisan de la Charte*"¹⁸ who would do anything, even to the point of contravening his judicial oath, to help Trudeau pass his constitutional package. He duly notes the inconvenient fact that Laskin vehemently opposed an entrenched bill of rights while an academic, but then asserts that he reversed his views about the constitutional protection of rights on joining the bench in 1965.¹⁹ For this Bastien relies²⁰ on a statement by Michael Mandel that Laskin "brought to the Supreme Court his strong beliefs in American-style judicial activism."²¹ Mandel's assessment accords with Bastien's own view but it would be seen as overly broad by those, such as Denise Réaume, who have explored Laskin's jurisprudential thought in depth. While Laskin certainly admired many things about American jurisprudence, and there

16. *Ibid* at 249-50. See also 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 99. MacGuigan notes that the mole was allowed to retire and no charges were laid, partly for fear of arousing Quebec opinion at a sensitive time.

17. The Gang of Eight provinces comprised those other than Ontario and New Brunswick.

18. *La Bataille de Londres*, *supra* note 1 at 318 [citations omitted].

19. *Ibid* at 317-18.

20. *Ibid* at 318.

21. Mandel, *supra* note 14 at 23. Bastien cites to Mandel in support, although he incorrectly lists the page number as 26 instead of 23. See *ibid*.

are elements of activism in his own, he was acutely aware of the distinction between the US Constitution and one based on parliamentary supremacy, and the correspondingly different role required of the judiciary in both jurisdictions.²²

As Réaume demonstrates, based on his writings before and after his appointment to the Ontario Court of Appeal in 1965, Laskin had a nuanced and layered view of the judicial role, according to whether common-law, statutory, or constitutional interpretation was involved; he

recognize[d] the need to prevent [judges] from controlling too large a share of the governance of society even when their intentions were for the best. Courts have a responsibility to supervise the development of the law, but they are not an elected body, and this limits their capacity and entitlement to speak for society.²³

And long before the recent vogue for discussing the relationship between courts and legislatures in terms of dialogue theory, Laskin saw them as working in “a partnership of sorts.”²⁴ My own analysis of his judicial decisions largely supports Réaume’s analysis, which is based on his scholarship. Laskin cherished liberal values but he was not a classical liberal; rather, he was a modernist who believed in a strong role for the state in redressing social and economic inequality so that all, not just a few in society, could aspire to the human flourishing promised by liberalism. There is much more concern with legislative deference and social stability in his judicial oeuvre than the broad labels “activist” or “*Charter* liberal” can account for.

La Bataille de Londres retells the patriation saga by adding the British perspective to an already well-known narrative. Through creative research and the filing of innumerable access to information requests, Bastien was able to obtain copies of much of the relevant British diplomatic correspondence: in particular, messages to and from the British High Commission in Ottawa and the Foreign Office in London, and notes prepared by various officials for the use of the latter. He also consulted some External Affairs documentation at Library and Archives Canada and some material originating in provincial ministries of intergovernmental affairs, but claims to have had much less success with freedom of information requests in Canada than in Britain.

This strategy had much to commend it, and it did turn up some new information, including the references to the judges that have caused such a furor. However, most of this evidence displays an inherent frailty that Bastien simply

22. Bora Laskin, “The Function of Law” (1973) 11:1 *Alta L Rev* 118.

23. Denise Réaume, “The Judicial Philosophy of Bora Laskin” (1985) 35:4 *UTLJ* 438 at 453.

24. *Ibid* at 450. See also *ibid* at 452.

ignores. Much of it consists of summaries of conversations and events passed on from one diplomat or official to another. Typically, A (the British High Commissioner, say) is reporting to D (the Foreign Office) on a conversation between B (someone with links to the British High Commission) and C (one of the judges, or a third party) as told by B to A. Occasionally a phrase is put in quotation marks, suggesting that C did use those exact words, but most of the conversations are reported in indirect speech; this makes it impossible to know exactly what was said or how the context of the conversation affected the meaning the parties gave to it.

A second limitation with this kind of evidence is that one cannot take at face value the assertion by a diplomat that what he or she is reporting as “Highly Confidential! Top Secret!” really is so. Diplomats are supposed to gather information that is not in the public domain as well as provide value-added interpretation to information that is. Officials in the Foreign Office are as capable of reading Canadian newspapers as the staff of the British High Commission, and at much less expense too. Thus, diplomats are disposed to portray their findings as insider information even when they are not, or to exaggerate the importance of what they convey. Trudeau once said that “he learned more from *The New York Times* than he did from the diplomatic despatches that landed on his desk.”²⁵

A final and insurmountable difficulty with all the evidence regarding the judges in *La Bataille de Londres* is that their side of the story does not appear in it. The documents give us fragments of their conversations reported indirectly in words chosen by others, but nothing about their motivation and little about the context. These are not the transcripts of the Watergate tapes. Bastien is nonetheless confident that he understands exactly what the actors had in mind at various points and weaves these bits and pieces of unreliable and ambiguous evidence into a narrative of high-level trickery and constitutional subversion.

With these preliminary remarks, we are now ready to consider each of the five incidents that Bastien characterizes as “interventions” on the part of the Chief Justice, as well as the one he attributes to Justice Estey, and to analyze them in detail.

I. 26 MARCH 1981

The inherent frailties of Bastien’s evidence are on full display in the first intervention by the Chief Justice. The author refers to a note dated 26 March 1981 from

25. Lackenbauer, *supra* note 16 at xiv.

the British High Commissioner at Ottawa, John Ford, to the Foreign Office, reporting that he had

learned confidentially that the Supreme Court decided today that it will hear the Manitoba appeal on April 28, much sooner than the federal government expected. The chief justice gave the impression (to a federal government source, not to be revealed please) that he hoped [or, possibly, expected] to convey the court's opinion before the end of the parliamentary process in the United Kingdom.²⁶

Bastien relates that

[t]his information was immediately communicated to the attorney general of Great Britain, Michael Havers. He confirmed what everyone suspected, that the situation “makes it very difficult, if not impossible, for the British Parliament to decide on the Canadian request before the expected judgment of the Supreme Court of Canada is made public.”²⁷

There seem to be two allegations here: first, that Chief Justice Laskin improperly tipped off the federal government about the date the Manitoba appeal would be heard; and second, that he planned to expedite the Court's process in some illegitimate way in order to aid the federal government and that he informed federal representatives of this plan.

