

5B
831

PREM 19/398

UK/Canadian Relations

Canadian Constitution

British North America Acts

Internal Acts

PART 3

CANADA

Part 1: May 1979

Part 3: March 1981

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
10-3-81		19.6.81					
16-3-81		26.6.81					
19-3-81		1.7.81					
24.3.81		10.7.81					
27.3.81		31.7.81					
2-4-81		18.8.81					
7.4.81		20.8.81					
8.4.81		15.9.81					
14-4-81		22.9.81					
27-4-81		8.10.81					
5.5.81		28.10.81					
15.5.81		29.10.81					
4-6-81		23.10.81					
5-6-81							
10-6-81							
10-6-81							
16.6.81							

PREM 19/398

PART

3

ends:-

23.10.87

PART

4

begins:-

26.10.87

Seen

UNCLASSIFIED
FM OTTAWA 231855Z OCT 81
TO ROUTINE FCO
TELEGRAM NUMBER 587 OF 23 OCTOBER

CONSTITUTION

1. MR BENNETT HAS NOW REPLIED AS FOLLOWS TO MR TRUDEAU ON BEHALF OF THE TEN PROVINCES:

MY COLLEAGUES AND I WELCOME YOUR ACCEPTANCE OF OUR PROPOSED MEETING DATES FOR A FIRST MINISTERS' CONFERENCE ON THE CONSTITUTION.

AS YOU KNOW, MOST OF THE PREMIERS HAVE BEEN CALLING FOR MORE THAN A YEAR FOR A RETURN TO THE NEGOTIATING TABLE TO PATRIATE THE CONSTITUTION IN THE CANADIAN WAY. MY COLLEAGUES AND I ARE GRATIFIED THAT, IN LIGHT OF THE SUPREME COURT OF CANADA HAVING RULED YOUR PROPOSED COURSE OF ACTION UNCONSTITUTIONAL, YOU NOW SHARE OUR DESIRED GOAL OF ACHIEVING CONSTITUTIONAL CHANGE THROUGH FEDERAL-PROVINCIAL AGREEMENT.

WHILE PLEASED WITH YOUR WILLINGNESS TO RETURN TO THE NEGOTIATING TABLE, THE PREMIERS ARE ASTONISHED BY YOUR INTENTION TO DELAY INTRODUCTION OF THE FEDERAL BUDGET UNTIL THE COMPLETION OF THE FIRST MINISTERS' CONFERENCE — PARTICULARLY IN VIEW OF YOUR INDICATION THAT A LENGTHY CONFERENCE MAY VERY WELL BE ANTICIPATED.

MY COLLEAGUES AND I SEE NO NECESSARY LINKAGE BETWEEN THE BUDGET AND THE CONSTITUTION, IF ANYTHING, THE ECONOMY IS THE MORE URGENT AND PRESSING ISSUE. IN PREVIOUS CORRESPONDENCE, YOU REJECTED THE IDEA OF A PRE-BUDGET CONFERENCE OF FIRST MINISTERS ON THE ECONOMY BECAUSE OF YOUR DESIRE FOR EARLY TABLING OF THE BUDGET IN OCTOBER. MY COLLEAGUES AND I BELIEVE THAT IT WOULD BE A DISSERVICE TO THE CANADIAN PEOPLE TO DELAY INTRODUCTION OF THE BUDGET IN FAVOUR OF A MEETING ON THE CONSTITUTION, AND URGE YOU TO GET ON WITH THE JOB OF MANAGING THE ECONOMY AS THE NUMBER ONE PRIORITY. IN THIS REGARD, THE PREMIERS ARE STILL AWAITING YOUR RESPONSE TO OUR CALL FOR A FIRST MINISTERS' CONFERENCE ON THE ECONOMY WHICH WAS OUR PRIORITY AT THE MONTREAL MEETING.

YOUR TELEX REFERS TO THE CONFERENCE OF NOVEMBER 2 AS A LAST CHANCE, OR AS "ONE FINAL ATTEMPT", TO REACH A CONSENSUS ON THE CONSTITUTION. THE PREMIERS FIRMLY REJECT THIS CHARACTERIZATION OF THE MEETING. IN OUR VIEW, THE UPCOMING CONFERENCE REPRESENTS THE FIRST CHANCE SINCE SEPTEMBER 1980 TO RESOLVE THE ISSUE — DESPITE OUR REPEATED URGINGS TO RETURN TO THE TABLE. MOREOVER, THE PREMIERS VIEW THE NOVEMBER CONFERENCE AS THE INITIAL ATTEMPT, WITHIN THE RULES ESTABLISHED BY THE SUPREME COURT OF CANADA, TO BREAK THE CONSTITUTION LOG-JAM.

/ MY COLLEAGUES

MY COLLEAGUES AND I ARE DISAPPOINTED THAT YOU HAVE REJECTED OUR PROPOSAL FOR A PREPARATORY MEETING OF MINISTERS TO DISCUSS THE DETAILS, FORMAT AND AGENDA OF THE FIRST MINISTERS' CONFERENCE. THE PREMIERS — EAGER TO LAY THE FOUNDATIONS OF A SUCCESSFUL CONFERENCE — WERE OF THE VIEW THAT SUCH A MEETING WOULD HAVE BEEN CONDUCTIVE TO RESOLUTION OF BOTH THE PROCESS AND THE ISSUES BEFORE US. INSTEAD, YOU HAVE CHOSEN THE LOCATION — OTTAWA — AS WELL AS THE DATE — NOVEMBER 2.

SINCE A MEETING OF MINISTERS HAS BEEN REJECTED BY YOU, MY COLLEAGUES HAVE ASKED ME TO INFORM YOU THAT THE MEETINGS SHOULD PROCEED ACCORDING TO TRADITIONAL PRACTICE. THEREFORE, THE PREMIERS WILL BE IN OTTAWA ON NOVEMBER 2.

WITH THE MEETINGS TO BEGIN AT 10.00 AM — THE OPENING SESSION TO BE PUBLIC — TO BE FOLLOWED AT THE DIRECTION OF THE MEETING BY PRIVATE DISCUSSIONS AT AN AGREED-UPON LOCATION — TO BE CONCLUDED BY A PUBLIC CLOSING SESSION. SINCE YOU ARE OUT OF THE COUNTRY AND IN ORDER TO AVOID ANY ADMINISTRATIVE ROAD BLOCKS, I HAVE TAKEN IT UPON MYSELF TO RESERVE THE CONFERENCE CENTRE IN OTTAWA FOR NOVEMBER 2, 3 AND 4.

I LOOK FORWARD TO MEETING YOU AND THE OTHER PREMIERS IN OTTAWA, AND AM HOPEFUL THAT OUR DELIBERATIONS WILL MEET WITH SUCCESS.

MORAN

[THIS TELEGRAM WAS NOT ADVANCED]

CANADIAN CONSTITUTION LIMITED

NAD

CCD

P & CD

PCCU

PARLIAMENTARY UNIT

NEWS D

INFORMATION D

PS

PS/LPS

PS/MR LUCE

PS/MR HURD

PS/LORD TREFARNE

PS/PUS

SIR E YOUDE

MR DAY

MR URE

LORD N G LENNOX

CABINET OFFICE

COPIES TO:

SIR I SINCLAIR

MR FREELAND

DR PARRY

} LEGAL ADVS.

PS/CHANCELLOR OF THE DUCHY OF LANCASTER

PS/LORD CHANCELLOR HOUSE OF LORDS

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

PS/HOME SECRETARY

[COPIES SENT TO NO 10 DOWNING ST]

With the compliments of

H STEEL

*Attorney General's Chambers,
Law Officers' Department,
Royal Courts of Justice,
Strand. W.C.2A 2LL*

01 405 7641 Extn.

CONFIDENTIAL

01-405 7641 Ext. 3229

Communications on this subject should
be addressed to

THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

Our Ref: 14/2/98

23 October, 1981

Dear Stephen,

Paul

CANADIAN CONSTITUTION: REPLY TO FOREIGN AFFAIRS COMMITTEE

In my letter of 22 ~~October~~ I promised that I would show your draft and that letter to the Attorney-General as soon as I could and would pass on any comments which he might have. I have now shown him the papers. He has commented as follows:-

"You cannot 'revise' the draft created before the Supreme Court Judgment. You must start again. This draft looks exactly what it is! I agree entirely with your comments."

I am copying this letter to Michael Collon in the Lord Chancellor's Office, Jim Buckley in the Lord President's Office, David Heyhoe in the Office of the Chancellor of the Duchy of Lancaster, Michael Alexander at No.10 and Roger Facer in the Cabinet Office.

James
Henry

H. STEEL

S J Gomersall Esq
Private Secretary to the Lord Privy Seal
Foreign and Commonwealth Office
King Charles Street
London SW1

CONFIDENTIAL

GRS 510
RESTRICTED

RESTRICTED

FM OTTAWA 222050Z OCT 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 586 OF 22 OCTOBER

FROM HIGH COMMISSIONER IN ST JOHN'S

CANADIAN CONSTITUTION

1. I SAW PECKFORD, PREMIER OF NEWFOUNDLAND, THIS AFTERNOON. HE TOLD ME THAT THE 8 DISSENTING PREMIERS WERE ABOUT TO MAKE CONTACT ON THE TELEPHONE. HIS OWN VIEW WAS THAT THEY SHOULD INSIST ON THE PRIOR PREPARATORY MEETING THEY HAD PROPOSED WHICH MR TRUDEAU HAD REJECTED IN HIS MESSAGE. HAVING HAD EXPERIENCE OF EARLIER MEETINGS HE BELIEVED THAT SOME PREPARATION WAS ESSENTIAL IF THEY WERE TO BE SUCCESSFUL. OTHERWISE WHAT HE CALLED THE PERSONAL CHEMISTRY OF THE PARTICIPANTS MIGHT SPOIL THE CHANCES OF AGREEMENT. MR TRUDEAU AND MR LEVESQUE, FOR EXAMPLE, MIGHT EASILY GET INTO A SLANGING MATCH.

2. HE SAID THAT MR TRUDEAU'S AGREEMENT TO SUCCESSIVE POSTPONE-MENTS MADE IT CLEAR THAT HE REALISED THAT TO PROCEED UNILATERALLY WOULD CREATE GREAT DIFFICULTIES. HE BELIEVED THAT BOTH SIDES WERE PREPARED TO COMPROMISE, DESPITE TOUGH PUBLIC STATEMENTS, AND THAT A GENERAL AGREEMENT WAS POSSIBLE. HE THOUGHT IT WOULD TAKE "A FEW WEEKS" AND DISMISSED MR TRUDEAU'S SUGGESTION OF DAY AND NIGHT NEGOTIATIONS AS NONSENSICAL. ON THE AMENDING FORMULA HE SAID HE FOUND UNACCEPTABLE THE PROPOSED VETO FOR TWO PROVINCES BUT HE BELIEVED QUEBEC WAS PREPARED TO GIVE UP ITS VETO AND HE KNEW ONTARIO WAS. HE OBJECTED ALSO TO THE REFERENDUM PROVISIONS. BUT I WAS LEFT WITH THE IMPRESSION THAT HE PERSONALLY THOUGHT THAT A GOOD DEAL OF WHAT WAS BEING SAID BY BOTH SIDES WAS POSTURING TO BRING PRESSURE ON THE OTHER SIDE AND THAT AN AGREEMENT WAS QUITE ON THE CARDS. HE SAID THAT THE LAST TIME THERE HAD BEEN A REAL NEGOTIATION EVERYONE HAD BEEN PREPARED TO MAKE REAL CONCESSIONS, EVEN LEVESQUE ON LANGUAGE RIGHTS, AND AN AGREEMENT HAD BEEN THERE AROUND THE TABLE BUT MR TRUDEAU HAD FAILED TO REALISE IT AND THE OPPORTUNITY WAS LOST. HE SAID THAT DAVIS OF ONTARIO SHARED HIS VIEW ON THIS.

3. HE SAID THAT IF NEGOTIATIONS FAIL AND MR TRUDEAU PROCEEDS UNILATERALLY THEN THERE WOULD BE "ALL OUT WAR". EVERY POSSIBLE INITIATIVE WOULD BE TAKEN, EVERY MP WOULD BE TALKED TO, HE WOULD GO TO LONDON, PUBLIC RELATIONS FIRMS WOULD BE BROUGHT IN, ALL PREPARATIONS HAD BEEN MADE. AT PRESENT TACTICS WERE BEING COORDINATED FOR THE 8 BY THE AGENT GENERAL FOR ALBERTA. HE WAS STUDYING POSSIBLE ACTION IN LONDON. HE HAD BEEN TOLD THAT WE MIGHT INTRODUCE AN "ACT TO RATIFY" INSTEAD OF A BILL, WHICH WOULD BE LESS SUBJECT TO AMENDMENT BUT HE HAD BEEN ADVISED THAT THERE WOULD BE STILL SOME POSSIBILITY OF PROPOSING AMENDMENTS.

RESTRICTED

/4.

RESTRICTED

4. I ASKED HIM WHAT WOULD HAPPEN IF, DESPITE ALL THESE EFFORTS, THE BRITISH PARLIAMENT DID PASS A PACKAGE PRESENTED UNILATERALLY BY THE FEDERAL GOVERNMENT. HE SAID THAT AS FAR AS NEWFOUNDLAND WAS CONCERNED HE WOULD "TAKE A RAIN CHECK". HE BELIEVED THAT AS MANY AS FIVE PROVINCES WOULD REFUSE TO ACCEPT THE MEASURE. THE FIVE WOULD OF COURSE INCLUDE QUEBEC.

5. ON NEWFOUNDLAND HE SAID THAT THE TERMS OF UNION MUST REMAIN GUARANTEED AND HE THOUGHT MR TRUDEAU WOULD AGREE TO THIS. HE WAS HIMSELF FLEXIBLE ON THE QUESTION OF THE CHARTER OF RIGHTS AND BELIEVED THAT THE FEDERAL GOVERNMENT WERE PREPARED TO COMPROMISE AS HE WAS ON THE QUESTION OF MOBILITY OF LABOUR IN CANADA.

MORAN

CANADIAN CONSTITUTION LIMITED

NAD

CCD

P & CD

PCCU

PARLIAMENTARY UNIT

NEWS D

INFORMATION D

PS

PS/LPS

PS/MR LUCÉ

PS/MR HURD

PS/LORD TREFARNE

PS/PUS

SIR E YOUDE

MR DAY

MR URE

LORD N G LENNOX

CABINET OFFICE

COPIES TO:

SIR I SINCLAIR

MR FREELAND

DR PARRY

LEGAL ADVS.

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR House of Lords

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

PS/HOME SECRETARY

[COPIES SENT TO NO 10 DOWNING ST]

2

RESTRICTED

CONFIDENTIAL

01-405 7641 Ext. 3229

Communications on this subject should
be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

Our Ref: 14/2/98

22 October 1981

S J Gomersall Esq
Private Secretary to the Lord Privy Seal
Foreign and Commonwealth Office
King Charles Street
LONDON S W 1

Handwritten signature
26/10

Dear Stephen,

CANADIAN CONSTITUTION : REPLY TO FOREIGN AFFAIRS COMMITTEE

Thank you for your letter of 18 October and its enclosed revision of the draft reply. I have come to the conclusion that I should not be justified in seeking the Attorney General's comments on the draft at this stage. So much depends on the attitude which the Government will adopt in the House when the time comes and this may not become clear at least until after the meeting of OD on Thursday of next week. However, I shall show him the draft and this letter as soon as I get the opportunity and, if he then has any general comments which it would be useful to pass to you at this stage, I shall write again.

I do have a few comments of my own which I hope you may find helpful. The first is a very general one. It is that, even if Ministers are disposed to give full support to the Federal Government's request in the first instance, we ought still to keep in mind the possibility that they may decide to change course if Parliament throws the Bill out or forces through an amendment to it. I have in mind here the ideas canvassed in Sir Robert Armstrong's note to the Prime Minister of 4 October and the similar suggestions canvassed at the Ministerial meeting which took place under the Home Secretary's chairmanship on 30 September. The same thoughts are obviously behind the question posed in paragraph 6 of Ottawa telegram No 565 - incidentally, what reply is going to be sent to that? The thought which all this suggests to me is that it might be prudent to soft-pedal our endorsement of the FAC's view of the impropriety of our enacting any measure which did not correspond exactly with the Federal request and consent. If Government is going to have to climb down, it would be as well to have a ladder ready.

/My

CONFIDENTIAL

CONFIDENTIAL

01-405 7641 Ext.

*Communications on this subject should
be addressed to*

THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

My second comment is that it seems to me to be dangerous to emphasise as strongly as the draft does in many places, eg in paragraphs 17 and 18, the superiority of law to convention. There is scarcely a quotation from the judgment that we make in this connection that cannot be countered or even trumped by another quotation which emphasises the importance of the relevant convention. The most obvious example is the passage on page 14 which starts with the sentence: "It should be borne in mind however that, while they are not laws, some conventions may be more important than some laws" and finishes with the sentence: "The foregoing may perhaps be summarised in an equation: constitutional conventions plus constitutional law equal the total Constitution of the country." I cannot help feeling that, in trying to down-play what the Court said on the convention point, we are leading with our chin.

Connected with the point I have just made is my view that the draft brushes aside too glibly (see, for example, the last sentence of paragraph 18) the bearing of that part of the Supreme Court's judgment which deals with convention on the question which faces the UK Parliament. To argue that the UK Parliament need not concern itself with breaches of Canadian constitutional convention seems to me to invite the retort that such obligation as rests on the UK Parliament has itself no more than the force of convention and cannot be relied on to enforce compliance with something which is itself in breach of convention. The last sentence of paragraph 33 does attempt to deal with this but it is really an assertion rather than an argument. And the 5th, 6th and 7th sentences of paragraph 31, though helpful on the "legality" point, seemed to me again to be leading with our chin on the convention point.

My last comment is that, though the draft constitutes an effective response to the arguments that were put forward some nine months ago in the FAC's Report, the issues which Parliament now has to consider have been fundamentally changed by the Supreme Court's judgment. It is no longer necessary for Parliament to decide whether to apply the FAC's criteria to determine the constitutionality of the request: the Supreme Court has said authoritatively, though applying different criteria, that the request is not constitutional. The sole major issue now is whether Parliament must nevertheless comply with it or, if not, what it may properly do. That, rather than fancy questions about how one determines the wishes of Canada "as a federally structured whole", is

/what

CONFIDENTIAL

CONFIDENTIAL

01-405 7641 Ext.

Communications on this subject should
be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

what the debate will be about. If that is right, much of the draft (eg paragraphs 19 to 25 and the first part of paragraph 31) is shadow boxing. But I recognise that it may nevertheless be a useful vehicle for deploying our case that we can deal only with the Federal Government and Parliament.

rl I am copying this letter to Michael Collon in the Lord Chancellor's Office, Jim Buckley in the Lord President's Office and David Heyhoe in the Office of the Chancellor of the Duchy of Lancaster. Also, for information, to Michael Alexander at No 10 and Roger Facer in the Cabinet Office.

*James
H. Steel*

H STEEL

CONFIDENTIAL

Mr. Alexander (M)

Canada
10/28/10
26/10



[Handwritten signature]

WN
23/10

CABINET OFFICE

file ?

- gone to Mexico.

21.10

With the compliments of
The Private Secretary to the
Secretary of the Cabinet

70 Whitehall, London SW1A 2AS
Telephone 01-233 8319

CONFIDENTIAL



CABINET OFFICE

70 Whitehall, London SW1A 2AS Telephone 01-233 8319

From the Secretary of the Cabinet: Sir Robert Armstrong KCB, CVO

Ref. A05767

20th October, 1981

The Canadian Constitution

Thank you for your letter of 20th October.

Sir Robert Armstrong spoke to Mr. Pitfield this evening, in the sense suggested in your letter. He made all three points.

Mr. Pitfield said that he hoped that what had been happening in Canada would have been picked up and appreciated in London. He had particularly in mind the fact that the Federal Government had accepted all the proposals by the Provincial Premiers for delay. Sir Robert said that we had indeed noted that, and also noted some apparently more optimistic pronouncements by Mr. Bennett, the spokesman for the Provincial Premiers. Mr. Pitfield said that there had been a further development today: Mr. Bennett had asked for a full meeting of the Provincial Premiers with the Federal Government early in November. He implied that the Federal Government would be acceding to that request, and he thought that there was a possibility of a substantial measure of agreement. Sir Robert said that that would certainly make a great difference to the handling of the matter, when ~~it~~ came over to Westminster.

Mr. Pitfield concluded by saying that they would continue with the process of discussion with the Provincial Premiers, and that he would be in touch with Sir Robert again when there was more to report.

I am sending copies of this letter to Willy Rickett, David Heyhoe and Jim Buckley.

D. J. WRIGHT

(D. J. Wright)
Private Secretary

S. J. Gomersall, Esq.

CONFIDENTIAL

010
CONFIDENTIAL



Foreign and Commonwealth Office

London SW1A 2AH

October
20 February 1981

Dear Michael,

Cancun: The Canadian Constitution

/ Mr Trudeau will be meeting the eight dissident Provincial Premiers on or soon after 26 October. He has spoken of a possible compromise with them but has also indicated that if no greater degree of agreement with the Provinces is forthcoming, he will press through his patriation proposals by the end of this month. I attach Ottawa telegram no 569 of 19 October giving further details.