Let us look first at the dates. The alleged leak occurred on 26 March, the day the Court decided when the Manitoba appeal would be heard. The Court confirmed the date of 28 April after meeting with counsel for *both* parties that day. A document held by the registrar's office of the Court in what it calls the “court file,”²⁸ dated 26 March 1981, sets out the dates for the filing of documents

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26. Bastien, *La Bataille de Londres*, *supra* note 1 at 292 [emphasis added] [translated by author]. Bastien provides only his own translations of the original English documents. As a result one is left to speculate about the original wording. Here Bastien uses the French word “*espérait*”; presumably he would have used “*attendait*” if “expected” was the original English word, but one cannot be sure.
27. *Ibid* at 293 [translated by author]. As for Havers's reaction to the information, it is not clear why he was only now waking up to the fact that the Court was going to rule on the patriation issue. The Manitoba Court of Appeal had rendered its decision on 3 February and Manitoba Premier Sterling Lyon announced his intention to appeal the decision a week later. See Jeffrey Simpson & Richard Cleroux, “Premiers vow to intensify BNA fight,” *The Globe and Mail* (10 February 1981) 1. The *Supreme Court Act* in force at the time stated that there was a right of appeal from the decision of a provincial court of appeal “on any matter referred to it for hearing and consideration by the lieutenant governor in council of that province . . .” (as had occurred here). See RSC 1970, c S-19, s 37. Thus, there was no doubt. The issue was going to the Court. As of mid-February, that was perfectly clear to anyone.
28. Email from Records Centre, Registrar's Office, Supreme Court of Canada to the author (8 May 2013), with attached files [on file with author].

in the appeal and concludes with the statement: “[T]he hearing of the appeal, counsel for the Attorney-General of Manitoba and counsel for the Attorney-General of Canada consenting, [will] commence at the opening of the April term of the Court, namely, on Tuesday, April 28, 1981.”²⁹ The document is signed by the Court registrar, Bernard Hofley, and a handwritten note, presumably by him, states, “Read to counsel by Chief Justice and agreed to 26/3/81.”³⁰

This information was immediately made public, presumably by one or both parties, and there was no reason it should not have been. *La Presse* reported on 27 March that the hearing was set for 28 April.³¹ And on 27 March, both Trudeau and Clark referred in Parliament to the Court’s decision to hear the appeal on 28 April.³² The ‘confidential tip’ that Ford was passing on was never confidential information—there was no problem with Chief Justice Laskin mentioning the 28 April date to a federal source or anyone else on 26 March, and the date was public knowledge within a matter of hours, probably before Ford’s note reached the United Kingdom.

Bastien has committed several basic errors here. He is not at all critical of his source, the Ford note, which he accepts at face value. He does not seek to check the veracity of the information in it, even though several obvious and easily accessible Canadian sources were available to do so: newspaper accounts, parliamentary debates, and the records of the Court itself, which are public records available to anyone (I was sent scanned copies of the relevant documents the day after my inquiry). And he has not thought to inquire what the normal procedure of the Court would be when setting the dates for the hearing of appeals.

According to the second allegation, the unidentified federal government source heard the Chief Justice say something from which he or she derived an “impression” about the date when Laskin “hoped” the Court’s opinion would be ready. Expressing a hope or even an expectation is not equivalent to passing on confidential information, and any interested observer would know that the Chief

29. Order Re *An Act for Expediting the Decision of Constitution and other Provincial Questions, being Chapter C180, C.C.S.M.*, and Re *a Reference pursuant thereto by Lieutenant Governor in Council to the Court of Appeal for Manitoba, for hearing and consideration the questions concerning the amendment of the Constitution of Canada as set out in Order in Council No 1020/80* (26 March 1981), Ottawa, Records Centre, Registrar’s Office, Supreme Court of Canada [on file with author]. The Court maintains on site only a limited file relating to older cases; the full court file on patriation is at Library and Archives Canada.

30. *Ibid.*

31. “La Cour suprême entendra le Manitoba le 28 avril,” *La Presse* (27 March 1981) A2.

32. Robert Sheppard, “Tories still stalling move to limit debate,” *The Globe and Mail* (28 March 1981).

Justice was not capable of forcing his eight colleagues to reach a decision within a set time frame. Given the vagueness and ambiguity of the terms used, it is simply impossible to reconstruct the interchange between Laskin and the source on the basis of Ford's note. Does this give the author pause? Not a bit. According to Bastien:

Laskin ... was obviously in direct contact with the executive power: he spoke to someone highly placed in the federal government, who passed on the message to the British government. Why? Because, clearly aware of the difficulties faced by the English government as a result of the matter being sub judice, he sought to accelerate the judicial process.³³

The note says nothing about whether the source was highly placed—this is pure speculation on Bastien's part—nor can one equate the vague expression “gave the impression” with anything like “direct contact.” If anything, “gave the impression” suggests a studied evasiveness on Chief Justice Laskin's part that the source is trying to paper over.

Nonetheless, some twenty pages later, without any more evidence being introduced on this incident, the reader is treated to an even more fevered interpretation of this non-event. After rehearsing briefly Chief Justice Laskin's career, Bastien states that Trudeau was counting on him “to help his cause triumph in the spring of 1981.”³⁴ The British allegedly realized this as well because

[A]s we have seen, they were informed thanks to Laskin that the Supreme Court would take charge [“se saisirait”] of the patriation case and expedite it promptly. This information having come via federal sources it seems impossible that Trudeau was not aware of it. And as Laskin was a centralizer plus a great supporter of the Charter of rights, it is obvious that the rapidity with which he intended to guide the process was aimed at furthering Ottawa's cause in London. The message that he sent to the English was aimed at encouraging them: the Court will expedite the matter.³⁵

And as Bastien explains earlier:

At the same time, the Chief Justice informed the federal authorities that they need not worry about the matter getting mired before the top court. Laskin took it upon himself to inform them of what was going on; they knew that they could count on the help of this most influential judge. In a way, Laskin's message amounted to saying: have confidence in me, the Supreme Court is going to deliver the goods.³⁶

33. *La Bataille de Londres*, *supra* note 1 at 293 [translated by author].