/ The problems which the Government are likely to encounter in Parliament over the Canadian Constitution were discussed in Cabinet this morning. In the light of this discussion, Lord Carrington thinks it would be useful for the Prime Minister to have a further word with Mr Trudeau at Cancun. I attach for ease of reference the Melbourne telegram which recorded the agreed press statement on Mrs Thatcher's last meeting with Mr Trudeau. The Prime Minister could warn Mr Trudeau again that, if the Constitutional package reaches us as things now stand, we would anticipate very serious difficulties in Parliament. With Mr Trudeau's forthcoming discussions with the Provincial Premiers in mind, she may wish to emphasise that a greater degree of provincial support for his proposals could make a major difference to Parliamentary opinion here.

I am sending copies of this letter to the Private Secretaries to the Lord President, the Chancellor of the Duchy of Lancaster and to Sir R Armstrong.

yours ever
Roderic Lyne

(R M J Lyne)
Private Secretary

M O'D B Alexander Esq
10 Downing Street

CONFIDENTIAL

GRS475

UNCLASSIFIED
FM UKDEL MELBOURNE 050630Z OCT 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 72 OF 5 OCTOBER
AND TO IMMEDIATE OTTAWA

FOLLOWING IS TEXT OF AGREED GUIDANCE REFERRED TO IN MIPT:

BEGINS

MRS THATCHER AND MR TRUDEAU MET THIS AFTERNOON TO TAKE STOCK OF THE POSITION, FOLLOWING THE RULING BY THE SUPREME COURT OF CANADA ON THE CANADIAN GOVERNMENT'S PROPOSALS FOR AMENDMENTS TO THE CONSTITUTION OF CANADA.

MR TRUDEAU INDICATED THAT ON HIS RETURN TO CANADA HE WOULD BE CONSULTING HIS COLLEAGUES IN THE FEDERAL GOVERNMENT AND THE SPOKESMAN FOR THE PROVINCIAL PREMIERS. SUBJECT TO THE OUTCOME OF THESE CONSULTATIONS, HIS GOVERNMENT WOULD INVITE THE CANADIAN PARLIAMENT TO APPROVE A RESOLUTION AND DRAFT BILL - BASICALLY THE MEASURE WHICH IS BEFORE PARLIAMENT NOW, SUBJECT TO THE POSSIBILITY OF MODIFICATIONS IN THE LIGHT OF THOSE CONSULTATIONS. IF THE RESOLUTION AND DRAFT BILL WERE APPROVED BY THE CANADIAN PARLIAMENT, THEY WOULD THEN BE SENT TO THE QUEEN, SO THAT THE BILL COULD BE PRESENTED FOR ENACTMENT BY THE BRITISH PARLIAMENT.

MRS THATCHER CONFIRMED THAT, FOLLOWING THE RULING BY THE SUPREME COURT ON THE LEGALITY OF WHAT WAS PROPOSED, THE BRITISH GOVERNMENT WOULD INTRODUCE AT WESTMINSTER THE LEGISLATION DULY REQUESTED AND APPROVED BY THE CANADIAN PARLIAMENT. SHE SAID THAT MR TRUDEAU WOULD KNOW THAT SOME MEMBERS OF PARLIAMENT AT WESTMINSTER WERE CONCERNED AT THE PROPOSAL THAT THEY SHOULD BE ASKED TO APPROVE A MEASURE AFFECTING FEDERAL - PROVINCIAL RELATIONS WHICH DID NOT HAVE THE APPROVAL OF A SUBSTANTIAL NUMBER OF THE PROVINCIAL GOVERNMENTS. THAT CONCERN WOULD BE STRENGTHENED BY THE SUPREME COURT'S RULING THAT IT WAS NOT IN ACCORDANCE WITH CONSTITUTIONAL CONVENTION THAT SUCH A MEASURE SHOULD BE ENACTED WITHOUT PROVINCIAL CONSENT, EVEN THOUGH IT LEFT UNDEFINED THE MEASURE OF CONSENT REQUIRED.

MR TRUDEAU SAID THAT THE SUPREME COURT'S RULING MADE IT CLEAR THAT THE QUESTION OF PROVINCIAL CONSENT WAS A MATTER OF CONVENTIONAL BUT NOT OF LEGAL REQUIREMENT. THE CONSTITUTIONAL CONVENTION IN QUESTION WAS A POLITICAL MATTER, AND A CONVENTION OF CANADIAN POLITICS. HE HOPED THAT THE MEMBERS OF THE BRITISH PARLIAMENT CONCERNED WOULD RECOGNISE THAT IT WAS FOR CANADIAN POLITICIANS TO DECIDE WHETHER THE CONVENTION SHOULD BE MODIFIED OR OVERRIDEN ON THIS OCCASION; IT WAS THEY, AND NOT BRITISH POLITICIANS, WHO WOULD BEAR RESPONSIBILITY FOR THEIR DECISION.

MRS THATCHER AND MR TRUDEAU ALSO DISCUSSED THE POSSIBLE TIMETABLE FOR HANDLING THESE MATTERS. MRS THATCHER SAID THAT ANY MEASURE APPROVED BY THE CANADIAN PARLIAMENT COULD NOT NOW BE INTRODUCED AT WESTMINSTER UNTIL THE NEW SESSION OF PARLIAMENT. MR TRUDEAU ACCEPTED THIS, AND ALSO ACCEPTED THAT IT WOULD BE FOR THE BRITISH GOVERNMENT TO DECIDE UPON THE TIMING OF THE INTRODUCTION AND PASSAGE OF ANY SUCH MEASURE IN PARLIAMENT, HAVING REGARD TO ITS OWN LEGISLATIVE PRIORITIES AND THE OTHER DEMANDS UPON PARLIAMENTARY TIME.

/ MRS THATCHER

MRS THATCHER AND MR TRUDEAU AGREED THAT THEY SHOULD
REMAIN IN TOUCH IN THESE MATTERS, AND REVIEW THE POSITION
ONCE MR TRUDEAU'S CONSULTATIONS IN CANADA WERE COMPLETED.

ENDS

CARRINGTON

CANADIAN CONSTITUTION LIMITED

NAD

CCD

P & CD

PCCU

PARLIAMENTARY UNIT

NEWS D

INFORMATION D

PS

PS/LPS

PS/MR LUCE

PS/MR HURD

PS/PUS

MR DAY

MR URE

LORD N G LENNOX

CABINET OFFICE

COPIES TO:

SIR I SINCLAIR

MR FREELAND

DR PARRY

} LEGAL ADVS.

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

OTWON 011/19

OO FCO

GRS 660

CONFIDENTIAL

FM OTTAWA 191900Z OCT 81

TO IMMEDIATE FCO

TELEGRAM NUMBER 569 OF 19 OCTOBER

CONSTITUTION

ADVANCE COPY

*Pl copy to Mr
Fruland
Dr Pany*

Ps

Ps LPS

Ps ~~Mr Lally~~

Ps Mr Luce

Ps Mr Hurd

Ps to Pol

Sir A Almond

Mr Day

Mr UNE

Mr (NA)

Mr (Mr)

AC

1. ALL TEN PROVINCIAL PREMIERS ARE MEETING TODAY IN MONTREAL AMID SPECULATION, FED BY LEAKS FROM SOME OF THEM, THAT THERE IS LITTLE PROSPECT OF A COMPROMISE PROPOSAL EMERGING FROM THE SESSION. I HOPE TO SEE TWO OF THEM, BUCHANAN OF NOVA SCOTIA AND AND PECKFORD OF NEWFOUNDLAND LATER IN THE WEEK SO I MAY BE ABLE TO GET FIRST-HAND ACCOUNTS FROM THEM.
2. OVER THE WEEKEND MR TRUDEAU WHO WILL BE AWAY AT CANCUN FROM WEDNESDAY UNTIL THE WEEKEND, GAVE INTERVIEWS CONFIRMING HIS INTENTION TO KEEP THE PRESSURE UP FOR EARLY ACTION. IN ANSWER TO ONE QUESTION HE SAID THAT THE INTRODUCTION OF THE BUDGET HAD BEEN DELAYED TO 3 NOVEMBER SO THAT THE CONSTITUTION COULD BE DISPOSED OF BY THE END OF OCTOBER. HE AGREED WHEN HIS INTERVIEWER SUGGESTED THAT THE END OF OCTOBER WAS A DEADLINE AND THAT IT WOULD GO TO THE UK WITH OR WITHOUT A DEAL THEN "IF THERE IS OBVIOUSLY NO AGREEMENT OR POSSIBILITY OF AGREEMENT WE WILL HAVE TO DO THE LEGAL THING". THIS QUALIFICATION HAS BEEN DOWNPLAYED BY THE MEDIA.
3. MR TRUDEAU ALSO SAID THAT HE THOUGHT COMPROMISE POSSIBLE BUT DID NOT AT THIS STAGE KNOW WHETHER IT WAS LIKELY. HE SAID THAT HE "WOULD BE VERY SURPRISED IF AT LEAST TWO OR THREE OF THEM OR FOUR OR FIVE WOULD NOT, IN THEIR HEARTS, PREFER TO BE ON THE SIDE OF PATRIATING THE CONSTITUTION".
4. IN ANOTHER INTERVIEW, MR TRUDEAU MAINTAINED THAT HE HAD OFFERED A COMPROMISE TO MR BENNETT, WHATEVER MR DAVIS HAD SAID FOLLOWING A SUBSEQUENT MEETING: HE ALSO CLAIMED THAT 80 PER CENT OF THE POPULATION (INCLUDING QUEBEC) WERE IN FAVOUR OF

AND FOLLOWING A SUBSEQUENT MEETING WITH THE
80 PER CENT OF THE POPULATION (INCLUDING QUEBEC) WERE IN FAVOUR OF
PATRIOTISM, THE ABILITY TO AMEND THE CONSTITUTION IN CANADA AND
THE CHARTER OF RIGHTS. HE CONCLUDED THE INTERVIEW WITH A BARBED
EXHORTATION TO THE PROVINCES: "ALORS, ESSAYONS, ENCORE UNE
FOIS DE NE PAS BRISER LES CONVENTIONS. ESSAYONS DE NOUS
ENTENDRE. MAIS, LEGALEMENT, LA COUR SUPREME A DIT - ET
MME THATCHER ME L'A DIT AUSSI - 'SI NOUS RECEVONS UN PROJET
QUI EST LEGAL, NOUS N'AURONS PAS DE CHOIX QUE DE LE PRESENTER
AU PARLEMENT BRITANNIQUE. ALORS, NOUS AURONS BIENTOT UNE CHARTE.,
SOIT PAR ENTENTE SOIT PAR LA GRACE DU PARLEMENT BRITANNIQUE".

5. MR CLARK SAID LAST WEEK WHEN THE BUDGET DATE WAS SET THAT HE
WOULD REGRET IT VERY MUCH IF THE GOVERNMENT OF CANADA SET UP AN
ARTIFICIAL DEADLINE TO TRY TO ABORT IN ADVANCE THE CONSTITUTIONAL
DISCUSSIONS BY THE 11 FIRST MINISTERS. FOR HIS PART MR BROADBENT,
LEADER OF THE NDP, SUGGESTED ON SATURDAY THAT THERE SEEMS TO
BE A POSSIBILITY THAT SOME OF THE DISSIDENT PROVINCES MIGHT BE
PERSUADED TO SWITCH SIDES.

6. THE MINISTER OF JUSTICE, CHRETIEN, HAS SPOKEN IN, FOR HIM,
CONCILIATORY TERMS ON TELEVISION SUGGESTING THAT THE GOVERNMENT WOULD
BE PREPARED TO BE FLEXIBLE ON THE AMENDING FORMULA BUT WOULD ONLY
MAKE MINOR MODIFICATIONS TO THE CHARTER.

7. HATFIELD OF NEW BRUNSWICK SAID AFTER SEEING TRUDEAU THAT
HE HAD ADVISED THE PRIME MINISTER TO PUSH AHEAD UNLESS HE CAN
GET UNANIMOUS AGREEMENT FROM THE PROVINCES. HE SAID THAT NOT ONLY
IS THERE NO COMPROMISE ON THE TABLE, "THERE IS NO TABLE".
HE SAID HE WOULD NOT HIMSELF RETURN TO LONDON TO LOBBY, "I
COULD NOT FEEL COMFORTABLE ARGUING IN ANOTHER COUNTRY FOR WHAT
I BELIEVE THIS COUNTRY HAS THE RIGHT TO DO.... I THINK THE EFFORT
MUST BE HERE IN CANADA." IN QUEBEC CLAUDE MORIN CLAIMED THAT
TRUDEAU HADN'T BUDGED AN INCH ON FUNDAMENTAL POINTS.

8. DAVIS OF ONTARIO WAS VERY MUCH ON THE DEFENSIVE IN
ADDRESSING SOME OF HIS SUPPORTERS WHO OBVIOUSLY FAILED TO UNDERSTAND
WHY AS A CONSERVATIVE HE CONTINUES TO SUPPORT TRUDEAU WHEN THE
FEDERAL CONSERVATIVE PARTY IS BITTERLY OPPOSED TO HIM. HE CLAIMED
TO HAVE HIMSELF PROPOSED THE SECTION IN THE CHARTER WHICH ALLOWS
ALL CANADIANS TO MOVE AND WORK ANYWHERE IN CANADA. ONTARIO HAS
OFFERED TO RELINQUISH ITS VETO ON THE AMENDING FORMULA IF OTHERS
RELINQUISH THEIRS (BUT OF COURSE QUEBEC WOULD NOT AGREE) AND TO
ACCEPT SUBSTANTIAL CHANGES IN THE CHARTER IF THAT WOULD PRODUCE



Foreign and Commonwealth Office

London SW1A 2AH

20 October 1981

010

Dear David,

for
V. Hunt

THE CANADIAN CONSTITUTION

As you know from our conversations today, we think it would be useful if Sir Robert could have a word on the telephone this afternoon with Mr Pitfield. This conversation would act as a link between the discussions in Melbourne and a possible further exchange between the Prime Minister and Mr Trudeau at Cancun (you will be receiving separately a copy of a letter we are sending to No 10).

I think there are three points which Sir Robert might make. His entrée would be to allude to the Prime Minister's promise to Mr Trudeau that she would think about the question of whether the Federal Government should follow the example of the Provincial Governments by lobbying in this country, and let him know (paragraph 13 of Melbourne telegram no 89 of 6 October, attached). On this, Sir Robert could say that our view is that it would not be appropriate for the Federal Government to lobby in this country at least until the patriation request reaches the UK. He could add that we would like to remain in touch with the Canadians about the desirability of Federal lobbying thereafter.

Secondly, Sir Robert could suggest that since returning to the UK he has been impressed by the degree of opposition to the Federal package in Parliament and elsewhere following the Supreme Court judgment. He could express anxiety about the possibility of failure in the UK Parliament.

/In this

David Wright Esq
Private Secretary to the Secretary
to the Cabinet
Cabinet Office
Whitehall
London SW1



In this connection, Sir Robert could lastly emphasise that a greater degree of Provincial agreement in Canada could make a crucial difference to parliamentary opinion here. Mr Trudeau had spoken of compromise; any compromise which brought the agreement of extra Provinces would pay real dividends at this end also.

I am copying this letter to Willie Rickett (No 10), David Heyhoe (Lord President's Office), and to Jim Buckley (Chancellor of the Duchy's Office).

Yours ever
Stephen Gomersall

S J Gomersall
Private Secretary to the
Lord Privy Seal

EPS 202Y
CONFIDENTIAL

CONFIDENTIAL

FROM UKDEL MELBOURNE 060540Z OCT 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 89 OF 6 OCT
INFO SAVING OTTAWA.

CANADIAN CONSTITUTION.

THE PRIME MINISTER AND MR TRUDEAU MET TO TAKE STOCK OF THE LATEST POSITION ON THIS MATTER AT THE RESIDENCE OF H M CONSUL GENERAL IN MELBOURNE ON MONDAY 5 OCTOBER 1981 AT 2.45 PM. THE PRIME MINISTER WAS ACCOMPANIED BY SIR ROBERT ARMSTRONG AND MR TRUDEAU BY MR MICHAEL PITFIELD.

2. THE PRIME MINISTER SAID THAT SHE HAD NOT HAD AN OPPORTUNITY OF READING THE JUDGMENT OF THE SUPREME COURT OF CANADA, BUT SHE UNDERSTOOD THAT THE COURT HAD RULED, BY A MAJORITY, THAT THE CANADIAN GOVERNMENT'S PROPOSALS WERE NOT ILLEGAL BUT WERE NOT IN ACCORDANCE WITH THE CONSTITUTIONAL CONVENTION WHICH REQUIRED PROVINCIAL CONSENT FOR MEASURES WHICH AFFECTED THE RELATIONSHIP BETWEEN FEDERAL AND PROVINCIAL GOVERNMENTS IN CANADA. THIS WAS LIKELY TO ENCOURAGE SOME OF HER SUPPORTERS TO PERSIST IN THEIR OPPOSITION TO WHAT WAS PROPOSED, IF AND WHEN A MEASURE CAME BEFORE THE HOUSE OF COMMONS. THE GOVERNMENT WOULD DO WHAT THEY WERE ASKED BY THE CANADIAN GOVERNMENT AND PARLIAMENT TO DO, AND THEIR OBJECT WOULD BE TO GET THE MEASURE THROUGH WITH THE GREATEST POSSIBLE DEGREE OF SUPPORT.

3. MR TRUDEAU SAID THAT HE COULD NOT ASK FOR MORE THAN THAT. HE ACKNOWLEDGED THE DIFFICULTIES WHICH THE PRIME MINISTER AND HER COLLEAGUES WOULD FACE AT WESTMINSTER, AND HE WOULD LIKE TO DO ANYTHING HE COULD TO MAKE IT EASIER FOR THEM. HE WAS GOING TO HAVE ONE MORE ROUND OF CONSULTATIONS WITH THE SPOKESMAN FOR THE PROVINCIAL PREMIERS. HE HAD TO SAY THAT THERE WAS NOT MUCH CHANCE OF A COMPROMISE. THE PROVINCIAL PREMIERS WHO ARE OPPOSED TO THE GOVERNMENT'S PROPOSALS HAD ALWAYS SAID THAT, EVEN IF THEY LOST THE LEGAL ISSUE, THEY WOULD CONTINUE THE POLITICAL FIGHT. THE SUPREME COURT'S RULING ON THE CONSTITUTIONAL CONVENTION HAD GIVEN THEM NEW AMMUNITION. IT WAS FOR THE CANADIAN GOVERNMENT AND PARLIAMENT TO DECIDE WHETHER TO CHANGE OR OVERRIDE THE CONVENTION, AS PROPOSED, AND THEY WOULD HAVE TO TAKE THE CONSEQUENCES POLITICALLY. IT WAS ALL RATHER UNSATISFACTORY, BECAUSE THOSE WHO SAID THAT THERE WAS A CONSTITUTIONAL CONVENTION WERE UNABLE TO DEFINE IT PRECISELY. DELAY IN DEALING WITH THE MATTER FROM NOW ON COULD ONLY HURT BOTH GOVERNMENTS AND ANGLO-CANADIAN RELATIONS.

CONFIDENTIAL

14. THE

4. THE PRIME MINISTER SAID THAT, BEHIND ALL THE LEGAL AND CONSTITUTIONAL ARGUMENTS, THE POLITICAL REALITIES WERE THAT THE TWO PRIME MINISTERS AND GOVERNMENTS WERE DIRECTLY ELECTED BY AND RESPONSIBLE TO THEIR ELECTORATES, AND THAT IT WAS VERY IMPORTANT TO PRESERVE CLOSE AND FRIENDLY ANGLO-CANADIAN RELATIONS. HOW IT WAS HANDLED IN PARLIAMENT IN THE NEW SESSION WOULD DEPEND PARTLY ON PROGRESS IN CANADA AND PARTLY ON HOW THE BRITISH GOVERNMENT GOT ON WITH ITS OWN PROGRESS. MR TRUDEAU SAID THAT HE WAS ENTIRELY CONTENT TO RELY ON THE PRIME MINISTER'S DECISIONS ON TIMING AND PROCEDURE AT WESTMINSTER, IN THE SAME WAY AS SHE HAD TAKEN THE VIEW THAT INTERNAL AFFAIRS IN CANADA WERE NOT FOR THE BRITISH GOVERNMENT TO DEAL WITH. HE WOULD ONLY MAKE THE POINT, ON TIMING, THAT TIME COULD ONLY PLAY AGAINST HIMSELF AND THE PRIME MINISTER, IN TERMS OF ANGLO-CANADIAN RELATIONS. THE LONGER THINGS DRAGGED ON, THE MORE BRITISH MEMBERS OF PARLIAMENT WOULD VISIT CANADA AND THE MORE PROVINCIAL PREMIERS WOULD VISIT THE UNITED KINGDOM. AT SOME POINT HE WOULD HAVE TO TELL CANADIANS NOT TO LISTEN TO BRITISH BACKBENCHERS. AT SOME STAGE THE PRIME MINISTER MIGHT NEED TO SAY TO PROVINCIAL PREMIERS THAT SHE COULD NOT IN LAW TAKE COGNIZANCE OF THEIR ARGUMENTS.

5. MR TRUDEAU WENT ON TO SAY THAT MR LEVESQUE, THE PREMIER OF QUEBEC, WAS INTENT ON STIRRING UP TROUBLE. IF THERE HAD TO BE A FIGHT WITH QUEBEC, HIS OWN JUDGMENT WAS THAT THAT FIGHT WOULD BE BEST FOUGHT NOW THAN LATER. HE WOULD, THEREFORE, KEEP UP THE PRESSURE. IT WAS BETTER TO HAVE THE FIGHT NOW, WHEN THE MAJORITY OF CANADIANS SUPPORTED THE SUBSTANCE OF THE FEDERAL GOVERNMENT'S PROPOSALS, IF NOT THE METHOD OF PUTTING THEM INTO EFFECT; POLLS SHOWED THAT 70 TO 80 PER CENT OF THE PEOPLE IN EVERY PROVINCE WERE IN FAVOUR OF PATRIATION OF THE CONSTITUTION AND OF A BILL OF RIGHTS; BUT THERE WAS A MAJORITY AGAINST THE METHOD WHICH THE FEDERAL GOVERNMENT HAD CHOSEN TO ADOPT.

6. THE PRIME MINISTER ASKED HOW FAR THE CANADIAN PEOPLE WERE AGAINST THE PROPOSED BILL OF RIGHTS.

7. MR TRUDEAU SAID THAT 80 PER CENT OF THE PEOPLE WERE FOR IT. THE SUPREME COURT HAD NOT DISTINGUISHED BETWEEN PATRIATION AND THE BILL OF RIGHTS IN THEIR JUDGMENT. THE PROVINCES HAD NOT DARED TO CHALLENGE THE BILL OF RIGHTS ON SUBSTANCE BUT THEY WERE USING IT AS A WEAPON IN THEIR FIGHT AGAINST FEDERALISM. THIS WAS MISGUIDED; THE PROPOSED BILL OF RIGHTS WOULD REDUCE THE POWERS OF GOVERNMENT AT BOTH FEDERAL AND PROVINCIAL LEVEL. THE FEDERAL GOVERNMENT WAS PREPARED TO CONTEMPLATE SOME WEAKENING OR NARROWING OF THE PROPOSALS ON THE BILL OF RIGHTS, IF THAT WOULD HELP TO REDUCE THE OPPOSITION OF THE PROVINCIAL GOVERNMENTS. THAT WOULD BE A MATTER FOR NEGOTIATION. BUT MR LEVESQUE AND PROBABLY MR LYON WOULD SAY THAT THERE WAS NOTHING DOING, AND IT WAS PROBABLE THAT THE SPOKESMAN FOR THE PROVINCIAL PREMIERS (MR BENNETT OF BRITISH COLUMBIA) WOULD HAVE TO REPORT THAT THERE WAS NO CONSENSUS.

2
CONFIDENTIAL

18. THE PRIME

8. THE PRIME MINISTER ASKED WHEN THE CANADIAN GOVERNMENT PROPOSED TO INTRODUCE THE RESOLUTION IN THE CANADIAN PARLIAMENT.
9. MR TRUDEAU SAID THAT PRESENT PLANS WERE TO INTRODUCE IT ON 14 OCTOBER, BUT THAT IT MIGHT WELL BE A LITTLE LATER, DEPENDING ON NEGOTIATIONS WITH THE PROVINCIAL PREMIERS. THE DEBATE COULD LAST ONLY TWO DAYS IN THE HOUSE OF COMMONS, AND TWO IN THE SENATE: ONE OF THE DAYS IN THE SENATE COULD OVERLAP WITH THE SECOND DAY IN THE HOUSE OF COMMONS. AFTER THAT, THE RESOLUTION AND DRAFT BILL WOULD BE SENT TO LONDON.
10. THE PRIME MINISTER SAID THAT THE BRITISH GOVERNMENT WOULD WANT TO DEAL WITH IT AS SOON AS THEY COULD, AND TO DEAL WITH IT EFFECTIVELY.
11. THE PRIME MINISTER AND MR TRUDEAU SAID THAT THEY WERE CONTENT WITH THE DRAFT GUIDANCE FOR PRESS SPOKESMEN WHICH HAD BEEN PREPARED BY SIR ROBERT ARMSTRONG AND MR MICHAEL PITFIELD IN ADVANCE OF THEIR MEETING (SEE MY TEL 72).
12. THE PRIME MINISTER SAID THAT THE SPOKESMEN SHOULD ALSO MAKE IT CLEAR THAT THERE WAS AGREEMENT BETWEEN THE TWO PRIME MINISTERS ABOUT DEALING WITH THIS MATTER AS SOON AS IT COULD BE DEALT WITH, AND ABOUT THE IMPORTANCE FOR CLOSE AND FRIENDLY ANGLO-CANADIAN RELATIONS OF DOING SO.
13. MR TRUDEAU SAID THAT AT LUNCH MR IAN BOW HAD SAID TO HIM THAT ONE OF THE DIFFICULTIES WAS THAT THE FEDERAL GOVERNMENT HAD NOT BEEN LOBBYING IN LONDON AS THE PROVINCIAL GOVERNMENTS HAD BEEN. THEY HAD FELT INHIBITED FROM GOING OVER TO THE ATTACK WHILE THE ISSUE WAS BEFORE THE SUPREME COURT. HE ASKED FOR THE PRIME MINISTER'S ADVICE AS TO WHETHER THEY SHOULD DO SO NOW. THE PRIME MINISTER SAID SHE WOULD LIKE TO THINK ABOUT THAT AND LET MR TRUDEAU KNOW. AS FOR THE BRITISH GOVERNMENT, THE FIRST TASK WOULD BE TO REVISE THE DRAFT REPLY TO THE REPORT BY THE SELECT COMMITTEE ON FOREIGN AFFAIRS. SHE WOULD BE LOOKING CAREFULLY AT THAT ON HER RETURN TO LONDON. SHE WOULD HOPE TO KEEP IN CLOSE TOUCH WITH MR TRUDEAU THROUGH SIR ROBERT ARMSTRONG AND MR PITFIELD, AS SOON AS MR TRUDEAU'S CONSULTATIONS WITH THE SPOKESMAN OF THE PROVINCIAL PREMIERS WERE COMPLETED.
14. MR TRUDEAU SUGGESTED THAT THE PRIME MINISTER MIGHT LIKE TO HAVE IN THE BACK OF HER MIND THE POSSIBILITY OF COMPLETING THE PROPOSED BILL BY 11 DECEMBER 1981, WHICH WAS THE 50TH ANNIVERSARY OF THE STATUTE OF WESTMINSTER. SIR ROBERT ARMSTRONG RECALLED THAT IT WOULD BE IMPOSSIBLE TO INTRODUCE THE BILL EARLIER THAN 16 NOVEMBER, AND IT MIGHT, THEREFORE, BE EXTREMELY DIFFICULT TO TAKE THE BILL THROUGH ALL ITS STAGES BY 11 DECEMBER.

3
CONFIDENTIAL

115. THE

~~CONFIDENTIAL~~

15. THE PRIME MINISTER ACKNOWLEDGED THE DIFFICULTY, BUT AGREED THAT SHE WOULD KEEP THE DATE AT THE BACK OF HER MIND. MR TRUDEAU SAID THAT, WHEN ONE WAS GOING TO DO SOMETHING THAT WAS RIGHT, THERE WAS NOTHING TO BE GAINED BY PROCRASTINATION. THE FIGHT COULD NOT GET WORSE AND, THEREFORE, IT HAD BETTER BE BROUGHT TO A CONCLUSION. CANADA HAD POURED DECADES OF MENTAL AND PHYSICAL ENERGY INTO THIS QUESTION, WHICH HAD BEEN UNDER CONSIDERATION FOR 54 YEARS. THE TIME HAD COME TO GET IT BEHIND THEM, SO AS TO LIBERATE THE ENERGIES OF CANADA TO MAKE THE MOST OF ITS POTENTIALS FOR THE FUTURE.

16. THE MEETING CONCLUDED AT 3.20 PM.

FCO PLEASE PASS SAVING TO OTTAWA, AND SEND ADVANCE COPIES TO PRIVATE SECRETARIES TO PRIME MINISTER, HOME SECRETARY, LORD CHANCELLOR, LORD PRESIDENT, LORD PRIVY SEAL, CHANCELLOR OF THE DUCHY OF LANCASTER, CHIEF WHIP AND THE ATTORNEY GENERAL.

CARRINGTON

[ADVANCED AS REQUESTED]

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/IPS
PS/MR RIDLEY
PS/MR LUCE
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO
ADVANCE ADDRESSEES ABOVE

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

~~CONFIDENTIAL~~

WONFC 058/20

OO KCO

GRS 240

RESTRICTED

FM OTTAWA 202117Z OCT 81

TO IMMEDIATE FCO

TELEGRAM NUMBER 574 OF 20 OCTOBER

Ps
 Ps LPS
 Ps no huc
 Ps on WAG
 Ps to LVS
 Mr Day
 Mr VNE
 Mr NAG
 Mr CCI
 No to Mr KC

CONSTITUTION

1. THE PROVINCIAL PREMIERS MET IN MONTREAL YESTERDAY AND TODAY. AT THE END OF YESTERDAY'S SESSION THE EIGHT DISSENTING PREMIERS ISSUED A COMMUNIQUE PROPOSING A MEETING OF MINISTERS RESPONSIBLE FOR CONSTITUTIONAL AFFAIRS IN THE WEEK BEGINNING 26 OCTOBER AND A FEDERAL/PROVINCIAL FIRST MINISTERS MEETING IN THE FIRST WEEK OF NOVEMBER (IE A WEEK LATER THAN PROPOSED BY MR TRUDEAU). MR DAVIS OF ONTARIO AND MR HATFIELD OF NEW BRUNSWICK WHO ATTENDED SOME BUT NOT ALL OF YESTERDAY'S SESSION (AND NONE OF TODAY'S) CONFIRMED TODAY THAT THEY SUPPORTED THE PROPOSAL FOR A MEETING IN NOVEMBER.
2. MR BENNETT COMMENTED TODAY THAT THE 8 PREMIERS WERE CONFIDENT AND HOPEFUL THAT A RESOLUTION OF THE CONSTITUTIONAL DEBATE IN A POSITIVE AND CONSTITUTIONAL WAY. HE SAID THAT DISCUSSION OF SUBSTANCE WOULD HAVE TO WAIT FOR A FEDERAL/PROVINCIAL FIRST MINISTERS MEETING.
3. FOLLOWING A CABINET MEETING THIS MORNING, M. CHRETIEN SAID THAT MR TRUDEAU WOULD BE REPLYING TO THE PREMIERS PROPOSAL TODAY BY TELEGRAM.
4. IN A RADIO INTERVIEW TODAY MR HATFIELD WAS HIGHLY EMOTIONAL AND OCCASIONALLY INCOHERENT. HE CLAIMED TO HAVE BEEN SHAKEN THAT THE 8 PREMIERS HAD NOT WISHED TO HAVE ANYTHING TO DO WITH HIM. HE SAID THE BATTLE WAS ON TO WIN MORE POWER FOR THE PROVINCES AND "TO WEAKEN THE STRONG CENTRAL GOVERNMENT". M. LEVESQUE FOR HIS PART SAID THAT QUEBEC HAD MADE NO COMPROMISES AT THE MONTREAL MEETING AND THAT HIS GOVERNMENT'S POSITION WAS THAT OF THE JOINT PROVINCIAL CONSTITUTIONAL ACCORD OF 16 APRIL.

MORAN

NNNN

AAAAAAAAA

IMMEDIATE

OTWON 011/19

ADVANCE COPY

OO FCO

GRS 660

CONFIDENTIAL

FM OTTAWA 191900Z OCT 81

TO IMMEDIATE FCO

TELEGRAM NUMBER 569 OF 19 OCTOBER

Ps
 Ps LPS
~~Ps Mr. [unclear]~~
 Ps Mr. [unclear] H. H. NAD
 Ps Mr. [unclear]
 Ps to [unclear] H. H. [unclear]
 Sir A. [unclear]
 Mr. [unclear]
 Mr. [unclear]

CONSTITUTION

1. ALL TEN PROVINCIAL PREMIERS ARE MEETING TODAY IN MONTREAL AMID SPECULATION, FED BY LEAKS FROM SOME OF THEM, THAT THERE IS LITTLE PROSPECT OF A COMPROMISE PROPOSAL EMERGING FROM THE SESSION. I HOPE TO SEE TWO OF THEM, BUCHANAN OF NOVA SCOTIA AND AND PECKFORD OF NEWFOUNDLAND LATER IN THE WEEK SO I MAY BE ABLE TO GET FIRST-HAND ACCOUNTS FROM THEM.

2. OVER THE WEEKEND MR TRUDEAU WHO WILL BE AWAY AT CANCUN FROM WEDNESDAY UNTIL THE WEEKEND, GAVE INTERVIEWS CONFIRMING HIS INTENTION TO KEEP THE PRESSURE UP FOR EARLY ACTION. IN ANSWER TO ONE QUESTION HE SAID THAT THE INTRODUCTION OF THE BUDGET HAD BEEN DELAYED TO 3 NOVEMBER SO THAT THE CONSTITUTION COULD BE DISPOSED OF BY THE END OF OCTOBER. HE AGREED WHEN HIS INTERVIEWER SUGGESTED THAT THE END OF OCTOBER WAS A DEADLINE AND THAT IT WOULD GO TO THE UK WITH OR WITHOUT A DEAL THEN "IF THERE IS OBVIOUSLY NO AGREEMENT OR POSSIBILITY OF AGREEMENT WE WILL HAVE TO DO THE LEGAL THING". THIS QUALIFICATION HAS BEEN DOWNPLAYED BY THE MEDIA.

3. MR TRUDEAU ALSO SAID THAT HE THOUGHT COMPROMISE POSSIBLE BUT DID NOT AT THIS STAGE KNOW WHETHER IT WAS LIKELY. HE SAID THAT HE "WOULD BE VERY SURPRISED IF AT LEAST TWO OR THREE OF THEM OR FOUR OR FIVE WOULD NOT, IN THEIR HEARTS, PREFER TO BE ON THE SIDE OF PATRIATING THE CONSTITUTION".

4. IN ANOTHER INTERVIEW, MR TRUDEAU MAINTAINED THAT HE HAD OFFERED A COMPROMISE TO MR BENNETT, WHATEVER MR DAVIS HAD SAID FOLLOWING A SUBSEQUENT MEETING: HE ALSO CLAIMED THAT 80 PER CENT OF THE POPULATION (INCLUDING QUEBEC) WERE IN FAVOUR OF

SAID FOLLOWING A SUBSEQUENT MEETING, HE ALSO CLAIMED THAT 80 PER CENT OF THE POPULATION (INCLUDING QUEBEC) WERE IN FAVOUR OF PATRIATION, THE ABILITY TO AMEND THE CONSTITUTION IN CANADA AND THE CHARTER OF RIGHTS. HE CONCLUDED THE INTERVIEW WITH A BARBED EXHORTATION TO THE PROVINCES: "ALORS, ESSAYONS, ENCORE UNE FOIS DE NE PAS BRISER LES CONVENTIONS. ESSAYONS DE NOUS ENTENDRE. MAIS, LEGALEMENT, LA COUR SUPREME A DIT - ET MME THATCHER ME L'A DIT AUSSI--: 'SI NOUS RECEVONS UN PROJET QUI EST LEGAL, NOUS N'AURONS PAS DE CHOIX QUE DE LE PRESENTER AU PARLEMENT BRITANNIQUE. ALORS, NOUS AURONS BIENTOT UNE CHARTE., SOIT PAR ENTENTE SOIT PAR LA GRACE DU PARLEMENT BRITANNIQUE".

5. MR CLARK SAID LAST WEEK WHEN THE BUDGET DATE WAS SET THAT HE WOULD REGRET IT VERY MUCH IF THE GOVERNMENT OF CANADA SET UP AN ARTIFICIAL DEADLINE TO TRY TO ABORT IN ADVANCE THE CONSTITUTIONAL DISCUSSIONS BY THE 11 FIRST MINISTERS. FOR HIS PART MR BROADBENT, LEADER OF THE NDP, SUGGESTED ON SATURDAY THAT THERE SEEMS TO BE A POSSIBILITY THAT SOME OF THE DISSIDENT PROVINCES MIGHT BE PERSUADED TO SWITCH SIDES.

6. THE MINISTER OF JUSTICE, CHRETIEN, HAS SPOKEN IN, FOR HIM, CONCILIATORY TERMS ON TELEVISION SUGGESTING THAT THE GOVERNMENT WOULD BE PREPARED TO BE FLEXIBLE ON THE AMENDING FORMULA BUT WOULD ONLY MAKE MINOR MODIFICATIONS TO THE CHARTER.

7. HATFIELD OF NEW BRUNSWICK SAID AFTER SEEING TRUDEAU THAT HE HAD ADVISED THE PRIME MINISTER TO PUSH AHEAD UNLESS HE CAN GET UNANIMOUS AGREEMENT FROM THE PROVINCES. HE SAID THAT NOT ONLY IS THERE NO COMPROMISE ON THE TABLE, "THERE IS NO TABLE". HE SAID HE WOULD NOT HIMSELF RETURN TO LONDON TO LOBBY, "I COULD NOT FEEL COMFORTABLE ARGUING IN ANOTHER COUNTRY FOR WHAT I BELIEVE THIS COUNTRY HAS THE RIGHT TO DO..... I THINK THE EFFORT MUST BE HERE IN CANADA." IN QUEBEC CLAUDE MORIN CLAIMED THAT TRUDEAU HADN'T BUDGED AN INCH ON FUNDAMENTAL POINTS.

8. DAVIS OF ONTARIO WAS VERY MUCH ON THE DEFENSIVE IN ADDRESSING SOME OF HIS SUPPORTERS WHO OBVIOUSLY FAILED TO UNDERSTAND WHY AS A CONSERVATIVE HE CONTINUES TO SUPPORT TRUDEAU WHEN THE FEDERAL CONSERVATIVE PARTY IS BITTERLY OPPOSED TO HIM. HE CLAIMED TO HAVE HIMSELF PROPOSED THE SECTION IN THE CHARTER WHICH ALLOWS ALL CANADIANS TO MOVE AND WORK ANYWHERE IN CANADA. ONTARIO HAS OFFERED TO RELINQUISH ITS VETO ON THE AMENDING FORMULA IF OTHERS RELINQUISH THEIRS (BUT OF COURSE QUEBEC WOULD NOT AGREE) AND TO ACCEPT SUBSTANTIAL CHANGES IN THE CHARTER IF THAT WOULD PRODUCE A CHANGE IN HEART IN THREE OR FOUR OTHER PROVINCES.

MORAN



Foreign and Commonwealth Office

London SW1A 2AH

18 October 1981

Dear Henry,

CANADIAN CONSTITUTION: REPLY TO THE FOREIGN AFFAIRS COMMITTEE

... We have now prepared the attached revision of our draft which takes into account the Supreme Court judgment of 28 September.

We are admittedly in two minds about circulating a revised draft at this stage. At least publicly Mr Trudeau is showing some signs of compromise with the Provinces. If his talks with the dissident Provincial Premiers, now evidently postponed to 26 October at the earliest, result in alterations of substance to the existing Canada Bill and a greater degree of provincial support, further changes in our draft will be needed. All the same, we need to guard against the possibility of the need to publish at comparatively short notice and we therefore thought it worthwhile to circulate the paper at this stage.

On timing, our view remains that it would be wrong for us to publish our reply to the FAC before the Canadian Parliament has finished debating the matter. Such debate will of course have to follow Mr Trudeau's meeting with the Premiers and it therefore looks increasingly unlikely that we shall want to publish prior to the opening of the new session of Parliament on 4 November. The reason for our view on publication is not only the changing situation in Canada but also the fact that the publication of our paper, which in effect supports Mr Trudeau's position, might encourage him in intransigence with the Provinces. The Lord Privy Seal is keeping in touch with Sir A Kershaw over the delay in publication and his attitude has been understanding.

The revised draft has not yet been fully cleared at Ministerial level in the FCO. I would however be grateful for any comments which you or copy recipients may have. Given the uncertainties, I naturally leave it to you whether your Ministers should be consulted at this stage.

H Steel Esq
Law Officer's Department
Attorney-General's Chambers
Royal Courts of Justice
Strand

/I



I am sending copies to Michael Collon in the Lord Chancellor's Office, Jim Buckley in the Lord President's Office and David Heyhoe in the Office of the Chancellor of the Duchy of Lancaster. Also, for information, to Michael Alexander at No. 10 and Roger Facer in the Cabinet Office.

Yours ever
Stephen Gomersall.

S J Gomersall
PS/Lord Privy Seal

GOVERNMENT OBSERVATIONS ON THE FAC REPORT

"BRITISH NORTH AMERICA ACTS: THE ROLE OF PARLIAMENT"

Introduction

1. The British North America Act 1867 is the basic Canadian constitutional instrument. That Act was an Act of the United Kingdom Parliament. It can in certain important respects be amended only by Act of the United Kingdom Parliament. It has been so amended some 14 times. This anomalous situation whereby particular provisions of the constitution of one sovereign nation can be amended only by the legislature of another sovereign nation is preserved by section 7(1) of the Statute of Westminster 1931, under which Canada's complete independence was otherwise confirmed. The historical background is touched on in the Memorandum by the Foreign and Commonwealth Office to the Foreign Affairs Committee (147/79-80/FM; H.C. 42 II p.2) and generally in the Report of the Foreign Affairs Committee itself.

2. The proposals which may shortly be transmitted by the Canadian Federal Parliament would request that a Bill be laid before the United Kingdom Parliament which would essentially do two things. It would amend the Canadian Constitution in a number of respects, notably by providing for a Canadian Charter of Rights and Freedoms. Further, it would terminate the remaining responsibility of the United Kingdom Parliament in connection with amendment of the Canadian Constitution and confer the relevant powers of amendment on Canadian institutions, thereby (to use the term which has gained a wide currency) "patriating" the Canadian Constitution.

3. These Canadian proposals have provoked extensive public discussion in Canada and the United Kingdom. The Government welcome the Report of the Foreign Affairs Committee as making a significant contribution to this debate.