34. *Ibid* at 318 [translated by author].

35. *Ibid* at 318-19 [citations omitted] [translated by author].

36. *Ibid* at 293 [translated by author].

All of this may be obvious to Bastien, but it will not be to the reader who has been paying attention to the evidence provided earlier or has any familiarity with the Court's process on reference cases. Whoever the federal source was who heard Laskin mention the non-confidential date of the hearing and express a hope about the timing of the decision, Bastien has provided no evidence at all that the Chief Justice realized this person was or might be in contact with the British High Commission. But all of a sudden he has Laskin sending messages to the English. There is a crucial missing link here.

Other evidence not cited by Bastien also demonstrates that he completely misinterprets what he has found. With his assumption that everything important happens behind closed doors, he has not checked the newspapers to see what was *public* information at the time. *Globe and Mail* reporter Robert Sheppard wrote on 1 April that

Government sources confirmed yesterday that Chief Justice Bora Laskin raised the problem of timing with federal lawyers last week in a preliminary meeting in chambers to discuss the appeal of the Manitoba Court of Appeal decision, which was in favour of Ottawa. The Chief Justice was concerned about the relevance of a Supreme Court ruling if the matter had already been decided by Westminster.³⁷

Reporter Claude Turcotte of *Le Devoir* expanded on a *Canadian Press* story on the same date that some of the judges were concerned that the dignity of the Court was being trampled on by the government's mode of proceeding.³⁸

Even better evidence about this incident has now come to light: Barry Strayer, one of the participants in the 26 March 1981 meeting with the Chief Justice, has now published his version of that encounter.³⁹ One cannot fault Bastien for not advertizing to this source as it was only published in early 2013, when his book was already in press. In 1981, Strayer was assistant deputy minister for public law in the federal Department of Justice and thus head of the branch responsible for providing constitutional advice to the government. Along with John Scollin, senior counsel from the department, he reports attending a meeting with Chief Justice Laskin in his chambers at the "end of March,"⁴⁰ before the Newfoundland Supreme Court decision (ruling Trudeau's measure illegal) had come down on 31 March. Strayer does not state the exact date, but it must have been 26 March as

37. "Won't back package until court rules PCs reject Trudeau's BNA deal," *The Globe and Mail* (1 April 1981) 4 [emphasis added].

38. "Trudeau offre de soumettre sa résolution à la Cour suprême," *Le Devoir* (1 April 1981) 12.

39. Barry L. Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 173.

40. *Ibid.*

noted in the Court document referred to earlier, a date which is also consistent with the newspaper reports of 1 April. At the meeting, in Strayer's account, Kerr Twaddle, counsel for Manitoba, "press[ed] the Supreme Court to fix an early date for a hearing, for fear that the joint resolution would be passed by Parliament and sent to London before the Supreme Court could pronounce on the matter."⁴¹ Chief Justice Laskin then looked at the federal government counsel and said, "Surely the government does not plan to proceed with adoption of the resolution before our hearing."⁴² It fell to Strayer to state frankly that that was exactly what was planned. This "seemed to shock the Chief... [H]e grimaced and said that he would fix an early date for the hearing to commence, a little over a month later..."⁴³ Strayer protested that this would be too soon to hear the appeals from the other provinces, but to no avail. While conceding that all three appeals were heard together in the end, he avers that "the timetable was without precedent."⁴⁴

On 26 March, the Chief Justice, contrary to Bastien's interpretation, was trying to *slow down* the federal government by warning it, in effect, to wait for the Court's decision before taking the next step. The concern about waiting for its decision became academic on 31 March, however, when the Newfoundland Supreme Court released its opinion that Trudeau's unilateral request was illegal. The cabinet decided within minutes to appeal and to wait for the Court's opinion before going to London. That is probably why the government was now content to confirm on 1 April what had gone on the week before—because it was now allaying the Court's concerns by saying it would, after all, wait for its decision and showing the Canadian public that it was not behaving in a precipitous fashion.

By scheduling the Manitoba appeal for 28 April, the Court was also sending a message to the public that it was treating the patriation matter seriously and expeditiously, as the provincial courts of appeal had done and as the Court had done in other reference cases. There is no need to resort to conspiracy theories or secret messages, nor does Ford's note provide any basis for an assertion that the separation of powers was breached in this instance. The Court was treating this reference in the same way it had dealt with other politically sensitive reference cases in recent memory. The *Anti-Inflation Reference* of 1976 was heard within seven weeks of the reference being lodged with the Court (11 March to 31 May), which in turn rendered its opinion a mere five weeks after the close of arguments, in spite of this having been arguably the most important case the Court had

41. *Ibid.*

42. *Ibid.*

43. *Ibid.*

44. *Ibid.* at 174.

heard since the abolition of Privy Council appeals.⁴⁵ The *Senate Reference* in 1979 took nine months from hearing to judgment, but there was no particular urgency about the Court's opinion in that instance.⁴⁶ And observers expected, likely based on the *Anti-Inflation Reference* experience, that the Court would take only a month to render its decision in the *Patriation Reference*.⁴⁷

To conclude on this point: Chief Justice Laskin's alleged intervention, erected on the basis of the Ford note, is a pure invention based on incomplete research, a lack of understanding of the Court's process, and an uncritical approach to the note itself.