4. The Government note that in accordance with the mandate which the Foreign Affairs Committee gave itself, the Report of the Committee concentrates on the role of the United Kingdom Parliament in relation to the British North America Acts and accordingly deals from the UK Parliamentary angle with the constitutional history, with precedent and with legal propriety. It contains valuable material bearing on these aspects; and it clearly shows that there is room for debate among legal and constitutional experts about some of them. That genuine differences of opinion may be held about the inferences to be drawn from an examination of constitutional history and precedent is confirmed by the recent litigation in the Canadian courts bearing directly on whether, and if so to what extent, Provincial concurrence is required in the making by the Federal Parliament of a request for constitutional amendment (see paragraphs 11 to 18 below). The Government acknowledge the importance of the matters dealt with by the Committee in its Report. In the Observations that follow, the Government will comment on some of these matters, particularly in the light of developments that have occurred since the Committee published its Report. The Government will in addition draw attention to certain broader considerations which, in their view, are crucial to an overall examination of the issue. In preparing these Observations the Government have also taken into account the additional material contained in the Committee's Supplementary Report.

/The Committee's

The Committee's Conclusions

5. These Observations are directed primarily to the Committee's Conclusions as presented at pages xi to xiii of its Report. The Government find no difficulty in principle with Conclusions 1 to 3, while not necessarily accepting in detail the reasoning on which they are based. The Government fully accept Conclusions 7 and 11(i) to (v). Conclusion 12 relating to the existence of litigation in Canadian courts no longer falls to be considered in terms now that a series of Provincial cases has been dealt with on appeal by the Supreme Court of Canada. But for reasons which will be developed in these Observations, they are unable similarly to endorse the remaining Conclusions.

Conclusions 11 and 7

6. The Government are in complete agreement with what they regard as the central conclusions of the Committee, namely Conclusions 11(ii), (iii) and (iv). The Government endorse Conclusion 11 (iii) that it would not be in accord with the established constitutional position to patriate the Canadian Constitution unilaterally, and Ministers have so stated in the House. Unilateral patriation could hardly be reconciled with the convention by which the United Kingdom Parliament acts only at the request and with the consent of Canada. Moreover, such patriation without provision of a formula for Canadian amendment of the British North America Acts would, as the Committee points out, deprive the Canadian people of any lawfully established means of amending their own Constitution and would accordingly leave the Canadian Parliament in an impossible situation: in the Committee's words, it would "amount to a gross interference in the internal affairs of Canada and a grave breach of relations between the United Kingdom and Canada" (paragraph 120 of the Report).

Conclusion 11(iv) that it would be similarly improper to enact a requested constitutional package with amendments not consented to by the Canadian Government and Parliament is founded on the same basis as Conclusion 11(iii) and the Government likewise agree with it: as the Report says (paragraph 122), "A partial package is a new package". The Government are in no doubt that unilateral action would be deeply resented in Canada.

7. The Government also endorse Conclusion 11(ii) that it would not be in accord with the established constitutional position for the United Kingdom Parliament to undertake any deliberation about the suitability for the peoples of Canada of a requested constitutional package.

8. The Government likewise accept Conclusion 7, that there is no rule, principle or convention that the United Kingdom Parliament, when requested to enact constitutional amendments directly affecting Canadian Federal-Provincial relations, should accede to that request only if it is concurred in by all the Provinces directly affected.

9. The Government also wish to record their agreement with the finding of the Committee, in its discussion of the considerations which led it to formulate Conclusion 7, that the objective of section 7(1) of the Statute of Westminster "... was simply to maintain the status quo in relation to constitutional amendments. We cannot see in that status quo ... any evidence of a requirement ... of unanimous consent [of the Provinces]" (paragraph 99 of the Report). Differing views can of course be taken on what was the nature of the status quo prior to the enactment of the Statute of Westminster. What seems clear, however, is that it has at no time been the practice of the United Kingdom Government or Parliament, in relation to requests for constitutional amendment either before or after the Statute of Westminster, to seek to apply some considered test or measure of the extent of Provincial concurrence.

Beyond saying that, the Government do not think it necessary for them to enter into a discussion of the existence or extent of Provincial concurrence in relation to particular past instances of amendment to the British North America Acts.

10. Accordingly, the Government concur in what they regard as being the combined effect of Conclusions 7 and 11, namely that the United Kingdom Parliament will not examine the suitability for Canada of constitutional amendments requested by the Federal Parliament and that, for the United Kingdom Parliament in its role as part of the process of Canadian constitutional amendment, there is no requirement that there should be agreement to such amendments by all the Provinces directly affected.

11. On the separate but closely related issue of whether there exists in Canada a constitutional convention or principle requiring unanimous Provincial concurrence to a request for constitutional amendments directly affecting Federal-Provincial relations, the Committee explicitly refrains from expressing any settled view (paragraph 98 of the Report). As the Committee points out, that issue was at the time of its Report among those pending before various Provincial Courts of Appeal in Canada.

12. Since then the Supreme Court has ruled on appeals from the Courts of Appeal of Manitoba, Quebec and Newfoundland. The judgment on each appeal is, with slight variations, to the same effect. The cases were fully argued at Provincial level. The arguments advanced at that level and the somewhat conflicting judgments of the Provincial Courts of Appeal were before the Supreme Court and there were also fresh pleadings. In addition to the Federal Government, all the Provincial Governments and the Four Nations Confederacy Inc were represented at the Supreme Court hearing. The judgment of the Supreme Court takes the form of two separate majority opinions (to which there are

separate minority dissenting opinions) on different aspects of the questions referred to it.

13. It is apparent throughout the majority opinions that the Court was at pains to make clear that it did not presume to pronounce upon the authority of the United Kingdom Parliament, or its practices and conventions, but was concerned only with the Canadian aspects.

14. In the first opinion the Court concluded by a 7-2 majority that the proposed patriation package would clearly affect Federal-Provincial relationships, but that whatever Canadian constitutional convention might say on the matter there was no rule of Canadian law requiring Provincial assent as a pre-condition for the Federal Parliament to request constitutional amendments affecting those relationships. Specifically, constitutional conventions are not law and are not enforced by the courts. Further, as a matter of Canadian law there is no provision in the British North America Act or in the Statute of Westminster for taking into account the "nature and character of Canadian federalism". "The law knows nothing of any requirement of Provincial consent, either to a resolution of the federal Houses or as a condition of the exercise of United Kingdom legislative power." (p.50).

15. The second majority opinion must be set in context. The central question here was whether there existed a constitutional convention requiring Provincial assent to constitutional amendments affecting Federal-Provincial relationships. The Court was prepared to consider this question on the basis that

"We are not asked to hold that a convention has in effect repealed a provision of the B.N.A. Act ... Nor are we asked to enforce a convention. We are asked to recognise if it exists." (p.16).

It had already disposed of questions relating to any applicable rules of law in the first majority opinion.

16. In the event the Court found in the second majority opinion that there was a constitutional convention as to Provincial assent, although it was not prepared to quantify the required level of assent, and that the passage of the proposed package by the Canadian Parliament without the agreement of the Provinces "would be unconstitutional in the conventional sense",

17. The relationship of this second majority opinion to the first is clarified by the stress which it places on the nature of the sanction in the event of non-observance of convention. As the Court stated "It is because the sanctions of convention rest with institutions of government other than courts, such as the Governor General or the Lieutenant-Governor, or the House of Parliament, or with public opinion and ultimately, with the electorate that it is generally said that they are political."

18. In short, the effect of the judgment of the Supreme Court taken as a whole appears to be that as a matter of Canadian law Provincial assent is not required. The second majority opinion recognised that there is a Canadian constitutional convention as to Provincial consent. But conventions are not law. The sanctions for non-observance lie at the political level. While the Government regard these opinions as declaratory of Canadian law and convention, the enforcement of Canadian convention is a matter for Canadians. The judgment has no effect on the exercise by the United Kingdom Parliament of its own legal powers or on the nature and scope of conventions applicable to the United Kingdom by virtue of its own practices or of intra-Commonwealth relations.

/Conclusions 4 to 6

Conclusions 4 to 6

19. These Conclusions refer to the need to take account of the federal character of Canada's constitutional system (Conclusion 4); assert that the United Kingdom Parliament is left free to decide whether the making of a particular request is so out of line with the established constitutional position that the request can rightly be rejected (Conclusion 5); and assert also that it would not be in accord with the established constitutional position to accept unconditionally the propriety of every request from the Canadian Parliament (Conclusion 6).

20. These Conclusions set the scene for Conclusions 8 to 10, of which more will be said below. They appear to proceed on the basis that such precedent as there is admits of the United Kingdom Government and Parliament measuring constitutional propriety against some objective indicator as to the nature of Canada's constitution. They also appear to involve reliance on a view that the federal nature of that constitution necessarily involves some requirement for Provincial concurrence in the making of requests by the Federal Parliament for constitutional amendments which directly or significantly "affect the federal structure". The Canadian Supreme Court has, in the view of the Government, dealt conclusively with whether there is any such legal requirement.

21. The approach adopted in these Conclusions seems to give insufficient weight to the fact that, whatever may have been the circumstances in which the various requests for amendments have been made throughout the years, there has been no instance where the United Kingdom has declined to act on the basis of a Canadian request or has purported to examine whether or to what extent there would be effects upon "the federal structure" and whether Provincial consent existed or was required. The repeated statements by Ministers of successive Governments that it would be in

accordance with precedent for the Government to introduce, and for Parliament to enact, legislation on the basis of a Canadian request have been statements of plain fact: in every one of the numerous cases where there has been a request from the Federal Parliament for amendment, the Government have introduced, and Parliament has enacted, legislation in accordance with it.

22. In view not only of the consistent line taken by Ministers since 1940, if not earlier, but also of what has happened in practice on the occasion of previous requests, the Government regard as too dismissive the evidence, quoted at length in paragraph 80 of the Report, to the effect that "the series of Ministerial statements in the British Parliament ... cannot therefore properly be regarded as providing a clear convention for action in the present case". While the Government accept that there is in the nature of things never an exact precedent for a particular constitutional amendment, the consistent practice has been to act in accordance with the request and consent of the Federal Parliament. The force of this consistent practice cannot be ignored. This does not mean the United Kingdom Parliament is under some legal obligation automatically to enact whatever Canadian proposals are put before it; but it does point overwhelmingly in the direction of acceding to a request for patriation which is known to be within the legal powers of the Canadian Parliament to make. Certainly for the United Kingdom Government and Parliament not to act on such a request would be entirely unprecedented.

Conclusions 8 to 10

23. It follows that the Government do not agree with the Committee's Conclusions 8 to 10 which conclude, broadly, that, irrespective of what may be the position in Canadian constitutional law and convention, it would be proper for the United Kingdom Parliament to decide that the request did not convey the clearly expressed wishes of Canada as a federally structured whole because it did not enjoy a sufficient level and distribution of Provincial concurrence. Indeed the Government do not find these Conclusions readily reconcilable with the Committee's own Conclusion 11. A number of points arise here.

24. In the first place, the Committee's view seems to be based on an assumption that section 7(1) of the Statute of Westminster in some way conferred a positive role; that is, a role as in some sense custodian for the wishes of Canada as a federally structured whole though not (see paragraph 104 of the Report) as a guardian or trustee for the Provinces themselves. Yet the Committee itself concludes that section 7 (1) merely preserved the status quo. The Government have already concurred in the Committee's conclusion that there is no legal requirement to obtain the agreement of all the Provinces directly affected to requested amendments of the Constitution. This point has been mentioned in paragraphs 8 to 10 above.

25. The Committee expresses the opinion that the United Kingdom Parliament has "a duty or responsibility to the Canadian people or community as a federally structured community" (paragraph 103) or, in the words of Conclusion 10, to "Canada as a federally structured whole". The Committee concludes, also in Conclusion 10, that it would be proper to test the level and distribution of Provincial concurrence against the "least demanding of the formulae which have been put forward by the Canadian authorities for a post-

patriation amendment ...''.

26. The Government consider that these Conclusions fail to take sufficiently into account more than fifty years of constitutional and political development and the realities of present day international relations.

27. Canada has been a sovereign and fully independent nation at least since the enactment of the Statute of Westminster. The Balfour Declaration, contained in the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926, said of relations between the United Kingdom and the Dominions that:

''They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or internal affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'' (Cmnd. 2768, p.14).

28. Relations with Canada are conducted at the diplomatic level exclusively with the Federal Government. Access by the Provinces to the Crown is exclusively through Her Majesty's Ministers in Canada. For very many years, all Canadian requests for constitutional amendments have been acted on by the United Kingdom exclusively at the request of the Federal Parliament. The Government are not persuaded that any of the earlier cases show that Provincial objections must be heeded. [To refuse now to give effect to a legally valid request from the Federal Parliament would cause grave offence. Canada is a key member of the Commonwealth and, beyond this, there are close links between Canada and the United Kingdom in the form of common membership of the NATO Alliance, of the OECD group of

/industrialised

industrialised countries and of many other international organisations. Canada is a valued member of the international community with special influence in the Third World. Much is therefore at stake; the repercussions of a rift over the constitutional issue between the United Kingdom and Canada could well spread beyond the bilateral relations between the two countries.

29. Apart from international relations, there is, however, another and probably more fundamental reason why the United Kingdom should not put in question a legally valid request from the Federal Parliament for constitutional amendment.] Canada is a parliamentary democracy which has common roots with our own. The Federal Parliament is not a body isolated from and unrepresentative of the Provinces and the Canadian peoples. It represents Canada as a whole and the peoples of Canada just as the United Kingdom Parliament represents the United Kingdom as a whole and the peoples of the United Kingdom. The Ministers of the Canadian Government are elected members of the Federal Parliament. It is to that Parliament and to that Parliament alone that they are answerable. The members of that Parliament are sensitive to Canadian sentiments and Canadian opinion. If the members of the Federal Parliament were to misread the wishes of the Canadian people, it is they who would be answerable to the Canadian electorate. It ^{would} be for that electorate to decide what significance to attribute to any departure from the constitutional convention identified by the Canadian Supreme Court.

30. The United Kingdom Parliament has no constituency in Canada. It is answerable to no electorate there. The United Kingdom
/Parliament

Parliament could therefore be expected to refrain even from the appearance of assuming a responsibility which belongs properly to the duly elected representatives of Canada, by whom the issues have been exhaustively considered, particularly when such a role would involve judgments of a kind that, in the circumstances of 1981, it is not in a position to make.

31. As to the suggestion in Conclusion 10 that the United Kingdom Parliament should concern itself with the sufficiency of the level and distribution of Provincial concurrence, if there is, as Conclusion 7 suggests, no requirement of concurrence by all the Provinces directly affected, this would mean that a line is to be drawn somewhere short of full concurrence. The Government consider that there is no defensible basis for the drawing of such a line by the United Kingdom. There is certainly no precedent for it doing so: and certainly no precedent for any particular degree of Provincial opposition being critical. The Committee, also in Conclusion 10, proposes as the test the least demanding of the formulae which have been put forward by the Canadian authorities for post-patriation amendment. For the United Kingdom to select and apply for this purpose a particular post-patriation amendment formula would, however, involve a substantial incursion into Canadian prerogatives. In any event, the Supreme Court of Canada in the recent judgment has found as a matter of Canadian law that there is no legal requirement in Canada as to Provincial concurrence in the making of a request by the Federal Parliament for the enactment of legislation embodying constitutional amendments affecting Federal-Provincial relations. The opinion of the Supreme Court of Canada on these constitutional issues should be

/regarded

regarded as decisive. There can surely be no doubt that the Canadian courts are better placed than is the United Kingdom Parliament to determine disputed questions of Canadian constitutional law and convention. The repercussions of the United Kingdom Parliament obstructing a considered request of the Canadian Government and Parliament, the legality of which has been upheld by the Canadian courts, by interposing a criterion of its own selection would be extremely serious.

Conclusions of the Government

32. Technically and as a matter of strict law, the powers of the United Kingdom Parliament are undoubtedly unfettered. But the realities of fifty years and more of post-Colonial development have to be recognised. The exercise of such powers as still remain in the hands of the United Kingdom Parliament under the Statute of Westminster depends on the request and consent of Canada, the necessary request and consent being, from the point of view of the United Kingdom Parliament, not of the Provincial governments or legislatures but of the Federal Parliament.

33. The Government therefore concur fully in the conclusion of the Committee that the United Kingdom Parliament should not unilaterally modify a Canadian request for constitutional amendment. But it is necessary to go further. It is the Federal Parliament which is empowered to act for Canada as a whole and, in the view of the Government, is the legislature which is the true and sole guardian of the interests of the Canadian people as a whole. The Government would not think it right to reject a request for constitutional amendment which on its face reflects the will of the duly elected representatives of that legislature and which is, in

/Canadian

Canadian constitutional law, a request which it is proper for the Federal Parliament to make. Rejection of such a request would imply that in some respects the United Kingdom still exercises constitutional control over Canada. This would not, in the view of the Government, be compatible with the full sovereignty and equal status of the two nations recognised by the Balfour Declaration and with the relationships between the two countries as they have developed since then. Nor would any departure from constitutional convention held to exist in Canada provide a justification for declining to apply our own conventions which have been established in terms of relationships among fellow members of the Commonwealth and on the basis of international comity.

The Committee's Recommendation

34. The Committee recommended (paragraph 15) that the Government should draw to the attention of the Government of Canada its view that the considerations set out in Chapters V to VIII of its Report supported the Committee's Conclusions; also that that view, together with the other considerations and conclusions in the Report, had been reported to the House. This recommendation was carried out at the Foreign and Commonwealth Office at a meeting between the Canadian High Commissioner and an Under-Secretary at the Foreign and Commonwealth Office on the date of publication of the Report, ie 30 January 1981.

CONFIDENTIAL

FM OTTAWA 162035Z OCT 81

TO PRIORITY FCO

TELEGRAM NUMBER 565 OF 16 OCTOBER

CANADIAN CONSTITUTION: CONTINGENCY PLANNING

1. JUST AT THE MOMENT IT IS IMPOSSIBLE TO SAY WHETHER MR TRUDEAU, BY MODIFYING HIS PACKAGE, CAN REGAIN THE SUPPORT OF THE NDP AND PERHAPS DETACH SOME PROVINCES FROM THE DISSENTING GROUP OF EIGHT. IF HE COULD DO THIS, IT WOULD GREATLY REDUCE OUR PROBLEMS. BUT THE ODDS ARE AGAINST IT. SO I THINK WE SHOULD CONTINUE TO PLAN ON THE REASONABLE ASSUMPTION THAT THE REQUEST IN SUBSTANTIALLY ITS PRESENT FORM, OPPOSED BY A MAJORITY OF THE PROVINCIAL GOVERNMENTS, WILL COME TO LONDON IN THE REASONABLY NEAR FUTURE.
2. LAST DECEMBER THE CHANCELLOR OF THE DUCHY TOLD MR TRUDEAU (OTTAWA TELNO 552 OF 19 DECEMBER 1980) THAT IT WAS HIGHLY QUESTIONABLE WHETHER IT WOULD BE POSSIBLE AT THAT TIME TO ACHIEVE THE PASSAGE OF THE NECESSARY LEGISLATION THROUGH PARLIAMENT. MR PYM HAD TWO DAYS EARLIER TOLD THE PRIME MINISTER THAT IN HIS VIEW A BILL EMBODYING THE CANADIAN REQUEST (WHICH HAS NOT SO FAR CHANGED) WOULD GET THROUGH NEITHER THE HOUSE OF COMMONS NOR THE HOUSE OF LORDS AND HAD ARGUED THAT QUOTE HMG MUST NOT GET INTO A POSITION WHERE THEY ATTEMPTED TO PASS LEGISLATION ON BEHALF OF THE CANADIAN GOVERNMENT, AND FAILED BECAUSE OF OPPOSITION IN THE CONSERVATIVE PARTY UNQUOTE.
3. I DO NOT KNOW WHAT VIEW MINISTERS NOW TAKE OF THE LIKELIHOOD OF SUCH A BILL PASSING IF THE PROVINCIAL LINE-UP IN CANADA REMAINS UNALTERED. BUT I IMAGINE THAT THE SUPREME COURT JUDGEMENT, WHICH SAYS THAT THE REQUEST WOULD BE TECHNICALLY LEGAL BUT NEVERTHELESS UNCONSTITUTIONAL BECAUSE IT FLOUTS CONSTITUTIONAL CONVENTION, HAS MADE PASSAGE LESS NOT MORE LIKELY. AND I HAVE OBSERVED THAT THOSE MEMBERS OF BOTH HOUSES WHO HAVE COME HERE RECENTLY (THE LATEST IS LORD LIMERICK) APPEAR TO BE IMPRESSED BY THE DEGREE OF OPPOSITION TO THE FEDERAL GOVERNMENT'S PROPOSALS AND TO RETURN TO LONDON WITH THEIR DOUBTS REINFORCED.
4. ALMOST ANY COURSE WE TAKE AFTER RECEIVING A REQUEST FROM THE FEDERAL GOVERNMENT MAY HAVE IMPORTANT IMPLICATIONS FOR OUR INTERESTS IN CANADA. PROLONGED DEBATES IN EITHER HOUSE WOULD IN THEMSELVES BE HOTLY RESENTED IN CANADA, HOWEVER UNREASONABLY. WE HAVE ALREADY HAD A FORETASTE OF THIS IN THE PETULANT PRESS REACTION TO MR JONATHAN AITKEN'S COMPARATIVELY INNOCUOUS REMARKS HERE. THE SPECTACLE OF BRITISH PARLIAMENTARIANS HOLDING FORTH ON A CANADIAN ISSUE IS, I AM AFRAID, BOUND TO IRRITATE CANADIANS, AND THE LONGER THE DEBATES GO ON THE ANGRIER THEY WILL BECOME.

CONFIDENTIAL

5. FROM THE POINT OF VIEW OF OUR RELATIONS IT WOULD BE DAMAGING, IN MY VIEW, FOR HMG TO INTRODUCE THE BILL AND SEE IT FAIL. MR TRUDEAU, HIS GOVERNMENT AND HIS PARTY, MIGHT WELL THEN CAMPAIGN AGAINST US AS COLONIALIST, CLAIMING THAT WE WERE DENYING CANADIANS THEIR OWN CONSTITUTION AND OPPOSING THE ESTABLISHMENT OF THEIR FUNDAMENTAL RIGHTS. THEY WOULD PULL NO PUNCHES AND WOULD NOT HESITATE TO ATTACK BRITAIN AND THE BRITISH PARLIAMENT HOWEVER UNFAIRLY. I BELIEVE THAT EVEN AMONG THOSE WHO DO NOT NORMALLY SUPPORT MR TRUDEAU FEELINGS WOULD RUN HIGH AGAINST US, THOUGH THE FEDERAL GOVERNMENT MIGHT BE HARD PUT TO IT TO FIND MANY CONCRETE STEPS THEY COULD READILY TAKE AGAINST US.

6. I SUGGEST THAT IF WE JUDGE IT POSSIBLE THAT EITHER HOUSE OF PARLIAMENT WILL FAIL TO PASS THE BILL WE OUGHT TO CONSIDER WHAT WE THEN DO. BEFORE MAKING SUGGESTIONS ON THIS IT WOULD BE HELPFUL TO KNOW URGENTLY WHAT THE LATEST ESTIMATE OF OPINION IN BOTH HOUSES IS.

MORAN

CANADIAN CONSTITUTION LIMITED

NAD

CCD

P & CD

PCCU

PARLIAMENTARY UNIT

NEWS D

INFORMATION D

PS

PS/LPS

PS/MR LUCE

PS/MR HURD

PS/PUS

MR DAY

MR URE

LORD N G LENNOX

CABINET OFFICE

COPIES TO:

SIR I SINCLAIR

MR FREELAND

DR PARRY

LEGAL ADVS.

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR HOUSE OF LORDS

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

PS/HOME SECRETARY

[COPIES SENT TO NO 10 DOWNING ST]

2
CONFIDENTIAL

GRS 1000

CONFIDENTIAL

FM OTTAWA 161915Z OCT 81

TO ROUTINE FCO

TELEGRAM NUMBER 564 OF 16 OCTOBER

MS

CONSTITUTION

1. MR TRUDEAU HAD SEPARATE MEETINGS YESTERDAY WITH MR DAVIS OF ONTARIO AND MR HATFIELD OF NEW BRUNSWICK. MR DAVIS MADE A STATEMENT AFTERWARDS WHICH HAS BEEN VARIOUSLY INTERPRETED. LE DEVOIR HEADLINES ITS STORY "ILL N'Y A PAS DE COMPROMIS, DIT DAVIS" WHEREAS THE GLOBE AND MAIL SAYS "DAVIS SEES MORE HOPE FOR A BNA CONSENSUS". BOTH QUOTE MR DAVIS AS SAYING THAT THERE IS NO COMPROMISE ON THE TABLE. THIS APPEARS TO CONFLICT WITH MR TRUDEAU'S STATEMENT THAT HE HAD OFFERED "SUBSTANTIAL COMPROMISE" TO MR BENNETT AT THEIR MEETING ON 13 OCTOBER. BOTH NEWSPAPERS HOWEVER REPORTED DAVIS AS SAYING THAT HE WOULD BE PREPARED TO SEE REFINEMENTS IN THE PROPOSED CHARTER OF RIGHTS AND AMENDING FORMULA. THE KEY MAY BE THAT THE GLOBE AND MAIL REPORTER ALSO HEARD DAVIS SAY "THE POSSIBILITY EXISTS FOR SOME GREATER DEGREE OF CONSENSUS".

2. GIVEN THAT HE IS PRESUMABLY HOPING TO REGAIN THE SUPPORT OF THE NEW DEMOCRATIC PARTY MR TRUDEAU TREATED THEM WITH SURPRISING ABRASIVENESS IN THE HOUSE YESTERDAY, REFUSING TO ANSWER A QUESTION FROM THEM ON NORTH/SOUTH RELATIONS, SO THAT A FEW OF THEM WALKED OUT. ONE EXPERIENCED JOURNALIST WHO PERSONALLY SUPPORTS THE FEDERAL GOVT. ON THE CONSTITUTION COMMENTED THIS MORNING THAT THE PRIME MINISTER'S ARROGANCE AND PETULANCE HAD BEEN SUCH THAT QUOTE IT SEEMED APROPOS TO QUESTION NOT ONLY HIS JUDGEMENT BUT HIS EMOTIONAL STABILITY UNQUOTE.

3. DAVIES CALLED AT HIS OWN REQUEST YESTERDAY ON MICHAEL KIRBY CABINET SECRETARY FOR FEDERAL-PROVINCIAL RELATIONS. KIRBY, WHOSE CONFIDENCE WE SHOULD RESPECT WAS REMARKABLY OPTIMISTIC AND SPOKE CONFIDENTLY ON THE TELEPHONE ON SIMILAR LINES TO AN UNIDENTIFIED FEDERAL MINISTER IN FRONT OF DAVIES.

4. HE CLAIMED THAT MR TRUDEAU HAD INDEED OFFERED SUBSTANTIAL CHANGES IN HIS CONSTITUTIONAL PACKAGE IN DISCUSSION WITH MR BENNETT BUT HAD MADE IT CLEAR THAT SINCE THE LATTER HAD NO MANDATE TO NEGOTIATE ON BEHALF OF THE PREMIERS HE WAS NOT PREPARED TO REVEAL HIS "BOTTOM LINE". KIRBY DECLINED TO TELL DAVIES EXACTLY WHAT HAD BEEN OFFERED SO FAR TO THE PROVINCES. HE SAID THAT THE FEDERAL GOVERNMENT WAS WORKING HARD TO BREAK DOWN THE UNITY OF THE EIGHT DISSENTING PREMIERS AND WAS "MAKING THEM OFFERS WHICH THEY COULD NOT REFUSE". IF THIS IS SO, I CAN ONLY SAY THAT NONE OF THE PREMIERS IS SO FAR SHOWING MUCH SIGN OF HAVING RECEIVED

CONFIDENTIAL

OFFERS THEY HAVE NO OPTION BUT TO ACCEPT. KIRBY HELD THAT THE CHANCES OF SUCCESS HAD IMPROVED DRAMATICALLY IN THE LAST 2 WEEKS BUT WERE STILL 50%. IT WAS HE SAID THE FEDERAL GOVERNMENT'S VIEW THAT SOME OF PREMIERS WERE BECOMING INCREASINGLY CONCERNED AT BEING ALLIED WITH LEVESQUE IN PARTICULAR AND WITH LOUGHEED. HE SAID THAT THESE TWO PREMIERS AND PROBABLY PECKFORD WERE UNMOVABLE IN THEIR OPPOSITION TO THE FEDERAL GOVERNMENTS CONSTITUTIONAL PROPOSALS. LYON IN MANITOBA WAS NOW IN THE MIDDLE OF AN ELECTION CAMPAIGN AND MIGHT HE THOUGHT HAVE TO CHANGE HIS TUNE ON THE CHARTER OF RIGHTS GIVEN THE VERY CONSIDERABLE ETHNIC VOTE (EG UKRANIAN) WHO WOULD BE IN FAVOUR OF A CHARTER OF RIGHTS. HE THOUGHT THAT PREMIERS BENNETT, BLAKENEY, BUCHANAN AND MACLEAN WERE OPEN TO ARGUMENT AND WERE BEING SUBJECTED TO PUBLIC PRESSURE TO COMPROMISE: THE QUESTION WAS WHETHER THEY COULD BE PERSUADED TO MOVE FAR ENOUGH TO BE ACCEPTABLE TO THE FEDERAL GOVERNMENT. HE (KIRBY) WAS DELIGHTED AND ENCOURAGED BY THE NUMBER OF DISCREET ENQUIRIES HE WAS RECEIVING FROM CONTACTS IN THE PROVINCES ABOUT WHAT MIGHT OR MIGHT NOT BE ACCEPTABLE TO THE FEDERAL GOVT. BY WAY OF A COMPROMISE PACKAGE. PREMIERS DAVIS AND HATFIELD WOULD HE SAID BE ATTENDING THE PREMIERS MEETING IN MONTREAL ON 19 OCTOBER. KIRBY SAID THAT THIS WAS LIKE INVITING THE FEDERAL GOVERNMENT TO TAKE PART. THE TWO PREMIERS WOULD BE WORKING HARD TO SPLIT THE EIGHT. HE THOUGHT THAT THERE WAS A 99% CHANCE OF A FEDERAL PROVINCIAL MEETING BEING HELD AND THAT THE MOST LIKELY DATE WAS 26 OCTOBER. IN SUMMING UP, KIRBY CHARACTERISED THE POSITION AS BEING "VERY FLUID INDEED": AS FLUID AS THE SITUATION IN JANUARY WHEN THE FEDERAL GOVERNMENT HAD MADE MAJOR CHANGES TO THEIR DRAFT RESOLUTION.

5. I HAVE JUST SEEN TWO FEDERAL MINISTERS , PEPIN (TRANSPORT) AND AXWORTHY (EMPLOYMENT). NEITHER SHARED KIRBY'S EUPHORIA. PEPIN SAID THE GAP WAS ENORMOUS BUT HE WAS PRAYING THAT SOMEONE COULD PULL A RABBIT OUT OF THE HAT. AXWORTHY SAID THAT THE ESSENTIALS OF THE CHARTER WERE NOT NEGOTIABLE AND THAT HE BELIEVED THAT A NUMBER OF PREMIERS - HE SPECIFICALLY MENTIONED LYON - WERE TOO MUCH DUG IN AGAINST IT TO SHIFT.

6. KIRBY TOLD DAVIES THAT THE FEDERAL GOVERNMENT WERE WORKING ON THE ASSUMPTION THAT THE LEGISLATION WOULD GO THROUGH THE UK PARLIAMENT AND HE CLAIMED THAT PRIVATELY THE PROVINCIAL GOVERNMENTS

CONFIDENTIAL

ADMITTED THAT THIS WOULD BE THE CASE. I AM PERSONALLY SCEPTICAL ABOUT THIS CLAIM. HE VOLUNTEERED THAT IF IT DID NOT, THE UK WOULD BE IN A DIFFICULT POSITION IN CANADA, RATHER LIKE THAT OF A POLICEMAN WHO HAD BEEN ASKED TO BREAKUP A FAMILY QUARREL AND WAS SET UPON BY BOTH PARTIES. HE SAID THAT EVEN WASP LIBERAL MEMBERS OF PARLIAMENT HAD TOLD HIM THAT SUCH AN EVENTUALITY WOULD REBOUND TO THE ADVANTAGE OF THE LIBERAL PARTY AND THAT THEY WOULD BE DELIGHTED TO FIGHT AN ELECTION IN SUCH AN ATMOSPHERE.

7. IN ANSWER TO A QUESTION KIRBY SAID THAT IF THE FEDERAL GOVERNMENT'S PROPOSALS BECAME LAW THERE WOULD BE A VERY ROUGH PERIOD IN QUEBEC. HOWEVER THIS WOULD NOT HE THOUGHT BE UNMANAGEABLE. THE FEDERAL GOVERNMENT'S SOUNDINGS TAKEN IN THE LAST FORTNIGHT (IE POST SUPREME COURT RULING) SHOWED HE CLAIMED THAT THE QUEBEC POPULATION SUPPORTED THE TRUDEAU PACKAGE.

MORAN

[THIS TELEGRAM WAS NOT ADVANCED]

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR LUCE

PS/MR HURD
PS/PUS

MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR HOUSE OF LORDS

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT
PS/HOME SECRETARY

[COPIES SENT TO NO 10 DOWNING ST]

- 3 -

CONFIDENTIAL

RESTRICTED

GRS 630

RESTRICTED

FM OTTAWA 152000Z OCT 81
TO PRIORITY FCO
TELEGRAM NUMBER 562 OF 15 OCTOBER

MY TELNO 559: CONSTITUTION

1. FOLLOWING DISCUSSIONS ON THE TELEPHONE WITH MOST OF HIS PROVINCIAL COLLEAGUES OR THEIR REPRESENTATIVES, MR BENNETT (WHO HAD RETURNED TO BRITISH COLUMBIA) SENT MR TRUDEAU AN ASTUTELY WORDED TELEGRAM YESTERDAY WHICH MADE IT VIRTUALLY IMPOSSIBLE FOR THE PRIME MINISTER NOT TO RESPOND IN A POSITIVE FASHION. IN THE TELEGRAM, WHICH WAS OPTIMISTIC AND CONCILIATORY IN TONE, MR BENNETT SAID QUOTE IN GENERAL I CAN SAY THAT THE PREMIERS FOUND MUCH THAT WAS POSITIVE AND OF INTEREST IN MY BRIEF OUTLINE OF OUR MEETING. FULL CONSULTATION ON OUR CONVERSATION WILL TAKE PLACE AT THE MEETING OF THE PREMIERS ON 19 OCTOBER. AT THIS TIME I CAN REPORT TO YOU THAT THE PREMIERS ARE HOPEFUL THAT AN AGREEMENT CAN BE REACHED AMONG GOVERNMENTS TO RESOLVE IN CANADA THE CONSTITUTIONAL ISSUE THROUGH NEGOTIATION AND COMPROMISE, IN A MANNER CONSISTENT WITH THE DECISION OF THE SUPREME COURT..... GIVEN THE RANGE OF ISSUES THAT MUST BE DISCUSSED THE PREMIERS THINK THAT OUR DELIBERATIONS IN MONTREAL MIGHT VERY WELL EXTEND TWO DAYS.... THE PREMIERS ARE OF THE VIEW THAT IT WOULD BE NEITHER PRUDENT, NOR PRACTICABLE, NOR CONDUCTIVE TO AGREEMENT TO SCHEDULE A CONFERENCE FOR NEXT WEEK... I WISH TO ASSURE YOU, PRIME MINISTER, OF THE PREMIERS' STRONG DESIRE TO DISPOSE OF THE CONSTITUTIONAL ISSUE PROMPTLY AND IN A MANNER CONSISTENT WITH THE SUPREME COURT DECISION. ACCORDINGLY, FOLLOWING NEXT WEEK'S PREMIERS' MEETING, I SHALL BE IN A POSITION TO OUTLINE FOR YOUR CONSIDERATION SPECIFIC DATES AND PROPOSALS FOR THE FIRST MINISTERS' CONFERENCES UNQUOTE.

2. MR TRUDEAU REPLIED SAYING QUOTE I AM PLEASED THAT YOU AND YOUR COLLEAGUES HAVE ACCEPTED MY INVITATION TO MEET IN A FIRST MINISTERS CONFERENCE ON THE CONSTITUTION. HOWEVER I REGRET THAT FOR THE THIRD TIME YOU AND YOU COLLEAGUES HAVE FOUND IT NECESSARY TO DELAY OUR PROPOSED FIRST MINISTERS' MEETING. I HAD HOPED THAT WE WOULD BE ABLE TO COMPLETE OUR NEGOTIATIONS NEXT TUESDAY, AS I PROPOSED.

RESTRICTED

/ NEVERTHELESS

RESTRICTED

NEVERTHELESS I ASSUME THAT YOU ARE SERIOUS WHEN YOU SAY THAT THE PREMIERS HAVE A 'STRONG DESIRE TO DISPOSE OF THE CONSTITUTIONAL ISSUE PROMPTLY'. ACCORDINGLY I EXPECT THAT, AS AN INDICATION OF THIS DESIRE, YOU AND YOUR COLLEAGUES WILL AGREE TO A FIRST MINISTERS' MEETING ON OCTOBER 26, 27 OR 28 WHICH WOULD ENABLE US TO COMPLETE OUR WORK BEFORE THE END OF OCTOBER. UNQUOTE

3. MR TRUDEAU HAS MEANWHILE INVITED THE TWO PREMIERS WHO SUPPORTED HIM, MR DAVIS OF ONTARIO AND MR HATFIELD OF NEW BRUNSWICK TO TALKS AND THEY ARE MEETING HIM IN OTTAWA THIS AFTERNOON.

4. THE SPARRING THUS CONTINUES, BUT IT SEEMS LIKELY THAT THERE WILL BE A FEDERAL PROVINCIAL MEETING AT THE END OF THIS MONTH IF ONLY BECAUSE NEITHER SIDE SEEMS TO BE PREPARED TO INCUR THE ODIUM OF DECLINING TO MEET AGAIN. THE TIMING WILL BE PARTICULARLY INTERESTING AS THE FEDERAL GOVERNMENT IS EXPECTED TO PRESENT ITS BUDGET BEFORE THE END OF OCTOBER. THIS IS LIKELY TO LEAD TO LENGTHY AND HEATED DEBATE. WHEN PARLIAMENT RESUMED YESTERDAY BOTH THE CONSERVATIVES AND NDP IGNORED THE CONSTITUTION AND CONCENTRATED THEIR FIRE ON THE GOVERNMENT'S ECONOMIC AND FINANCIAL POLICIES. MR BENNETT SAID IN HIS MESSAGE TO MR TRUDEAU THAT AT THEIR 19 OCTOBER MEETING THE PREMIERS WILL ALSO QUOTE BE REVIEWING THE STATUS OF THE PROPOSED FIRST MINISTERS' CONFERENCE ON THE ECONOMY THAT YOU WERE UNABLE TO AGREE TO AT OUR MEETING OF SEPTEMBER 24 UNQUOTE.

MORAN

[THIS TELEGRAM WAS NOT ADVANCED]

CANADIAN CONSTITUTION LIMITED

NAD

CCD

P & CD

PCCU

PARLIAMENTARY UNIT

NEWS D

INFORMATION D

PS

PS/LPS

PS/MR LUCE

PS/MR HURD

PS/PUS

MR DAY

MR URE

LORD N G LENNOX

CABINET OFFICE

COPIES TO:

SIR I SINCLAIR

MR FREELAND

DR PARRY

} LEGAL ADVS.

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR HOUSE OF LORDS

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

PS/HOME SECRETARY

[COPIES SENT TO NO 10 DOWNING ST]

- 2 -

RESTRICTED

RESTRICTED

FM OTTAWA 131748Z OCT 81
 TO IMMEDIATE FCO
 TELEGRAM NUMBER 554 OF 13 OCTOBER

CONSTITUTION

1. MR TRUDEAU AND MR BENNETT MEET THIS AFTERNOON IN OTTAWA. THEY LAST MET ON 24 SEPTEMBER WHEN MR TRUDEAU IS REPORTED TO HAVE TOLD MR BENNETT THAT HE WOULD DROP THE CHARTER OF RIGHTS IF THE SUPREME COURT DEEMED IT ILLEGAL. MR TRUDEAU MAINTAINS THAT HE WON AND THAT THERE IS THEREFORE NO REASON TO DROP THE CHARTER. MR BENNETT CLAIMS THAT THE FEDERAL GOVERNMENT LOST AND PROFESSES TO SEE A POSSIBILITY OF AGREEMENT ON WHAT HE CLAIMS WAS MR TRUDEAU'S OFFER OF COMPROMISE ON 24 SEPTEMBER.

2. MR BENNETT HAS INVITED ALL THE PROVINCIAL PREMIERS TO MEET ON 19 OCTOBER IN MONTREAL BUT IT LOOKS AS THOUGH ONLY THE EIGHT DISSENTING PREMIERS WILL ACCEPT. MR TRUDEAU HAS NOW OFFERED TO MEET THE PREMIERS THE FOLLOWING DAY, 20 OCTOBER.

3. OVER THE WEEKEND JOE CLARK WARNED THAT IF THE FEDERAL GOVERNMENT PERSISTED IN "TRYING TO GET THEIR OWN WAY ON THE CONSTITUTION, THEY ARE GOING TO PROVIDE VERY REAL FUEL FOR THE SEPARATIST CAUSE IN QUEBEC". HE CLAIMED THAT THE CALL FOR SEPARATISM WOULD INCREASE IN QUEBEC BECAUSE OF THE FEDERAL GOVERNMENT'S STUBBORNNESS.

MORAN

CANADIAN CONSTITUTION LIMITED

NAD

CCD

P & CD

PCCU

PARLIAMENTARY UNIT

NEWS D

INFORMATION D

PS

PS/LPS

PS/MR LUCE

PS/MR HURD

PS/PUS

MR DAY

MR URE

LORD N G LENNOX

CABINET OFFICE

COPIES TO:

SIR I SINCLAIR

MR FREELAND

DR PARRY

} LEGAL ADVS.