Before proceeding to consider the other incidents involving Chief Justice Laskin, it is necessary to consider the sole intervention Bastien attributes to Justice Estey. The case against him rests on an opinion expressed to Ford in October 1980, shortly after Trudeau revealed his plan for unilateral patriation, and a comment made to Ford about a talk Justice Estey had had with Allan Blakeney, then premier of Saskatchewan, around the same time. Ford's note states that Justice Estey said the legality of Trudeau's move would be put into question and that the Court would take two months to decide the case.⁴⁸ Here is Bastien's interpretation of this evidence:

It is to say the least striking to see a judge of the Supreme Court engage freely in a political conversation with a representative of the executive power—in constitutional matters, London was still the imperial government, and as a result John Ford was part of the executive branch of government. Now, Estey indicated to him that it was likely that the Court would be seized of the matter, thus warning Her Majesty's government.⁴⁹

One hardly knows where to begin in deconstructing this extraordinary statement. Let us start with the constitutional law. If one lives, say, in the British Virgin Islands or on St. Helena, perhaps there is still an entity called the "imperial government" with which one must deal. The fact that the British Parliament was the legislative trustee of the Canadian Constitution until 1982 did not mean that Canada was subordinate to or involved in any way in a relationship with an imperial government. The Canada-Britain relationship ceased to be an imperial

45. *Reference re Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452 [*Anti-Inflation Reference*].

46. *Reference re Authority of Parliament in relation to the Upper House* (1979), [1980] 1 SCR 54, 102 DLR (3d) 1 [*Senate Reference*].

47. Robert Sheppard, "No other state requires that all agree, provinces concede," *The Globe and Mail* (5 May 1981).

48. Bastien, *La Bataille de Londres*, *supra* note 1 at 319.

49. *Ibid* at 320 [translated by author].

one after the passage of the *Statute of Westminster, 1931*.⁵⁰ Since then, Canada has dealt with Britain as a foreign power, and vice versa, as Bastien's own evidence shows earlier in the book. He refers to the belief of Saskatchewan officials that the British government "would treat this question [of patriation] as if it were a matter of international relations, not imperial relations..."⁵¹ Throughout the patriation affair, Canada dealt with the British government, not an imperial government. Bastien's reasoning that Justice Estey breached the separation of powers by communicating with Ford is based on anachronistic ideas and, indeed, on an utter constitutional fantasy.

But even if this point is conceded for the sake of argument—that Justice Estey was communicating with a representative of the imperial government—there was nothing improper about the content of the exchange between the two men. In October 1980, there was absolutely nothing wrong with Justice Estey expressing to the British High Commissioner or anyone else the opinion that Trudeau's unilateral patriation resolution would likely be put into question. It was not a warning or tip and did not involve inside information of any kind. Anyone who had taken Federalism 101 would know that such a challenge was not only likely but almost inevitable, and indeed the provinces had already launched their first court action on 23 October.

As Bastien himself shows, the first thing Thatcher, herself a barrister, asked when External Affairs Minister Mark MacGuigan met with her on 5 October 1980—before Justice Estey's meeting with Ford—was whether Trudeau's unilateralist resolution would be challenged in the courts.⁵² She did not need to be tipped off that such an eventuality existed. And as for the judge's estimate of the time the Court would take, we have been through this earlier. There is nothing confidential about a Court judge expressing an opinion about the time it might take for a decision to be rendered. *Caveat emptor* though. The Court took more than twice as long as Justice Estey had estimated.

Ford's note relays Justice Estey's concern about the Western alienation he encountered on a recent trip to Saskatchewan—a concern shared by virtually all eastern Canadians at the time and on full display during the patriation battles. Justice Estey always followed matters in the West closely, and there was no reason he should not have shared his impressions with Ford, especially when they contained no more than one could read in the newspapers. Again we see Ford

50. (UK), 22 & 23 Geo V, c 4, s 2. See Peter Hogg, *Constitutional Law of Canada*, vol 2, loose-leaf, 5th ed (Toronto: Carswell, 2007) ch 3 at 15, n 60.

51. Bastien, *La Bataille de Londres*, *supra* note 1 at 95 [citations omitted] [translated by author].

52. *Ibid* at 159-60.

gamely trying to pad his dispatches and Bastien taking it all at face value. Ford, by the way, was so opposed to the *Charter* and to Trudeau's plans, and so publicly (and inappropriately) vocal about it, that the British were obliged to recall him early in response to Canadian outrage at his undiplomatic antics.⁵³

As for Justice Estey's meeting with Blakeney, a little context is necessary. Justice Estey was born and raised in Saskatoon, had two brothers who remained there, and visited often. His father had been attorney general of Saskatchewan and the family was well known there. He was acquainted with Blakeney, though he certainly did not share his socialist politics, and it would not be unusual for the two men to meet when Justice Estey passed through Saskatoon.⁵⁴ All Ford says about this meeting, as reported by Justice Estey, is that Blakeney "wanted to play a positive role in the crisis but was afraid of losing the support of his electorate."⁵⁵ There is no evidence that during their conversation Justice Estey strayed into any impermissible terrain, no evidence of the slightest impropriety. There was as yet no proceeding involving any provincial premiers before the Court. Yet in responding to a comment that I wrote to this effect in *Le Devoir*, Bastien continues to assert that Justice Estey's "*indiscrétion*" was "*capitale*."⁵⁶ It may be *capitale* for the tale Bastien wants to tell, but that does not make his interpretation accurate. Moreover, the caption under Justice Estey's photo in *La Bataille de Londres* reads "Willard Estey: Supreme Court judge, he informed the British of the intentions of the top court."⁵⁷ What intentions? That the Court would hear a challenge to Trudeau's patriation plan if the matter were properly brought before it? Bastien seems honestly to believe that Justice Estey acted wrongly, but the fact is that this caption is demonstrably false based on the evidence he himself provides in the book. He nonetheless refers on at least three more occasions to Justice Estey's role in "warning" the British government.⁵⁸

Part of the problem here is Bastien's unrealistic idea about what constitutes inappropriate behaviour on the part of judges. Judges are not obliged to cross the

53. Lackenbauer, *supra* note 16 at 98-99. Bastien provides more details about the controversy that Ford aroused but does not seem to take a position on the appropriateness of his actions. See *La Bataille de Londres*, *supra* note 1 at 264-68.