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR HOUSE OF LORDS

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

PS/HOME SECRETARY

[COPIES SENT TO NO 10 DOWNING ST]

RESTRICTED

UNCLASSIFIED
FM OTTAWA 081610Z OCT 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 550 OF 8 OCTOBER

Prime Minister

Amud
M

CANADIAN CONSTITUTION

1. MR TRUDEAU (NOW IN FIJI) ANNOUNCED TODAY THAT HIS MEETING WITH MR BENNETT HAD BEEN POSTPONED AT THE LATTER'S REQUEST TO TUESDAY 13 OCTOBER, AND THAT HE WAS ASKING THE PREMIERS TO MEET HIM IN OTTAWA ON THURSDAY 15 OCTOBER.
2. IN MAKING THE ANNOUNCEMENT MR TRUDEAU SAID THAT HE WAS RESPONDING TO THOSE PREMIERS' WHO HAD REQUESTED MORE TIME FOR CONSULTATION WITH MR BENNETT (AFTER HIS MEETING WITH MR TRUDEAU) AND TO THOSE WHO HAD SAID THAT A MEETING OF FIRST MINISTERS MUST NOT BE VERY MUCH DELAYED.
3. INTERVIEWED THIS MORNING, MR BENNETT CONFIRMED THAT HE WOULD MEET MR TRUDEAU ON 13 OCTOBER BUT WAS NOT PREPARED TO BE DRAWN ON WHETHER THE PREMIERS WOULD AGREE TO A MEETING ON 15 OCTOBER. HE TOOK A MODERATE LINE BUT ARGUED FOR A GENUINE COMPROMISE AND FOR THE SUPPORT OF AT LEAST SEVEN PROVINCES FOR A REVISED PACKAGE.
4. OFFICIALS TRAVELLING WITH MR TRUDEAU HAVE BEEN REPORTED AS INDICATING THAT THE PM WISHES TO KEEP THE PRESSURE UP FOR SPEEDY ACTION, THAT THE PROPOSED MEETING WITH THE PREMIERS IS A LAST CHANCE AND THAT THE LAST TWO DAYS OF DEBATE ON THE CONSTITUTIONAL PROPOSALS COULD BE LAUNCHED AGAIN IN PARLIAMENT ON 16 OCTOBER.
5. JOURNALISTS HERE AND TRAVELLING WITH MR TRUDEAU HAVE DESCRIBED THE OFFER OF A MEETING ON 15 OCTOBER AS AN ULTIMATUM AND HAVE SUGGESTED THAT MR TRUDEAU'S LINE HAS BECOME NOTICEABLY TOUGHER AND MORE UNYIELDING SINCE HIS MEETING WITH MRS THATCHER.
6. INTERVIEWED IN LONDON MR LOUGHEED OF ALBERTA SAID HE WAS VERY PLEASED WITH THE COURT DECISION WHICH LARGELY ENDORSED THE PROVINCIAL CASE. HE ALSO SAID HE WAS HEARTENED BY MRS THATCHER'S STATEMENT AS SHE HAD WARNED MR TRUDEAU OF LIKELY DIFFICULTIES IN PARLIAMENT. SHE HAD NOT AGREED TO PUSH IT THROUGH PARLIAMENT BUT ONLY, HE THOUGHT, TO INTRODUCE IT.

MORAN

CANADIAN CONSTITUTION LIMITED

NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR LUCE
PS/MR HURD
PS/PUS

MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR HOUSE OF LORDS

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT
PS/HOME SECRETARY

[COPIES SENT TO NO 10 DOWNING ST]

CONFIDENTIAL

GRS 545
CONFIDENTIAL
DESKBY 080900Z
FM OTTAWA 072057Z OCT 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 547 OF 7 OCTOBER

CANADIAN CONSTITUTION

1. FROM THE POINT OF VIEW OF BRITISH INTERESTS IN CANADA AND ANGLO-CANADIAN RELATIONS BY FAR THE BEST OUTCOME, FOLLOWING THE COURT'S JUDGEMENT, WOULD NOW BE A COMPROMISE BETWEEN THE PROVINCES RESULTING IN A BROAD NATIONAL AGREEMENT, WITH A MAJORITY OF THE TEN PROVINCES SUPPORTING THE FEDERAL GOVERNMENT.
2. UNFORTUNATELY, AS I HAVE REPORTED, SUCH A COMPROMISE SEEMS AT PRESENT HIGHLY UNLIKELY, AS MR TRUDEAU HAS MADE IT CLEAR THAT HE IS NOT WILLING TO CONTEMPLATE ANY FUNDAMENTAL CHANGES TO THE PACKAGE BUT ONLY RELATIVELY MINOR CHANGES, WHILE THE DISSENTING PROVINCES APPEAR TO BE THINKING IN TERMS OF MUCH MORE RADICAL CHANGES LIKE DROPPING THE CHARTER OF RIGHTS OR MAKING IT OPTIONAL, WHICH MR TRUDEAU WILL NOT, I BELIEVE, ACCEPT. AND MR TRUDEAU IS CLEARLY AGAIN IN A HURRY AND IS GIVING THE PROVINCES VERY LITTLE TIME INDEED TO AGREE AMONG THEMSELVES ON A NEW FORMULA.
3. NEVERTHELESS, SINCE THE JUDGEMENT MR TRUDEAU HAS BEEN UNDER PRESSURE TO COMPROMISE. THE NDP HAVE SAID THEY WILL WITHDRAW THEIR SUPPORT UNLESS HE NEGOTIATES WITH THE PROVINCES. THE LEADER AND A MAJORITY OF THE QUEBEC LIBERALS HAVE SUPPORTED THE PARTI QUEBECOIS IN OPPOSING UNILATERAL ACTION, TWO FEDERAL LIBERALS FROM QUEBEC HAVE COME OUT AGAINST UNILATERAL ACTION AND MANY RESPECTED VOICES HAVE BEEN RAISED URGING A RENEWED SEARCH FOR A NATIONAL SOLUTION. AND MR TRUDEAU WAS EVIDENTLY UNCERTAIN ABOUT WHAT LINE HMG MIGHT TAKE AFTER THE JUDGEMENT. THE MELBOURNE MEETING HAS HOWEVER REMOVED THIS UNCERTAINTY AND MR TRUDEAU'S RELIEF IS PATENT. HE MAY NOW JUDGE THAT HE DOES NOT NEED COMPROMISE.
4. MR TRUDEAU OFFERED TO MEET ALL TEN PROVINCIAL PREMIERS ON 13 OCTOBER, THE DAY BEFORE THE CANADIAN PARLIAMENT OPENS, FOR "ONE MORE MEETING", BUT IT WAS CLEAR THAT THIS WOULD BE NO MORE THAN WINDOW-DRESSING, AND MR BENNETT HAS REFUSED THE OFFER ON BEHALF OF THE 8 DISSENTING PREMIERS, SAYING HE HIMSELF IS SEEING TRUDEAU ON MONDAY AND QUOTE IT NEITHER SEEMS POSSIBLE NOR NECESSARY FOR ME TO HOLD A FIRST MINISTERS' CONFERENCE THE NEXT DAY UNQUOTE.

CONFIDENTIAL

/5. ALL

CONFIDENTIAL

5. ALL TEN PREMIERS ARE REPORTED TO HAVE DOUBTED THE USEFULNESS OF THIS MEETING WHICH DID NOT LOOK TO THEM LIKE A GENUINE OFFER TO NEGOTIATE. IT AT PRESENT LOOKS AS THOUGH MR TRUDEAU WILL DECIDE TO RAM THE PACKAGE THROUGH WITHOUT ANY REAL ATTEMPT AT OBTAINING WIDER AGREEMENT. HIS PRESS CONFERENCES MAKE IT CLEAR THAT HE IS CONFIDENT THAT HE CAN DEAL WITH OPPOSITION BY REPRESENTING OPPONENTS AS BEING AGAINST BRINGING OVER THE CONSTITUTION AND A CHARTER OF RIGHTS AND LANGUAGE RIGHTS, AND HE CONTINUES TO IGNORE THAT PART OF THE COURT'S JUDGEMENT WHICH SAYS THAT UNILATERAL ACTION WOULD BE UNCONSTITUTIONAL.

6. THE CONSEQUENCES OF UNILATERAL ACTION IN CANADA ARE NOT EASY TO PREDICT. THE QUEBEC GOVERNMENT WILL GO TO ALMOST ANY LENGTHS SHORT OF ARMED RESISTANCE TO RESIST THE OVERRIDING OF THEIR PROVINCIAL LAWS. AND THE EFFECT ELSEWHERE NOTABLY IN THE WEST WILL BE DEEPLY DIVISIVE. OUTSIDE CANADA MUCH TURNS ON HOW THINGS MAY GO IN PARLIAMENT. THE CANADIANS ARE NEUROTICALLY SENSITIVE TO ANY CRITICISM OR SUGGESTION OF "INTERFERENCE" AND THE WESTMINSTER DEBATES HOWEVER THEY GO ARE ALMOST CERTAIN TO BE HOTLY RESENTED HERE. APPROVAL OF THE PACKAGE WOULD SATISFY THE FEDERAL GOVERNMENT BUT BE RESENTED BY THE 8 PROVINCIAL GOVERNMENTS WHO ARE ALREADY AGGRIEVED THAT WE ARE SUPPORTING MR TRUDEAU. ITS REJECTION WOULD GIVE MR TRUDEAU THE OPPORTUNITY TO DENOUNCE BRITAIN AS COLONIALIST, AN OPPORTUNITY HE WOULD SEIZE WITH BOTH HANDS.

MORAN

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR LUCE
PS/MR HURD
PS/PUS

MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR HOUSE OF LORDS

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT
PS/HOME SECRETARY

[COPIES SENT TO NO 10 DOWNING ST]

2
CONFIDENTIAL

GRS 370
UNCLASSIFIED
FM OTTAWA 071936Z OCT 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 546 OF 7 OCTOBER

Canadian Constitution

1. AT HIS PRESS CONFERENCE IN MELBOURNE ON 5 OCTOBER (FULL TEXT BY BAG) MR TRUDEAU MADE THE FOLLOWING COMMENTS IN ANSWER TO QUESTIONS

".....SHE (MRS THATCHER) DID MAKE THE POINT SEVERAL TIMES THAT SHE WANTED TO DEAL WITH IT SOON AND AS EFFECTIVELY AS POSSIBLE, AND INDICATED THAT EVEN IN TERMS OF CANADIAN-BRITISH RELATIONS IT WOULD BE IMPORTANT THAT THIS MATTER BE DEALT WITH AS SOON AS POSSIBLE."

"LE CHEF DU GOUVERNEMENT BRITANNIQUE SE DIT SATISFAITE SUR LA QUESTION DE LEGALITE"

"..I DON'T THINK IT'S FOR THE BRITISH PARLIAMENTARIANS TO SAY: YOU KNOW, WE DON'T LIKE THE PROVINCES TO BE SHOVED AROUND. AND THEREFORE WE WILL TELL THE CANADIAN GOVERNMENT HOW IT SHOULD ACT EVEN WHEN IT ACTS WITHIN THE LAW."

"THEY (BRITISH BACKBENCHERS) WERE DETERMINED TO CAUSE THE CANADIAN GOVERNMENT TROUBLE IN THIS, BECAUSE THEY FEEL THAT THEY SHOULD BE LOOKING AFTER CANADIAN AFFAIRS."

"MRS THATCHER SAID: I WILL DEAL WITH IT AS SOON AS POSSIBLE. BUT, FOR HEAVEN'S SAKE, LET'S NOT PUT THE WORDS IN BECAUSE MEMBERS OF PARLIAMENT HAVE THEIR DIGNITY AND THEY WANT TO BE CONSULTED ON THE SPEED AND EVERYTHING ELSE."

"I ALSO HAVE HER WORD TO DEAL WITH IT AS SOON AS POSSIBLE."

".....ONE HAS TO ASSUME THAT WHEN THE BRITISH GOVERNMENT INTRODUCES A MEASURE, THE PASSAGE OF WHICH IS IMPORTANT FOR GOOD RELATIONS BETWEEN OUR COUNTRIES, THEY WILL DO IT AS BEST THEY CAN."

"....WOULD WANT TO REVIEW IT (HMG'S RESPONSE TO THE FAC REPORT) A LITTLE BIT NOW TO TAKE INTO ACCOUNT THE JUDGEMENT OF THE COURT, BUT THAT SHE INTENDED PUBLISHING IT SOON."

/ ".... I SAID

".... I SAID EARLIER THAT MAYBE MR CHRETIEN MIGHT HAVE TO GO OVER, OR OTHER MINISTERS. SOMETHING RUBS ME THE WRONG WAY, OF THINKING THAT THE PRIME MINISTEG OF LEROVEREIGN COUNTRY LIKE CANADA HAS TO GO OVER AND EXPLAIN WHY WHAT THE COURTS HAVE JUDGED IS LEGAL IS SOMETHING THAT THE BRITISH PARLIAMENT SHOULD VIEW WITH A (INAUDIBLE). I HAD NOT RULED IT OUT, BUT AS I ANSWERED QUITE CLEARLY I HAVE NO INTENTION AT THIS TIME TO DO ANYTHING OF THE KIND.

"DON'T THEY THINK THIS IS GREAT NEWS? I MEAN, NOW IT IS IN WRITING. YOU CAN'T SAY: DID YOU REALLY SAY THAT, AND WHAT DID SHE REALLY ANSWER?"

"WE DON'T INTEND CHANGING THE THRUST OF OUR RESOLUTION. WE THINK WE HAD BETTER HAVE THE FIGHT WITH THE PROVINCES NOW (RATHER) THAN LET IT DRAG OUT ANOTHER FIVE MONTHS, FIVE YEARS, AND SO ON."

MORAN

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR LUCE
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR HOUSE OF LORDS

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

PS/HOME SECRETARY

[COPIES SENT TO NO 10 DOWNING ST]

2

EPS 2024
CONFIDENTIAL

CONFIDENTIAL

FROM UKDEL MELBOURNE 060540Z OCT 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 89 OF 6 OCT
INFO SAVING OTTAWA.

MA
MA

CANADIAN CONSTITUTION.

THE PRIME MINISTER AND MR TRUDEAU MET TO TAKE STOCK OF THE LATEST POSITION ON THIS MATTER AT THE RESIDENCE OF H M CONSUL GENERAL IN MELBOURNE ON MONDAY 5 OCTOBER 1981 AT 2.45 PM. THE PRIME MINISTER WAS ACCOMPANIED BY SIR ROBERT ARMSTRONG AND MR TRUDEAU BY MR MICHAEL PITFIELD.

2. THE PRIME MINISTER SAID THAT SHE HAD NOT HAD AN OPPORTUNITY OF READING THE JUDGMENT OF THE SUPREME COURT OF CANADA, BUT SHE UNDERSTOOD THAT THE COURT HAD RULED, BY A MAJORITY, THAT THE CANADIAN GOVERNMENT'S PROPOSALS WERE NOT ILLEGAL BUT WERE NOT IN ACCORDANCE WITH THE CONSTITUTIONAL CONVENTION WHICH REQUIRED PROVINCIAL CONSENT FOR MEASURES WHICH AFFECTED THE RELATIONSHIP BETWEEN FEDERAL AND PROVINCIAL GOVERNMENTS IN CANADA. THIS WAS LIKELY TO ENCOURAGE SOME OF HER SUPPORTERS TO PERSIST IN THEIR OPPOSITION TO WHAT WAS PROPOSED, IF AND WHEN A MEASURE CAME BEFORE THE HOUSE OF COMMONS. THE GOVERNMENT WOULD DO WHAT THEY WERE ASKED BY THE CANADIAN GOVERNMENT AND PARLIAMENT TO DO, AND THEIR OBJECT WOULD BE TO GET THE MEASURE THROUGH WITH THE GREATEST POSSIBLE DEGREE OF SUPPORT.

3. MR TRUDEAU SAID THAT HE COULD NOT ASK FOR MORE THAN THAT. HE ACKNOWLEDGED THE DIFFICULTIES WHICH THE PRIME MINISTER AND HER COLLEAGUES WOULD FACE AT WESTMINSTER, AND HE WOULD LIKE TO DO ANYTHING HE COULD TO MAKE IT EASIER FOR THEM. HE WAS GOING TO HAVE ONE MORE ROUND OF CONSULTATIONS WITH THE SPOKESMAN FOR THE PROVINCIAL PREMIERS. HE HAD TO SAY THAT THERE WAS NOT MUCH CHANCE OF A COMPROMISE. THE PROVINCIAL PREMIERS WHO ARE OPPOSED TO THE GOVERNMENT'S PROPOSALS HAD ALWAYS SAID THAT, EVEN IF THEY LOST THE LEGAL ISSUE, THEY WOULD CONTINUE THE POLITICAL FIGHT. THE SUPREME COURT'S RULING ON THE CONSTITUTIONAL CONVENTION HAD GIVEN THEM NEW AMMUNITION. IT WAS FOR THE CANADIAN GOVERNMENT AND PARLIAMENT TO DECIDE WHETHER TO CHANGE OR OVERRIDE THE CONVENTION, AS PROPOSED, AND THEY WOULD HAVE TO TAKE THE CONSEQUENCES POLITICALLY. IT WAS ALL RATHER UNSATISFACTORY, BECAUSE THOSE WHO SAID THAT THERE WAS A CONSTITUTIONAL CONVENTION WERE UNABLE TO DEFINE IT PRECISELY. DELAY IN DEALING WITH THE MATTER FROM NOW ON COULD ONLY HURT BOTH GOVERNMENTS AND ANGLO-CANADIAN RELATIONS.

CONFIDENTIAL

14 THE

4. THE PRIME MINISTER SAID THAT, BEHIND ALL THE LEGAL AND CONSTITUTIONAL ARGUMENTS, THE POLITICAL REALITIES WERE THAT THE TWO PRIME MINISTERS AND GOVERNMENTS WERE DIRECTLY ELECTED BY AND RESPONSIBLE TO THEIR ELECTORATES, AND THAT IT WAS VERY IMPORTANT TO PRESERVE CLOSE AND FRIENDLY ANGLO-CANADIAN RELATIONS. HOW IT WAS HANDLED IN PARLIAMENT IN THE NEW SESSION WOULD DEPEND PARTLY ON PROGRESS IN CANADA AND PARTLY ON HOW THE BRITISH GOVERNMENT GOT ON WITH ITS OWN PROGRESS. MR TRUDEAU SAID THAT HE WAS ENTIRELY CONTENT TO RELY ON THE PRIME MINISTER'S DECISIONS ON TIMING AND PROCEDURE AT WESTMINSTER, IN THE SAME WAY AS SHE HAD TAKEN THE VIEW THAT INTERNAL AFFAIRS IN CANADA WERE NOT FOR THE BRITISH GOVERNMENT TO DEAL WITH. HE WOULD ONLY MAKE THE POINT, ON TIMING, THAT TIME COULD ONLY PLAY AGAINST HIMSELF AND THE PRIME MINISTER, IN TERMS OF ANGLO-CANADIAN RELATIONS. THE LONGER THINGS DRAGGED ON, THE MORE BRITISH MEMBERS OF PARLIAMENT WOULD VISIT CANADA AND THE MORE PROVINCIAL PREMIERS WOULD VISIT THE UNITED KINGDOM. AT SOME POINT HE WOULD HAVE TO TELL CANADIANS NOT TO LISTEN TO BRITISH BACKBENCHERS. AT SOME STAGE THE PRIME MINISTER MIGHT NEED TO SAY TO PROVINCIAL PREMIERS THAT SHE COULD NOT IN LAW TAKE COGNIZANCE OF THEIR ARGUMENTS.

5. MR TRUDEAU WENT ON TO SAY THAT MR LEVESQUE, THE PREMIER OF QUEBEC, WAS INTENT ON STIRRING UP TROUBLE. IF THERE HAD TO BE A FIGHT WITH QUEBEC, HIS OWN JUDGMENT WAS THAT THAT FIGHT WOULD BE BEST FOUGHT NOW THAN LATER. HE WOULD, THEREFORE, KEEP UP THE PRESSURE. IT WAS BETTER TO HAVE THE FIGHT NOW, WHEN THE MAJORITY OF CANADIANS SUPPORTED THE SUBSTANCE OF THE FEDERAL GOVERNMENT'S PROPOSALS, IF NOT THE METHOD OF PUTTING THEM INTO EFFECT; POLLS SHOWED THAT 70 TO 80 PER CENT OF THE PEOPLE IN EVERY PROVINCE WERE IN FAVOUR OF PATRIATION OF THE CONSTITUTION AND OF A BILL OF RIGHTS; BUT THERE WAS A MAJORITY AGAINST THE METHOD WHICH THE FEDERAL GOVERNMENT HAD CHOSEN TO ADOPT.

6. THE PRIME MINISTER ASKED HOW FAR THE CANADIAN PEOPLE WERE AGAINST THE PROPOSED BILL OF RIGHTS.

7. MR TRUDEAU SAID THAT 80 PER CENT OF THE PEOPLE WERE FOR IT. THE SUPREME COURT HAD NOT DISTINGUISHED BETWEEN PATRIATION AND THE BILL OF RIGHTS IN THEIR JUDGMENT. THE PROVINCES HAD NOT DARED TO CHALLENGE THE BILL OF RIGHTS ON SUBSTANCE BUT THEY WERE USING IT AS A WEAPON IN THEIR FIGHT AGAINST FEDERALISM. THIS WAS MISGUIDED; THE PROPOSED BILL OF RIGHTS WOULD REDUCE THE POWERS OF GOVERNMENT AT BOTH FEDERAL AND PROVINCIAL LEVEL. THE FEDERAL GOVERNMENT WAS PREPARED TO CONTEMPLATE SOME WEAKENING OR NARROWING OF THE PROPOSALS ON THE BILL OF RIGHTS, IF THAT WOULD HELP TO REDUCE THE OPPOSITION OF THE PROVINCIAL GOVERNMENTS. THAT WOULD BE A MATTER FOR NEGOTIATION. BUT MR LEVESQUE AND PROBABLY MR LYON WOULD SAY THAT THERE WAS NOTHING DOING, AND IT WAS PROBABLE THAT THE SPOKESMAN FOR THE PROVINCIAL PREMIERS (MR BENNETT OF BRITISH COLUMBIA) WOULD HAVE TO REPORT THAT THERE WAS NO CONSENSUS.

2
CONFIDENTIAL

18. THE PRIME

8. THE PRIME MINISTER ASKED WHEN THE CANADIAN GOVERNMENT PROPOSED TO INTRODUCE THE RESOLUTION IN THE CANADIAN PARLIAMENT.

9. MR TRUDEAU SAID THAT PRESENT PLANS WERE TO INTRODUCE IT ON 14 OCTOBER, BUT THAT IT MIGHT WELL BE A LITTLE LATER, DEPENDING ON NEGOTIATIONS WITH THE PROVINCIAL PREMIERS. THE DEBATE COULD LAST ONLY TWO DAYS IN THE HOUSE OF COMMONS, AND TWO IN THE SENATE: ONE OF THE DAYS IN THE SENATE COULD OVERLAP WITH THE SECOND DAY IN THE HOUSE OF COMMONS. AFTER THAT, THE RESOLUTION AND DRAFT BILL WOULD BE SENT TO LONDON.

10. THE PRIME MINISTER SAID THAT THE BRITISH GOVERNMENT WOULD WANT TO DEAL WITH IT AS SOON AS THEY COULD, AND TO DEAL WITH IT EFFECTIVELY.

11. THE PRIME MINISTER AND MR TRUDEAU SAID THAT THEY WERE CONTENT WITH THE DRAFT GUIDANCE FOR PRESS SPOKESMEN WHICH HAD BEEN PREPARED BY SIR ROBERT ARMSTRONG AND MR MICHAEL PITFIELD IN ADVANCE OF THEIR MEETING (SEE MY TEL 72).

12. THE PRIME MINISTER SAID THAT THE SPOKESMEN SHOULD ALSO MAKE IT CLEAR THAT THERE WAS AGREEMENT BETWEEN THE TWO PRIME MINISTERS ABOUT DEALING WITH THIS MATTER AS SOON AS IT COULD BE DEALT WITH, AND ABOUT THE IMPORTANCE FOR CLOSE AND FRIENDLY ANGLO-CANADIAN RELATIONS OF DOING SO.

13. MR TRUDEAU SAID THAT AT LUNCH MR IAN GOW HAD SAID TO HIM THAT ONE OF THE DIFFICULTIES WAS THAT THE FEDERAL GOVERNMENT HAD NOT BEEN LOBBYING IN LONDON AS THE PROVINCIAL GOVERNMENTS HAD BEEN. THEY HAD FELT INHIBITED FROM GOING OVER TO THE ATTACK WHILE THE ISSUE WAS BEFORE THE SUPREME COURT. HE ASKED FOR THE PRIME MINISTER'S ADVICE AS TO WHETHER THEY SHOULD DO SO NOW. THE PRIME MINISTER SAID SHE WOULD LIKE TO THINK ABOUT THAT AND LET MR TRUDEAU KNOW. AS FOR THE BRITISH GOVERNMENT, THE FIRST TASK WOULD BE TO REVISE THE DRAFT REPLY TO THE REPORT BY THE SELECT COMMITTEE ON FOREIGN AFFAIRS. SHE WOULD BE LOOKING CAREFULLY AT THAT ON HER RETURN TO LONDON. SHE WOULD HOPE TO KEEP IN CLOSE TOUCH WITH MR TRUDEAU THROUGH SIR ROBERT ARMSTRONG AND MR PITFIELD, AS SOON AS MR TRUDEAU'S CONSULTATIONS WITH THE SPOKESMAN OF THE PROVINCIAL PREMIERS WERE COMPLETED.

14. MR TRUDEAU SUGGESTED THAT THE PRIME MINISTER MIGHT LIKE TO HAVE IN THE BACK OF HER MIND THE POSSIBILITY OF COMPLETING THE PROPOSED BILL BY 11 DECEMBER 1981, WHICH WAS THE 50TH ANNIVERSARY OF THE STATUTE OF WESTMINSTER. SIR ROBERT ARMSTRONG RECALLED THAT IT WOULD BE IMPOSSIBLE TO INTRODUCE THE BILL EARLIER THAN 16 NOVEMBER, AND IT MIGHT, THEREFORE, BE EXTREMELY DIFFICULT TO TAKE THE BILL THROUGH ALL ITS STAGES BY 11 DECEMBER.

~~CONFIDENTIAL~~

15. THE PRIME MINISTER ACKNOWLEDGED THE DIFFICULTY, BUT AGREED THAT SHE WOULD KEEP THE DATE AT THE BACK OF HER MIND. MR TRUDEAU SAID THAT, WHEN ONE WAS GOING TO DO SOMETHING THAT WAS RIGHT, THERE WAS NOTHING TO BE GAINED BY PROCRASTINATION. THE FIGHT COULD NOT GET WORSE AND, THEREFORE, IT HAD BETTER BE BROUGHT TO A CONCLUSION. CANADA HAD POURED DECADES OF MENTAL AND PHYSICAL ENERGY INTO THIS QUESTION, WHICH HAD BEEN UNDER CONSIDERATION FOR 54 YEARS. THE TIME HAD COME TO GET IT BEHIND THEM, SO AS TO LIBERATE THE ENERGIES OF CANADA TO MAKE THE MOST OF ITS POTENTIALS FOR THE FUTURE.

16. THE MEETING CONCLUDED AT 3.20 PM.

FCO PLEASE PASS SAVING TO OTTAWA, AND SEND ADVANCE COPIES TO PRIVATE SECRETARIES TO PRIME MINISTER, HOME SECRETARY, LORD CHANCELLOR, LORD PRESIDENT, LORD PRIVY SEAL, CHANCELLOR OF THE DUCHY OF LANCASTER, CHIEF WHIP AND THE ATTORNEY GENERAL.

CARRINGTON

[ADVANCED AS REQUESTED]

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/IPS
PS/MR RIDLEY
PS/MR LUCE
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO
ADVANCE ADDRESSEES ABOVE

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

4
~~CONFIDENTIAL~~

IMMEDIATE

X5

Hd JAD
Hd CCD
Hd PCD
Hd News Dept
COI
Press Office ~~100~~
Downing St.

RESTRICTED
FM UKDEL MELBOURNE 051047Z OCT 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 78 OF 5 OCTOBER
AND TO IMMEDIATE OTTAWA

FROM KYDD FOR NO 10 PRESS OFFICE, FCO NEWSROOM AND COI.

OUR TELNOS 71 AND 72: CANADIAN CONSTITUTION.

1. YOU MAY DRAW FROM THE FOLLOWING IN ANY UNATTRIBUTABLE BRIEFING.

BEGINS

MRS THATCHER MET MR TRUDEAU AT THE HOME OF HM CONSUL-GENERAL IN MELBOURNE IMMEDIATELY AFTER MRS THATCHER'S LUNCH FOR REPRESENTATIVES OF 19 COMMONWEALTH COUNTRIES WHICH MR TRUDEAU ATTENDED. THE MEETING LASTED ABOUT 25 MINUTES.

THERE WAS NO DISAGREEMENT AND THE AGREED LINE FOR THE PRESS SETS OUT CLEARLY THE POSITION REACHED IN TODAY'S DISCUSSIONS.

IN ESSENCE, THIS IS THAT THE BALL IS NOW IN THE CANADIAN COURT. AS AND WHEN THE CANADIAN PARLIAMENT HAS APPROVED A RESOLUTION AND DRAFT BILL AND SENT THEM TO THE QUEEN, THE BILL COULD BE PRESENTED TO THE BRITISH PARLIAMENT.

THE BRITISH GOVERNMENT WOULD THEN BE IN THE DRIVING SEAT. AND AS

MRS THATCHER CONFIRMED TODAY, THE LEGISLATION DULY REQUESTED AND APPROVED BY THE CANADIAN PARLIAMENT WOULD BE INTRODUCED AT WESTMINSTER.

IT IS ACCEPTED THAT THE LEGISLATION COULD NOT BE INTRODUCED IN THE PRESENT SESSION OF PARLIAMENT. A NEW SESSION STARTS ON 4 NOVEMBER (NEW LEGISLATION COULD NOT BE DEBATED BEFORE 16 NOVEMBER). WE CANNOT ANTICIPATE THE QUEEN'S SPEECH, BUT IT IS WELL KNOWN THAT THE LEGISLATION FROM CANADA COULD FORM PART OF THE NEXT SESSION'S LEGISLATIVE PROGRAMME.

THERE IS NO DISPOSITION ON THE PART OF THE BRITISH GOVERNMENT TO DELAY THE LEGISLATION ALTHOUGH THE TIMING IS ENTIRELY A MATTER FOR IT. HOWEVER IN VIEW OF THE LONGSTANDING AND EXTREMELY CLOSE RELATIONS THAT EXIST BETWEEN BOTH COUNTRIES YOU MAY ASSUME THAT THE GOVERNMENT WILL PROCEED AS QUICKLY AS POSSIBLE.

THE LEGISLATION WILL OF COURSE BE A GOVERNMENT BILL AND IT FOLLOWS THAT THE GOVERNMENT WILL BE CONCERNED TO SECURE ITS PASSAGE.

WE SHOULD NOT GET INVOLVED IN SPECULATION AS TO THE STRENGTH OF OPPOSITION TO ANY LEGISLATION IN THE BRITISH PARLIAMENT.

WE HAVE MADE IT CLEAR ALL ALONG THAT THE BRITISH GOVERNMENT IS NOT ANXIOUS-, TO SAY THE LEAST, TO GET ITSELF INTO A POSITION WHERE IT MIGHT BE SEEN TO BE INTERFERING IN CANADIAN AFFAIRS.

ENDS

2. FCO PLEASE ENSURE THAT NO 10 PRESS OFFICE AND COI HAVE RECEIVED TURS.

[NOT PASSED BY COI]

FCO PSE PASSOTTAWA

CARRINGTON

ADVANCE COPY

NEW

X-P

MMELFO 12/05

00 FCO

00 OTTAWA

GRSL75

IMMEDIATE

PS
PS/LPS
PS/MR LUCE
PS/PUS
MR URE
HD NAD
HD CCD
HD NENT D
PS/M 10 ~~St.~~ St.

(Ltd)

UNCLASSIFIED
FM UKDEL MELBOURNE 050630Z OCT 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 72 OF 5 OCTOBER
AND TO IMMEDIATE OTTAWA

FOLLOWING IS TEXT OF AGREED GUIDANCE REFERRED TO IN MIPT:

BEGINS

MRS THATCHER AND MR TRUDEAU MET THIS AFTERNOON TO TAKE STOCK OF THE POSITION, FOLLOWING THE RULING BY THE SUPREME COURT OF CANADA ON THE CANADIAN GOVERNMENT'S PROPOSALS FOR AMENDMENTS TO THE CONSTITUTION OF CANADA.

MR TRUDEAU INDICATED THAT ON HIS RETURN TO CANADA HE WOULD BE CONSULTING HIS COLLEAGUES IN THE FEDERAL GOVERNMENT AND THE SPOKESMAN FOR THE PROVINCIAL PREMIERS. SUBJECT TO THE OUTCOME OF THESE CONSULTATIONS, HIS GOVERNMENT WOULD INVITE THE CANADIAN PARLIAMENT TO APPROVE A RESOLUTION AND DRAFT BILL - BASICALLY THE MEASURE WHICH IS BEFORE PARLIAMENT NOW, SUBJECT TO THE POSSIBILITY OF MODIFICATIONS IN THE LIGHT OF THOSE CONSULTATIONS. IF THE RESOLUTION AND DRAFT BILL WERE APPROVED BY THE CANADIAN PARLIAMENT, THEY WOULD THEN BE SENT TO THE QUEEN, SO THAT THE BILL COULD BE PRESENTED FOR ENACTMENT BY THE BRITISH PARLIAMENT.

MRS THATCHER CONFIRMED THAT, FOLLOWING THE RULING BY THE SUPREME COURT ON THE LEGALITY OF WHAT WAS PROPOSED, THE BRITISH GOVERNMENT WOULD INTRODUCE AT WESTMINSTER THE LEGISLATION DULY REQUESTED AND APPROVED BY THE CANADIAN PARLIAMENT. SHE SAID THAT MR TRUDEAU WOULD KNOW THAT SOME MEMBERS OF PARLIAMENT AT WESTMINSTER WERE CONCERNED AT THE PROPOSAL THAT THEY SHOULD BE ASKED TO APPROVE A MEASURE AFFECTING FEDERAL - PROVINCIAL RELATIONS WHICH DID NOT HAVE THE APPROVAL OF A SUBSTANTIAL NUMBER OF THE PROVINCIAL GOVERNMENTS. THAT CONCERN WOULD BE STRENGTHENED BY THE SUPREME COURT'S RULING THAT IT WAS NOT IN ACCORDANCE WITH CONSTITUTIONAL CONVENTION THAT SUCH A MEASURE SHOULD BE ENACTED WITHOUT PROVINCIAL CONSENT, EVEN THOUGH IT LEFT UNDEFINED THE MEASURE OF CONSENT REQUIRED.

MR TRUDEAU SAID THAT THE SUPREME COURT'S RULING MADE IT CLEAR THAT THE QUESTION OF PROVINCIAL CONSENT WAS A MATTER OF CONVENTIONAL BUT NOT OF LEGAL REQUIREMENT. THE CONSTITUTIONAL CONVENTION IN QUESTION WAS A POLITICAL MATTER, AND A CONVENTION OF CANADIAN POLITICS. HE HOPED THAT THE MEMBERS OF THE BRITISH PARLIAMENT CONCERNED WOULD RECOGNISE THAT IT WAS FOR CANADIAN POLITICIANS TO DECIDE WHETHER THE CONVENTION SHOULD BE MODIFIED OR OVERRIDEN ON THIS OCCASION; IT WAS THEY, AND NOT BRITISH POLITICIANS, WHO WOULD BEAR RESPONSIBILITY FOR THEIR DECISION.

MRS THATCHER AND MR TRUDEAU ALSO DISCUSSED THE POSSIBLE
TIMETABLE FOR HANDLING THESE MATTERS. MRS THATCHER SAID
THAT ANY MEASURE APPROVED BY THE CANADIAN PARLIAMENT COULD
NOT NOW BE INTRODUCED AT WESTMINSTER UNTIL THE NEW SESSION
OF PARLIAMENT. MR TRUDEAU ACCEPTED THIS, AND ALSO ACCEPTED
THAT IT WOULD BE FOR THE BRITISH GOVERNMENT TO DECIDE UPON
THE TIMING OF THE INTRODUCTION AND PASSAGE OF ANY SUCH MEASURE
IN PARLIAMENT, HAVING REGARD TO ITS OWN LEGISLATIVE PRIORITIES
AND THE OTHER DEMANDS UPON PARLIAMENTARY TIME.

MRS THATCHER AND MR TRUDEAU AGREED THAT THEY SHOULD
REMAIN IN TOUCH IN THESE MATTERS, AND REVIEW THE POSITION
ONCE MR TRUDEAU'S CONSULTATIONS IN CANADA WERE COMPLETED.

ENDS

CARRINGTON

NNN

SENT AT 050937Z RD

IN REPLY

ADVANCE COPY

IMMEDIATE

MELFO 10/05

00 FCO

00 OTTAWA

GRS200

UNCLASSIFIED
FM UKDEL MELBOURNE 050630Z OCT 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 71 OF 5 OCTOBER
AND TO IMMEDIATE OTTAWA

CANADIAN CONSTITUTION.

Mr. N.A.D. (Ltd),
Mr. C.E.D.,
Mr. S.P.D.,
Ps.
Ps/Lt.,
Ps/Mr. Luce,
Ps/Mr. Hurd,
Ps/Pus.
Mr. Russell,
Mr. Use,
350 Cabinet
Office,

Sir I. Sinclair } Legal
Mr. Freeland } Affairs,
Dr. Parry }
R/Chancellor of the Duchy
of Lancaster,
Ps/Lt. Chancellor,
Ps/Lt. President,
Mr. H. Steel, Law Officers'
Dept
Ps/No. 10, Downing St.,
R.C. (19X)

1. PRIME MINISTER AND MR TRUDEAU MET IN MELBOURNE AT 1145 LOCAL TIME. AT THE END OF THEIR MEETING THEY AGREED GUIDANCE FOR PRESS SPOKESMEN AS IN MIFT. TWO FURTHER POINTS CAN BE MADE BY WAY OF BACKGROUND:
(1) THE TWO PRIME MINISTERS WERE IN COMPLETE AGREEMENT ON THE WAY IN WHICH THESE MATTER WERE TO BE CARRIED FORWARD AS INDICATED IN THE GUIDANCE.
(2) MRS THATCHER SAID THAT WE OWED IT TO THE MAINTENANCE OF OUR VERY CLOSE AND FRIENDLY RELATIONS WITH CANADA TO DEAL WITH THESE MATTERS AS QUICKLY AS MIGHT BE; MR TRUDEAU WELCOMED THAT INDICATION WHILE FULLY ACCEPTING THAT IT WAS FOR THE BRITISH GOVERNMENT TO DECIDE UPON TIMING ON OUR SIDE.

2. FULLER RECORD OF MEETING WILL FOLLOW WHEN AMSTRONG RETURNS TO LONDON.

CARRINGTON

FCO PSE PASS OTTAWA

NNNN

PSE AMMEDN SUB-PARA 2 FIRST LINE TO RIA E E READ WE OWED IT TO THE MAINTENANCE KK

Canada

5 October 1981

In the Prime Minister's absence at the Commonwealth Heads of Government meeting in Australia, I am writing on her behalf to thank you for your letter of 29 September, and for sending her a summary of the judgment of the Supreme Court of Canada on the patriation of the Canadian Constitution. I shall place this before the Prime Minister on her return.

WR

↓
True?
no
WR
gno

Her Excellency Mrs. Jean Casselman Wadds.

ds.



W. M. M.

See by his (own) Minister
AJ

PRIME MINISTER

Canadian Constitution

You are to discuss this with Mr Trudeau after lunch on Monday 5 October. By way of preparation for this meeting, I discussed the matter with my Canadian counterpart, Mr Pitfield, on Thursday 1 October.

2. The Supreme Court of Canada has ruled, by a majority of 7 to 2, that the resolution and draft Bill proposed by the Canadian Government for patriation of the Constitution, amending formula and a Bill of Rights, are not illegal under Canadian Law. The Court has ruled that the resolution and draft Bill would have an effect on the distribution of powers between the federal and provincial institutions; and that there is a constitutional convention that measures which have such an effect should be introduced with some measure of agreement between the federal and the provincial Governments. The Court has not indicated how many provincial Governments are required to agree in order to satisfy this requirement: that is regarded as a matter for political judgment, not the judgment of the Courts. It follows from the Court's ruling on this point that unanimity is not required. The Court has, however, ruled (by a majority of 6 to 3) that the resolution and draft Bill proposed by the Canadian Government and Parliament do not comply with the constitutional convention.

3. Mr Pitfield told me that Mr Trudeau regards this judgment as being as good as he could expect to get. The important ruling for him is that the resolution and draft Bill are not illegal under Canadian Law. It has always been clear that the proposals did not comply with the constitutional convention. He accepts that constitutional conventions should in all normal circumstances be regarded as binding, and should not be lightly or unadvisedly altered or broken. But it is of their nature that they should be capable of being modified or developed or overridden when changes of circumstances require; and it is a matter for political decision, and in this case for political decision in Canada, whether and when circumstances so require. The Canadian Government and Parliament are entitled to take the view that the time has come for the breach of constitutional convention now proposed; and it is they who will have to carry the responsibility and pay the price, if they have misjudged Canadian needs and public opinion.



That is a responsibility which the British Government cannot and should not seek to share.

4. Reactions from the provinces have varied, from the total intransigence of Monsieur René Levesque of Quebec to the more moderate position of Mr Peckford of Newfoundland. The convener of the provincial premiers is Mr Bennett of British Columbia, and I understand that Mr Trudeau may stop over at Vancouver on his way home from Melbourne, to talk to Mr Bennett.

5. Mr Trudeau's public position is that, having now got legal clearance from the Supreme Court, he proposes to press the matter forward, and invite the Canadian Parliament to approve the resolution and draft Bill for forwarding to Westminster. He is indicating both privately and publicly that he is ready to talk further with the provincial premiers, and is prepared to consider some "weakening" of some sections of the Charter of Rights, but nothing that would fundamentally alter it. Mr Peckford, the Prime Minister of Newfoundland, has suggested dropping the Charter of Rights, and proceeding only with the provisions for patriation of the constitution and for an amending formula. I asked Mr Pitfield whether Mr Trudeau was prepared to contemplate that, because it would (apart from anything else) transform the prospects of getting the Bill through at Westminster. Mr Pitfield said that he was not. He expects an early challenge from Quebec, and some kind of showdown with Monsieur Levesque; and he regards it as essential to have on the statute book those provisions in the Charter of Rights which assure French minority rights in the English-speaking provinces, as a demonstration to the people of Quebec that they are fully provided for in the federation.

6. As to timetable, though Mr Trudeau will leave some time for consulting the provincial premiers and clearly hopes to detach some moderates to add to the two who already support him, he judges that time is not on his side, and that the tactical advantage to him is to keep up the pressure on them. Though he may be able to detach some of them, he cannot hope to get enough to satisfy any of the stock amending formulas, all of which require any change to be agreed by both Ontario and Quebec. He, therefore, intends to put a resolution and draft Bill - either the one already approved or a slightly modified version - to the Canadian Parliament in the second half of October, and deliver it to London by the end of the month.



7. Mr Pitfield made it clear that Mr Trudeau is counting on the British Government continuing to adhere to their commitment to introduce at Westminster whatever Bill is duly approved by the Canadian Parliament. If there were any suggestion of weakening or qualifying that commitment, his position in Canada would be seriously undermined. He will, therefore, be seeking to find out from you whether that commitment still holds firm.