54. In his memoirs, Blakeney recalls a "convivial evening" spent with "Bud Estey" in Japan in the mid-1970s. See Allan Blakeney, *An Honourable Calling: Political Memoirs* (Toronto: University of Toronto Press, 2008) at 152.

55. Bastien, *La Bataille de Londres*, *supra* note 1 at 319 [citations omitted] [translated by author].

56. "Défendre l'indéfendable," *Le Devoir* (17 April 2013) A7. For my piece that Bastien was responding to, see Philip Girard, "Une thèse fragile comme un château de cartes," *Le Devoir* (15 April 2013) A7.

57. Bastien, *La Bataille de Londres*, *supra* note 1 ch 8 [translated by author].

58. *Ibid* at 351, 352, 446.

street if they see a cabinet minister coming towards them. Judges meet politicians and diplomats all the time on social occasions and at official events. They are not forbidden from discussing current events in a general way, or from observing that a contemporary dispute is likely to end up in court, as long as they do not express a view about how they think the dispute would or should be decided.

Before moving on it is also necessary to point out Bastien's possible misunderstanding about the role of the Court. We have seen his statement that the Court "*se saisisrait de la question du rapatriement*."⁵⁹ Literally translated, this means that the Court would "seize itself" of the case, or take charge of it on its own motion. Obviously, the Court has no power to deal with any matter that is not brought before it through the proper procedure. In this case either the federal government could have referred the matter directly to the Court, which it chose not to do, or a provincial government, having referred the matter to the court of appeal of that province, could appeal an unfavourable decision as of right to the Court.⁶⁰ There was no other way for this matter to come before the Court, and the Court had no power to decline to hear the case if it came forward in either of these ways. While on other occasions Bastien uses the correct, passive terminology, "*être saisi*,"⁶¹ such haziness about a fundamental aspect of Court process does not inspire confidence.

II. 26 JUNE 1981

After spending their first and only sabbatical in London in 1961–1962, the Laskins fell in love with England and returned there often for their summer holidays in the 1960s and 1970s. Chief Justice Laskin had been invited to attend the lectures of the Canadian Institute for Advanced Legal Studies, to be held in Cambridge, England, and Louvain-la-Neuve, Belgium, between 26 July and 8 August 1981, and, as honorary patron of the institute, felt some obligation to go.⁶² The Laskins decided to build a long holiday around this event and sailed to Britain on the *Queen Elizabeth II* in June. Peggy Laskin was very concerned about her husband's health and was keen for him to take a long break from his duties at the Court. The Chief Justice had had heart bypass surgery followed by significant

59. *Ibid* at 318.

60. See *supra* note 27.

61. Bastien, *La Bataille de Londres*, *supra* note 1 at 320. Note, however, that in some printings of Bastien's book, the incorrect "*se saisir de*" language appears on this page. The publication information of the various printings is identical.

62. Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005) at 508 [Girard, *Bora Laskin*].

post-operative complications in the spring of 1978, was diagnosed a year later with Addison's disease, a condition that weakens the immune system, and then had emergency bowel surgery in the fall of 1979 in Vancouver and almost died. He was away from the Court until the end of January 1980 but slowly regained his strength over the next year.

This context is necessary to rebut Bastien's innuendo that Laskin's presence in London in June to July 1981 was no coincidence. Bastien begins his account of the next intervention with the statement that "[*l*e *hasard* *faisant bien les choses*" ("as luck would have it"), Chief Justice Laskin found himself in London at the very moment when Trudeau was visiting Thatcher.⁶³ The implication is clearly ironic: that there was no *hasard* at all about the Chief Justice's presence in London at this time. On the day of the Trudeau-Thatcher meeting, 26 June, Bastien reports that "Laskin made a telephone call, apparently fortuitously [*comme par hasard*]", to Michael Pitfield, the clerk of the [Canadian] Privy Council, who was also in London."⁶⁴ Pitfield later met his British counterpart, Cabinet Secretary Robert Armstrong, who reported the conversation thus in a note to the Foreign Office on the same date:

Mr. Pitfield said he received a call from the Chief Justice of the Supreme Court advising him that he was cutting short his vacation in this country to return to Canada in early July to rejoin his colleagues on the Supreme Court for two or three days. The Chief Justice said to Mr. Pitfield: "You understand what that means," and then hung up.⁶⁵

According to Bastien:

Pitfield seemed to decode perfectly this admittedly short and enigmatic message. He explained to Armstrong that it meant that the judgment of the Supreme Court would fall on 7 July. [Proclaiming the constitution on] 1 July was thus out of the question, which did not prevent Pitfield from insisting that the adoption of the constitutional resolution should occur during the summer session, which finished at the end of July, rather than waiting for the fall.⁶⁶

It is not clear what precipitated Chief Justice Laskin's call to Pitfield. But even without knowing the Chief Justice's travel plans, any informed observer would have realized as of 26 June (a Friday), especially with Chief Justice Laskin still in London, that it would be impossible for the decision to be released in time for the matter to get through the British Parliament and have the new constitu-

63. Bastien, *La Bataille de Londres*, *supra* note 1 at 321.

64. *Ibid* [translated by author].

65. *Ibid* [citations omitted] [translated by author].

66. *Ibid* at 321 [translated by author]. I am given to understand that Pitfield is in poor health and not able to be interviewed about these matters.

tion proclaimed for 1 July. And as for decoding the message perfectly, Pitfield obviously did not do so. The judgment was not ready on 7 July.

In fact, the return of the Chief Justice had been announced publicly by the registrar some time prior to 29 June, when it was reported in *The Globe and Mail*. Since 29 June was a Monday, the most likely time of the announcement would have been the previous Friday, 26 June, which was the same day that Chief Justice Laskin made his call to Pitfield. Thus, the Chief Justice was not conveying anything secret or inappropriate to Pitfield in his telephone call.

Pitfield passed on the information about Chief Justice Laskin's return to Ottawa to Trudeau, who then expressed disappointment to Thatcher that the Court had been as yet unable to arrive at a decision. Bastien's interpretation of this incident is as follows:

[A]ccording to Trudeau, Laskin was returning to Ottawa to bring the matter to a close more swiftly. The clerk of the Privy Council knew this, as did his boss. Why? Because, according to all indications [*selon toute vraisemblance*], the Chief Justice kept them up-to-date regarding the deliberations of the Court, if only with bits of information and hints. ... Instead of taking the time necessary to render the best decision possible, Laskin was behaving like a politician. His objective was no longer to rule on the law but to position his court favourably, to ensure its prestige and authority in a process that amounted to the judicialization of politics....⁶⁷

Once again, there is simply no evidence for these assertions. There are no indications that Laskin or anyone else kept the government up-to-date regarding the Court's deliberations. The documents recently provided to the Quebec government, discussed below, make it absolutely clear that in July and August the Privy Council and the Department of Justice had no idea what was going to be in the Court's decision and only a vague idea of when it would be released. At most, the Pitfield call conveyed that the Court was still deliberating—which anyone would assume given that the judgment had not yet been released. It is strange to see Bastien putting such faith in Trudeau's speculation that the Chief Justice was returning to Ottawa "to bring the matter to a close more swiftly."⁶⁸ Laskin was returning to Ottawa because the Court was still deliberating, period. Naturally, the decision would be produced more swiftly if the judges met to discuss it than if they did not. What is illegitimate about that? As Chief Justice, Laskin had a legitimate concern in ensuring that judgments not only contained the best legal reasoning possible, but were also produced in a timely fashion, in this case as in all others. He often berated Justice Jean Beetz, in front of his

67. *Ibid* at 322-23 [translated by author].

68. *Ibid* [translated by author].

colleagues no less, for taking excessive time to perfect his reasons.⁶⁹ Aware that the Canadian government and public as well as the British government were anxiously awaiting the Court's decision, Chief Justice Laskin was concerned about bringing the matter to a close as expeditiously as possible. But, especially given the length of the resulting opinion, there is not the slightest indication that it was rushed through or that the judges sacrificed quality in order to conform to some outside schedule. There was no "Laskin Express."

Quite the contrary: Justice Brian Dickson's biographers quote him as saying that the decision required "very many more' meetings and conferences than any other case on which he had sat, 'not only conferences with all the members of the Court, but also with groupings within the Court in order to try and decide the best manner of resolving the issue.'"⁷⁰ This is direct evidence from a participant that the judges discussed the issues at length and were prepared to take whatever time was necessary to prepare their historic opinion. But Bastien prefers hearsay-based speculation to evidence and does not refer to Justice Dickson's biography anywhere in his book.

What is really interesting about this telephone call is what was *not* said. If the Chief Justice had wanted to convey any message about the substance of the deliberations, now was the perfect chance, while he had Pitfield on the phone. But all he conveyed was an odd message that contained some information that was already or would shortly be in the public domain (he was returning to Ottawa where, it could be inferred, the Court would resume its deliberations) and a further cryptic reference that the recipient did not understand.

III. 1-2 JULY 1981

On 2 July 1981, Lord Carrington sent a telegram to Lord Moran (Ford's successor) at the High Commission in Ottawa reporting that Chief Justice Laskin had spoken (either that day or the previous day) to Havers, the Attorney General. Bastien observes in passing that the Canadian High Commissioner to the United Kingdom, Jean Wadds, had informed Ottawa some weeks earlier that Havers was the designated person to reply to any questions about patriation in the British House of Commons; Bastien asserts that this was confidential information and suggests that Chief Justice Laskin was informed (by inference, improperly) of

69. Girard, *Bora Laskin*, *supra* note 62 at 432.

70. Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2003) at 269.

this fact.⁷¹ Chief Justice Laskin did not need to be informed of something that any lawyer would have taken for granted. The attorney general would be the cabinet member expected to respond to any legal questions relating to patriation, just as Minister of Justice Jean Chrétien had carriage of the file for the Canadian government, and provincial ministries of justice or attorneys general did for their respective provinces.

This telegram, which is reproduced only in part in the book in French translation but was released in full to the media, continues as follows, and I quote verbatim in the original English:

Some of the conversation was in the hearing of [Henry] Richardson, Counsellor at the Canadian High Commission. The latter has indicated to North America Department that he will be treating the conversation in strict confidence. He fully took the point which we put to him that it might be most embarrassing for the Chief Justice if the Canadian Government heard that he had been speaking in this manner in the UK. He clearly spoke more frankly to Sir Michael Havers than to others, in confidence and as between lawyers. Please therefore protect fully.

The Chief Justice said there was a major disagreement among the members of the Supreme Court. He was returning shortly to Ottawa but clearly did not expect this would bring about the immediate resolution of their difficulties. If no quick solution was found, he did not expect judgement to appear until the end of August. We needed to bear in mind that the judgement needed to be carefully polished and produced in both languages. ...

In view of the confidentiality of the Chief Justice's conversation with the Attorney General, it would clearly be wrong for you [i.e., Moran] to reveal at this stage that we now have a clear indication of further likely delay by the Supreme Court. You will therefore want to respond to Pitfield's queries which were put on the basis of a possible judgement in early July. On his question whether there was any hope of early action here in the event of a clear line from the Supreme Court, I see no need for you to go beyond the language you have already used, quoting the Prime Minister and Lord Privy Seal.⁷²

This is clearly a surprising document to come across. One would not expect the Chief Justice to be talking to the English Attorney General while the judges were still deliberating on the case. But was it a serious breach of judicial ethics? Laskin knew that the British Parliament would rise for its summer break after the wedding of the Prince of Wales and Lady Diana Spencer on 29 July 1981; he was essentially advising Havers that the government would not have to deal with the

71. *La Bataille de Londres*, *supra* note 1 at 325.

72. Telegram from Lord Carrington to Lord Moran (2 July 1981) [on file with author].

issue that month—that it would not arise until the fall. The British government was not, it will be recalled, a party to the reference. Laskin probably thought he could rely on the discretion of England's attorney general not to share this information with the actual parties, and that is the line Carrington takes. In fact, Carrington tells Moran not to share this information with Pitfield. The telegram does not say what part of the conversation was in the hearing of Richardson but does say that he agreed to treat the matter in strict confidence.

Upon receipt of the telegram, Moran replied that in his opinion, “unless certain factors in this regard escape us, it seems extremely improbable that Richardson would not have presented a complete account.”⁷³ The basis for this opinion is not clear, and it is only an opinion. Richardson himself was a counsellor with the Canadian High Commission who had been seconded to the British Foreign Office, so Bastien tells us.⁷⁴ Why he should have been present for part of this meeting is unclear. That Richardson had not gone back on his word is suggested by Bastien's own evidence regarding an exchange between Pitfield and Armstrong in Ottawa on 9 July, to be discussed shortly. Based on this exchange, a week after Laskin's meeting with Havers, Pitfield appears to have acquired no new information about the timing of the judgment since the cryptic call from the Chief Justice on 26 June. If Richardson had spoken to anyone at the Canadian High Commission or in the Canadian government about this, the information, we can safely assume, would have gone straight to Pitfield. But Armstrong reported on 9 July that Pitfield “seemed resigned to the idea that the Court would not render its decision this week.”⁷⁵ It is also interesting that Laskin was prepared to say more to Havers on 2 July than to Pitfield the week before. To Havers, he stated that the opinion would not be ready until the end of the summer. To Pitfield, he said nothing intelligible about the timing, suggesting that he made a clear distinction in his mind between what was appropriate to say to a non-party such as the British government and what might be said to the agent of a party to the case such as Pitfield.

It was imprudent of Chief Justice Laskin to speak to Havers, and I analyze this incident in more detail below. But he revealed nothing, apparently, about the substance of the disagreement among the judges. There is no evidence at all that he was caving in to the federal position, that he was inappropriately trying

73. Bastien, *La Bataille de Londres*, *supra* note 1 at 326 [citations omitted] [translated by author].

74. According to Bastien, Richardson had been seconded from the Canadian High Commission to the British Foreign Office, North America Department as of November 1980. See *ibid* at 216-17. Presumably he was still functioning in that capacity, as otherwise Carrington would have had no authority to ask him to observe confidentiality, but this is not entirely clear.

75. *Ibid* at 327 [citations omitted] [translated by author].

to sway his fellow judges to one position or another, or that he was rushing the judgment through to accommodate the federal government.

IV. 15 JULY 1981

It appears that Laskin flew to Ottawa on or about 5 July 1981 and then returned to London some time before he was due to attend a dinner on 15 July at the Middle Temple, the site of the next intervention. After the meal, he met Ian Sinclair, one of the jurists at the Foreign Office who was working on the patriation file. Sinclair reported their conversation the next day to Martin Berthoud, head of the North America desk at the Foreign Office, in the following terms: “He said he had recently returned to Ottawa ‘to try to knock a few heads together.’ He had not however had much success in this regard. This clearly indicated that the Supreme Court remained seriously divided.”⁷⁶ Bastien labels this a “confidence” but without more context it is impossible to understand the content and meaning of this interchange.⁷⁷ Did Laskin take Sinclair aside to make these remarks privately after the dinner? Who initiated the conversation and how? The expression “knock a few heads together” is often used in a jocular sense in English, and it is hard to imagine Laskin using it in relation to his colleagues in other than a jocular sense, as otherwise it would sound disrespectful of them. If used jocularly, it sounds more like an attempt by the Chief Justice to evade answering a question, rather than an attempt to convey information. As in, “I understand you were in Ottawa recently? Oh yes, I was trying to knock a few heads together.”

Furthermore, the statement about not having much success is reported in indirect speech. Is it something Laskin actually said or an inference Sinclair drew from something he said? Are we in the realm of “giving impressions” again? And if Laskin had already told the English Attorney General two weeks earlier that the Court was divided, as he seems to have, why would he have troubled to tell a lower official in the Foreign Office the same thing, especially in the semi-public setting of a dinner at the Middle Temple? It really makes no sense. An interpretation that is equally, if not more plausible than Bastien’s is that Sinclair himself, knowing his employer’s keen interest in the date of the Court decision, over-interpreted some of the Chief Justice’s harmless remarks and rushed to report them.

But Bastien is not yet done with the knocking of heads. On 9 July, when Laskin was still in Ottawa, Armstrong was also there and met with Pitfield. Armstrong reported his conversation with Pitfield to the Foreign Office as follows: “Pitfield said that the Supreme Court was meeting again and he supposed that

76. *Ibid* at 326-27 [citations omitted] [translated by author].

77. *Ibid* at 326 [translated by author].

the Chief Justice would ‘bang their heads together.’ But he seemed resigned to the idea that the Court would not render its decision this week.”⁷⁸ The astute reader will have guessed where Bastien will go with this coincidence of language: “How not to think that [Laskin] had again spoken to Pitfield?”⁷⁹ One is tempted to invoke Freud’s observation that sometimes a cigar is just a cigar. But innuendo and speculation cannot replace evidence and rational argument.

V. 10 SEPTEMBER 1981

On this day, Ford’s successor as British High Commissioner, Moran, met with Laskin under circumstances that are unclear. Moran reported to the Foreign Office that Laskin had said, “[U]nlike the prime minister, he could not constrain his colleagues, who were exhibiting great independence of thought.”⁸⁰ In the high commissioner’s view, this was “an indirect way of saying that the Court was divided.”⁸¹ For once, Bastien gives us no interpretation of this exchange, apparently believing that it speaks for itself. It does. It is a completely anodyne exchange that reveals nothing of substance and, coming just two weeks before the release of the decision itself, could not possibly have affected the actions of any of the parties had they known of it.

Bastien has often complained of the fact that Ottawa had not released the documents under its control relating to the patriation process, insinuating that they must contain some dark secrets.⁸² As noted at the beginning of this review essay, he recently got his wish. More than two thousand pages of documents from the Privy Council Office and the Ministry of External Affairs, with only a few redacted passages, were released to the Quebec government on 29 November 2013 pursuant to a freedom of information request. They were made available to *La Presse* and an overview of their contents was provided in that newspaper on 7

78. *Ibid* at 327 [citations omitted] [translated by author].

79. *Ibid* [translated by author].

80. *Ibid* [translated by author].

81. *Ibid* [citations omitted] [translated by author].

82. See e.g. “Re: ‘Judging the Judges,’ by Philip Girard,” *Literary Review of Canada* (September 2013), online: <<http://reviewcanada.ca/magazine/2013/09/letters/>>. Bastien was responding to my book review in the magazine. See Philip Girard, “Judging the Judges,” Book Review of *La Bataille de Londres* by Frédéric Bastien, *Literary Review of Canada* (September 2013), online: <<http://reviewcanada.ca/magazine/2013/09/judging-the-judges/>>.

December 2013. To my knowledge, the documents themselves have not yet been made public. According to Joël-Denis Bellavance of *La Presse*, the documents contain no indication that the Trudeau government was given any advance warning of the content of the decision or of the date of its release.⁸³ Numerous notes by Michael Kirby, then cabinet secretary for federal-provincial relations, outline diverse scenarios for a federal response depending on the content of the decision, and speculation about the date of the decision continues almost down to the actual day of release. Unless the relevant actors were trying to lay down a deceptive paper trail for future historians, there is nothing to indicate any incursion on the separation of powers or inappropriate behaviour by either judges or politicians with regard to the judicial aspects of patriation.

Given the opportunity to reply by *La Presse*, Bastien stood by his conclusions, stating that “the conversations [*sic*] [between Chief Justice Laskin and Havers] took place,” and that “what is in the book is sufficient.”⁸⁴ Sufficient for what exactly? It is time to analyze this meeting more closely.

Of all the interventions described in *La Bataille de Londres*, only one comes close to involving any kind of a breach of judicial ethics, and that is Chief Justice Laskin’s meeting with the English Attorney General on 1 or 2 July 1981. The other interventions are either completely without substance, as with the first and fifth incidents and the one involving Justice Estey, or the evidence adduced is too unsatisfactory to support an inference of impropriety, as with the second and fourth incidents. With regard to the meeting with Havers, the context relates to the timing of the presentation of the resolution to the British Parliament. This was the essence of the Chief Justice’s message to Havers: We are divided and it is very unlikely that we will release our opinion in time for the Prime Minister to present his resolution to you before the end of July. He did not discuss the substance of the decision as far as we know and spoke only to its timing. It could be argued that he did nothing wrong in seeking to allay the concerns of the British government. The communication did not involve imparting information about timing to one of the parties to the reference.

However, should Laskin have foreseen that the British government might share this information with the federal government? The memo suggests that the British, not Laskin, raised concerns about creating a firewall with the Canadian government. But the memo does not purport to be a complete account of what transpired, so we do not know what the Chief Justice might have said in this regard. We do not know why the Canadian counsellor Richardson was there,

83. *Supra* note 8.

84. *Ibid* [translated by author].

what he heard during the part of the meeting for which he was present, or, if he heard anything confidential, whether he breached his undertaking by passing it on to the federal government.

The test for determining whether the appearance of judicial independence has been breached is “whether a well-informed and reasonable observer would perceive that judicial independence has been compromised.”⁸⁵ If Laskin passed on information about the timing of the decision to the British, knowing or reasonably expecting that they would pass it on to the federal government and not the provincial governments, that would likely be, in the words of the Court, an “affront to judicial independence”⁸⁶ and a breach of judicial ethics. It would suggest a troubling lack of impartiality on the part of the Chief Justice. But the telegram does not allow us to peer into Laskin’s mind, nor is there any evidence that, even if confidentiality was not in fact respected by Havers or Richardson, he was or should have been aware of that likelihood. The documents newly released by Ottawa give no hint that the meeting between Laskin and Havers ever became known to the federal government.

Even if Laskin did not expect the information about the timing of the decision to be passed on to the Canadians, his meeting with Havers is still somewhat troubling. The British and Canadian governments were working quite closely on this file, as he must have known, even if each was still trying to achieve its own distinct goals. If information about his meeting with Havers had become public, and someone had complained to the Canadian Judicial Council, it is possible that he could have been reprimanded for appearing to compromise the appearance of judicial independence. Given that the test relates to appearances, not results, it would not have been a defence for him to argue that he dissented from the majority of the Court on the crucial point as to whether, by convention, Trudeau had to obtain the consent of some, or any, provincial governments.

Putting the case at its highest, that this one incident did reveal a lack of impartiality on the part of the Chief Justice, it still would not have affected the result in any way in legal terms. As Adam Dodek has said recently:

As a matter of constitutional law, the allegations [in *La Bataille de Londres*] have no legal relevance because the *Patriation Reference*, like all references, was an advisory opinion that does not bind the government, or any party. Calling into question [the opinion’s] legitimacy does not affect the legality of patriation itself [nor] the enact-

85. *Canada (Minister of Citizenship and Immigration) v Tobias*, [1997] 3 SCR 391 at para 70, 151 DLR (4th) 119. While this case dates from the mid-1990s there is no suggestion that the test was any different in the early 1980s.

86. *Ibid* at para 36.

ment of the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms*. At the end of the day, the Constitution was patriated at the request of Canadians' democratically-elected representatives in Ottawa, with the substantial consent of the provincial governments. Nothing that is alleged changes that.⁸⁷

But Bastien is, in the end, not concerned with constitutional law as such, and cites no legal treatises or law in support of his conclusion that the opinion in the *Patriation Reference* is null and void. His main goal is to impugn the reputation of the Court so as to undermine its legitimacy in the province of Quebec. I hope I have succeeded in showing that his allegations are not supportable and should not provide any cause for concern about the impartiality of Chief Justice Laskin, Justice Estey, or the Court. The one allegation that does raise some doubt cannot be conclusively proved or disproved unless more evidence comes to light, and in any case has no impact on the status of the *Patriation Reference* itself in law.⁸⁸

87. Cristin Schmitz, "Patriation allegations: 'A tempest in a teapot,'" *The Lawyers Weekly* (26 April 2013), online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=1886>>.

88. Havers died in 1992 and efforts to locate Richardson have been unsuccessful so far.