8. I said that I thought that, since the Supreme Court had confirmed that what was proposed was legal under Canadian Law, you would confirm that the British Government accepted a duty to introduce into the Westminster Parliament whatever Bill was duly requested and approved by the Canadian Parliament. As to how the Bill might fare at Westminster, I said that it was early days to say, and it might be difficult to judge clearly until the House of Commons returned on 19 October; but our preliminary view was that the Supreme Court's ruling that the request was not in accordance with constitutional convention was bound to exacerbate the difficulties of the Bill's passage at Westminster. (Since I spoke, this has been confirmed by Mr Jonathan Aitken MP in Canada: see telegram no. 535 attached.)

9. Mr Pitfield made three points on this:

- (i) If the Bill was introduced at Westminster but fell during its passage because of opposition and backbench refusal to support it, Mr Trudeau would not blame the British Government and Anglo-Canadian relationships would not be affected, though Mr Trudeau might be publicly critical of Parliament and even of individual Members of Parliament.
- (ii) Mr Trudeau accepted that it was possible that the Bill might hang around at Westminster for quite a long time; the implication being that, if it failed a first time, we might have to try again.
- (iii) Mr Trudeau accepted that, if the Bill was introduced at Westminster and then failed during the course of its passage, that failure would be his responsibility; he would have failed to convince British MPs of the case for passing the Bill, and he would carry the consequences of that. But (Mr Pitfield said) Mr Trudeau had a plan, the details of which



Mr Pitfield did not divulge, but which would, he hoped, ensure that the Bill reached Westminster with a greater degree of Canadian provincial support, and with a good chance of being acceptable at Westminster.

10. This last point is, of course, compatible with Mr Trudeau's position, that the constitutional convention which he is breaking is a political one and not a legal one, that it is for Canadian political decision, and that Canadian politicians will have to pay for the consequences of it and that those consequences have to be faced by Canadian politicians (including himself) and not British backbenchers.

11. As to the timetable, Mr Pitfield said that Mr Trudeau would want to discuss it with you. Of course, he wanted this Bill passed, but he accepted that it was up to the British Government both to assess what timetable would be most likely to lead to a satisfactory outcome and how the Canadian Bill had to be fitted into the British Government's own legislative priorities. I said that the Bill could not in any event be introduced until the new Session, and could not come up for Second Reading before 16 November at the earliest. It might well have to be later than that, because the Government's legislative programme included a number of Bills with early deadlines, including a number of financial Bills and a controversial Bill on local government finance which had to pass through all its stages by the end of February.

12. So much for my talk with Mr Pitfield.

13. Though Mr Trudeau is putting a brave face on the Supreme Court's ruling, I would judge that he is well aware that it has weakened his political position. He cannot now pretend that what he is about is other than a breach of constitutional convention; and he would, therefore, be a good deal less convincing, both in Canada and in Britain, if he complained that the British Parliament's failure to pass this Bill was a breach of the constitutional convention that Westminster should pass without alteration any measure duly requested and approved by the Canadian Parliament. I would judge, therefore, that he will be looking very hard for the possibility of making modifications to the Bill - and particularly to the Charter of Rights - that enable him to secure the support of a greater number of provincial premiers. But he will want to maximise their concessions and minimise his own: hence the importance to him of maintaining the clear impression that he is pressing on regardless.



14. Whether he will in the end be prepared to drop the Charter of Rights completely, in order to get patriation and the amending formula, I cannot judge. He is saying publicly that he would not; and to do so would be a major political defeat. But he might conclude that that would in the end be less humiliating than failure to get anything.

15. What should the British Government's position be? It seems to me that nothing that has happened gives any reason for departing from the commitment you have given and repeated: that the British Government will introduce as Government legislation at Westminster and invite Parliament to pass any measure duly requested and approved by the Canadian Parliament. You could go on to confirm to Mr Trudeau that the Supreme Court's ruling on the question of constitutional convention will certainly exacerbate the difficulties of getting the Bill through Westminster, and that anything he can do to modify it so as to make it acceptable to more of the provincial Governments would reduce the dangers of defeat, and improve the prospects of getting the Bill through in reasonable time.

16. I suggest that you should not at this stage be drawn into answering hypothetical questions about what would happen if the Bill was defeated at Westminster. I think that there are two possibilities which we ought to consider:

(a) that the Bill gets a second reading, but an amendment at Committee stage to delete the Charter of Rights is successful;

(b) that the Bill fails at second (or third) reading.

I believe that, if the Charter of Rights is deleted at Committee stage, we had better complete and pass the truncated Bill with the patriation and amending formula provisions. If the Bill fails at Second Reading, I believe that we should then consider the immediate introduction, not on Canadian request but on our own initiative, of another Bill containing only the patriation and amending formula provisions. Either of these courses would be in breach of the constitutional convention that the Westminster Parliament can act only on the request of the Canadian Parliament and cannot vary or modify the provisions requested; but the Canadian Government could hardly complain at our breaching that convention, when they were themselves in authoritatively confirmed breach of the constitutional convention about obtaining provincial agreement for any measure which altered the federal-provincial balance of powers.



And either course would have the great advantage of divesting Westminster of its last vestiges of colonial responsibility in this field and putting responsibility for Canadian constitutional issues where it unquestionably belongs: in Canada.

17. You will have to consider as the discussion goes along whether to hint at these possibilities when you see Mr Trudeau on 5 October. It is arguable that by doing so you might make him readier to consider himself dropping the Charter of Rights before the Bill is sent over to Westminster. But I think that any hint of this kind would be premature at this stage, and possibly counterproductive; and I also think that, if and when any hint of this kind is to be given, it would be better in the first instance to trail it below the top level (eg the Lord President to Monsieur Chrétien, or me to Mr Pitfield) rather than for you to put it direct to Mr Trudeau.

18. The Press know that your meeting with Mr Trudeau is happening in the afternoon of 5 October, and you will need to agree a line for your and his spokesman to use. I attach a draft of a possible text; if it is acceptable to you, you could give a copy to Mr Trudeau, discuss it briefly with him, and invite Mr Pitfield and me to agree a text in the light of your and Mr Trudeau's comments.

19. I am sending copies of this note to the Foreign and Commonwealth Secretary and Sir Michael Palliser; copies will go to the Lord President, the Chief Whip and the Attorney General when we get back to London.

REA

ROBERT ARMSTRONG

4 October 1981

DRAFT

Mrs Thatcher and Mr Trudeau met this afternoon to take stock of the position, following the ruling by the Supreme Court of Canada on the Canadian Government's proposals for amendments to the constitution of Canada.

Mr Trudeau ^{included} ~~said~~ that on his return to Canada he would be consulting his colleagues in the Federal Government and the provincial premiers. Subject to the outcome of these consultations, his Government would invite the Canadian Parliament to approve a resolution and draft Bill - basically the drafts already considered, subject to the possibility of ~~minor~~ modifications in the light of those consultations. If the resolution and draft Bill were approved by the Canadian Parliament, they would then be sent to The Queen, so that the Bill could be presented for enactment by the British Parliament.

Mrs Thatcher confirmed that, following the ruling by the Supreme Court on the legality of what was proposed, the British Government would, in accordance with convention, introduce at Westminster ~~and invite the~~ ^{the} ~~British Parliament to pass whatever~~ legislation ~~was~~ duly requested and approved by the Canadian Parliament. She said that Mr Trudeau would know that some Members of Parliament at Westminster were concerned at the proposal that they should be asked to approve a measure affecting the balance of power between the Federal Government and provincial Governments in Canada which did not have the approval of a substantive majority of the provincial Governments. Their concern would undoubtedly be strengthened by the Supreme Court's ruling that it was not in accordance with constitutional convention that such a measure should be enacted without provincial consent.

Mr Trudeau said that the Supreme Court's ruling made it clear that provincial consent was a matter of conventional but not of legal requirement. The constitutional convention in question was a political matter,



and a convention of Canadian politics. He hoped that the Members of the British Parliament concerned would recognise that it was for Canadian politicians to decide whether the convention should be modified or overridden on this occasion; it was they, and not British politicians, who would ^{be} responsible ~~for, and would have to pay the consequences of,~~ their decision.

Mrs Thatcher and Mr Trudeau also discussed the possible timetable for handling these matters. Mrs Thatcher said that any measure approved by the Canadian Parliament could not now be introduced at Westminster until the new Session of Parliament. Mr Trudeau accepted this, and also accepted that it would be for the British Government to decide upon the timing of the introduction and passage of any such measure in Parliament, having regard to its own legislative priorities and the other demands upon Parliamentary time.

Mrs Thatcher and Mr Trudeau agreed that they should remain in touch in these matters, and review the position once Mr Trudeau's consultations in Canada were completed.

5 October 1981

CONFIDENTIAL
IMMEDIATE

Al file
2/1838

CONFIDENTIAL

FM OTTAWA 021615Z OCTOBER 81

TO IMMEDIATE FCO

TELEGRAM NUMBER 535 OF 2 OCTOBER

INFO IMMEDIATE UKDEL MELBOURNE (FOR PS AND PS/PM AND DAY)

See 153 3/10

CANADIAN CONSTITUTION

1. FOUR CONSERVATIVE MPS, JONATHAN AITKEN, TONY MARLOW, NICK BUDGEN AND RICHARD SHEPHERD CAME TO SEE ME THIS MORNING. THEY HAVE BEEN IN CANADA AT THE INVITATION OF THE QUEBEC GOVERNMENT. WE DISCUSSED PROSPECTS FOR THE CONSTITUTIONAL PACKAGE AND I TOLD THEM HOW MATTERS STOOD. THE PARTY ARE RETURNING TO LONDON TONIGHT. THEY PLAN TO SEE MR LUCE AFTER THEIR RETURN TO TELL HIM THEIR IMPRESSIONS.

(Also has of course just been appointed < Whips)

2. IN AN INTERVIEW PUBLISHED IN THE PRESS THIS MORNING MR AITKEN IS REPORTED AS SAYING THAT THE COURT RULING QUOTE CONFIRMED THAT TAKING INTO ACCOUNT THE DEGREE OF SUPPORT FROM THE PROVINCES AND OTHER INTERESTS IN CANADA THERE WAS A CONSTITUTIONAL CONVENTION. SINCE WE IN PARLIAMENT HAVE A VERY HIGH REGARD FOR THE IMPORTANCE OF CONSTITUTIONAL CONVENTIONS I THINK AT THE VERY LEAST THE CHANCES OF GETTING IT THROUGH HAVE BEEN DECREASED AND THE CHANCES OF A GREAT DEAL OF PRETTY INTENSE ARGUMENT HAVE SUBSTANTIALLY INCREASED UNQUOTE. ASKED TO ASSESS THE PROSPECTS OF SUCCESS AT WESTMINSTER MR AITKEN SAID THAT HE RECKONED IT WAS 6-4 AGAINST. FOR HIS PART MR MARLOW SAID QUOTE IT IS QUITE OBVIOUS WE WILL BE BEING ASKED TO CHANGE THE BALANCE OF POWER BETWEEN THE FEDERAL GOVERNMENT AND THE PROVINCIAL GOVERNMENTS IN CANADA. IT IS NOT THE BUSINESS OF THE BRITISH PARLIAMENT TO CHANGE THE BALANCE OF POWER IN CANADA, THAT IS SOMETHING FOR CANADIANS TO DECIDE FOR THEMSELVES UNQUOTE. AITKEN ADDED THAT IT WAS QUOTE THE MOST FERVENT HOPE OF OTHER MPS AT WESTMINSTER THAT THIS WHOLE MATTER COULD BE RESOLVED IN CANADA AND WILL NOT COME TO US IN ANYTHING BUT A PURELY AGREED FORM. WE WANT TO DO WHAT CANADA WANTS. HE SAID THAT IF TRUDEAU DECIDED TO CARRY ON IN THE ABSENCE OF GREATER PROVINCIAL CONSENSUS HE THOUGHT THE BRITISH GOVERNMENT WOULD DO ITS BEST TO HELP THE FEDERAL GOVERNMENT IN CANADA.

3. MR MARLOW POINTED OUT THAT THE STRICT PARTY DISCIPLINE THAT EXISTS IN CANADA IS UNKNOWN IN BRITAIN, WHERE BACKBENCH MPS ACT MUCH MORE INDEPENDENTLY, BUT MR SHEPHERD SAID THAT HE BELIEVED THAT MOST BRITISH MPS WOULD BE LIKELY TO FOLLOW THE ADVICE OF THE GOVERNMENT. MR AITKEN POINTED OUT THAT THE LAST TWO MAJOR CONSTITUTIONAL ISSUES TO REACH THE FLOOR OF THE BRITISH HOUSE OF COMMONS HAD BEEN EITHER DEFEATED OR TALKED OUT BY BACKBENCHERS DESPITE STRONG PRESSURE FOR APPROVAL FROM THE GOVERNMENT. HE ADDED THAT THE CHARTER OF RIGHTS WAS THE SINGLE ELEMENT OF THE TRUDEAU PACKAGE THAT WAS MOST TROUBLING TO BRITISH MPS, SAYING QUOTE THOSE WHO HAVE LOOKED AT IT EVEN CURSORILY ARE PROFOUNDLY CONCERNED, PARTICULARLY ABOUT THE INHERENT ABSURDITY OF WESTMINSTER PARLIAMENTARIANS LEGISLATING FOR CANADIANS ON BASIC RIGHTS, SOME OF WHICH ARE DEEPLY CONTROVERSIAL HERE IN CANADA UNQUOTE. MARLOW ADDED QUOTE WE FEEL THIS IS SOMETHING THAT SHOULD BE DONE ENTIRELY IN CANADA. IT IS QUITE INAPPROPRIATE THAT THIS MATTER SHOULD BE PUT BEFORE THE BRITISH PARLIAMENT AT ALL UNQUOTE.

MORAN

NNNN

Prime Minister



Handwritten signature

CABINET OFFICE

With the compliments of

R L L Facer

1 October 1981

70 Whitehall, London SW1A 2AS

Telephone 01 233

CONFIDENTIAL

T/05614

1 October 1981

CABINET

PATRIATION OF THE CANADIAN CONSTITUTION

MINUTES of a Meeting held in
Conference Room C, Cabinet Office on
WEDNESDAY 30 SEPTEMBER 1981 at 4.00 pm

PRESENT

The Rt Hon William Whitelaw MP
Secretary of State for the Home Department
(In the Chair)

The Rt Hon Lord Hailsham
Lord Chancellor

The Rt Hon Francis Pym MP
Lord President of the Council

The Rt Hon Humphrey Atkins MP
Lord Privy Seal

The Rt Hon Baroness Young
Chancellor of the Duchy of Lancaster

The Rt Hon Sir Michael Havers QC MP
Attorney General

The Rt Hon Michael Jopling MP
Parliamentary Secretary, Treasury.

The Rt Hon Lord Denham
Captain of the Gentlemen-at-Arms

SECRETARIAT

Mr R L L Facer
Mr D H J Hilary

CONFIDENTIAL

CONFIDENTIAL

PATRIATION OF THE CANADIAN CONSTITUTION

(Previous Reference: OD(81)3rd Meeting)

The meeting had before it a minute from the Lord Privy Seal dated 30 September on the options before the Government as a result of the judgements of the Supreme Court of Canada published on 28 September; and a letter from the Lord Chancellor dated 29 September giving preliminary views on the judgements.

THE LORD PRIVY SEAL said that the Supreme Court of Canada had ruled, by a majority of six to three, that there was a constitutional convention under which Canada would not request the United Kingdom Government to put to Parliament a measure to amend the constitution of Canada affecting Federal-provincial relationships without first obtaining the agreement of the provinces; but had found by a majority of seven to two, that there was no legal requirement to follow that convention. The Prime Minister was likely to discuss the implications of the Supreme Court judgements with the Prime Minister of Canada, Mr Trudeau, in the margins of the Commonwealth Heads of Government meeting in Melbourne. He had sent preliminary advice to the Prime Minister suggesting that she should take the line that the judgements had created a new situation which deserved close study by the experts. This line could not be maintained for long, though it was open to the Government to await developments in Canada before taking up a firm position. Alternatively, the Prime Minister might be advised to warn Mr Trudeau that under the new circumstances the proposals of the Federal Government to amend and patriate the Canadian Constitution were unlikely to pass through Parliament, and she might go further and expressly ask Mr Trudeau not to send the patriation request in its present form. Although Mr Trudeau had said publicly that he intended to proceed with the legislation, he did not appear to have ruled out further discussions with the Provinces. It was also necessary to re-consider the proposed reply to the report of the House of Commons Foreign Affairs Committee published in January and decide whether to arrange an early debate in the House.

THE LORD CHANCELLOR said that the judgements of the Supreme Court had created the possibility of a constitutional crisis in Canada and greatly worsened the Parliamentary difficulties at Westminster. The judgements were complex, but his preliminary view was that if Mr Trudeau pressed his existing proposals unamended

CONFIDENTIAL

CONFIDENTIAL

in the form of a request from the Canadian Parliament under the Statute of Westminster 1931, the conventions precluded the United Kingdom Parliament from either amending a request validly made for an amendment to the British North America Act 1867 or simply repatriating the Canadian Constitution on any terms other than contained in such a valid request. As Canada was an independent nation, only the views of the Federal Government and Parliament could influence the decision of the United Kingdom Parliament. Breach of convention as between a Federal Government recognised as the Government of an independent nation, and its constituent Provinces, did not justify the Westminster Parliament in disregarding the Ottawa Parliament's request.

THE ATTORNEY GENERAL said that his preliminary view was that the Supreme Court's judgement that the Federal Government was in breach of the conventions might make it possible for the United Kingdom Parliament to enact a short Bill patriating the Canadian Constitution without at the same time enacting the Federal Government's proposals for amendment. He had noted the Supreme Court's statement that some conventions might be more important than some laws and that it was appropriate to say that to violate a convention was to do something which was unconstitutional although it entailed no legal consequences.

In discussion the point was made that further study of the legal and constitutional position was required before clear advice could be offered to the Government. Any attempt by Mr Trudeau to obtain an early indication of the Government's intentions should therefore be resisted. The United Kingdom had a moral obligation to avoid simply returning the problem to Canada by enacting the patriation Bill without the proposed amending formula, since to do so against the advice of the Federal Government would have severe repercussions in Canada. Nevertheless, it was clear that the Supreme Court's judgements had considerably worsened the prospects of securing the passage of the present Federal proposals through both Houses of Parliament. Government backbenchers who would previously have supported the legislation might well in the new circumstances oppose it. The tendentious nature of the pamphlet recently circulated by the Canadian High Commission would only serve to make matters worse. Even if the Bill passed the House of Commons, it could be delayed in the House of Lords through the right of Peers to petition against it: such petitions might be referred to a Select Committee. It would not be appropriate to introduce the Bill first in the House of Lords. Furthermore, it would be difficult to discover

CONFIDENTIAL

CONFIDENTIAL

at this stage how the Opposition parties intended to vote. Mr Trudeau should be asked to seek a measure of consensus within Canada before submitting any request.

THE HOME SECRETARY, summing up the discussion, said that the judgements of the Supreme Court of Canada had created a new situation. The Law Officers would wish in due course to tender their formal advice to the Government on the legal and constitutional implications of the judgements. But the meeting, which included all the Ministers with a responsibility for advising on the legal, constitutional and Parliamentary aspects, was in no doubt that if Mr Trudeau persisted with his proposals without obtaining a greater degree of consensus within Canada, there would be great difficulty in passing them through Parliament. The Prime Minister should be advised to take the opportunity of explaining this to Mr Trudeau and indicating that the problem would be eased if he were able to secure a broader measure of agreement within Canada. If Mr Trudeau asked whether the Government would confirm their earlier undertaking to submit to Parliament whatever request was received from the Federal Government and would make every effort, if necessary by a three-line whip, to secure its passage, he should be told that the Government would of course urge Parliament to accede to a proper Canadian request, but that British Ministers should be left to decide how best to handle it in Parliament. At this stage only a short reply, couched in neutral terms, should be given to the Foreign Affairs Committee, and a debate in the House of Commons should be avoided until the Canadian Government's intentions became clearer.

The meeting -

1. Invited the Lord Privy Seal to arrange for advice to be sent to the Prime Minister in Melbourne for her forthcoming meeting with Mr Trudeau on the lines indicated in the Chairman's summing up.
2. Invited the Lord Privy Seal, in consultation with the Lord Chancellor, the Lord President of the Council and the Attorney General, to draft a neutral interim reply to the Foreign Affairs Committee.

CONFIDENTIAL

Circulated to:

The Prime Minister
Secretary of State for the Home Dept
Lord Chancellor
Lord President
Lord Privy Seal (2)
Secretary of State for Foreign
and Commonwealth Affairs
Attorney General
Chancellor of the Duchy of Lancaster
Chief Whip
Sir Michael Palliser
Captain of the Gentlemen-at-Arms
Sir Robert Armstrong
Mr R L Wade-Gery
Mr D H J Hilary
Mr R L L Facer

Cabinet Office

1 October 1981

CONFIDENTIAL

PP UKDEL MELBOURNE

GRS 145

UNCLASSIFIED

FM F C O 011237Z OCT 81

TO PRIORITY UKDEL MELBOURNE

TELEGRAM NUMBER 115 OF 01 OCTOBER

FOLLOWING FOR ALEXANDER, PRIME MINISTER'S PARTY, FROM PATTISON,
NO.10

FOLLOWING IS TEXT OF A TELEGRAM WHICH SIR BERNARD BRAINE HAS
ASKED SHOULD BE TRANSMITTED TO THE PRIME MINISTER:
QUOTE IN THE LIGHT OF THE RULING BY THE SUPREME COURT OF CANADA
THAT THE CANADIAN GOVERNMENT'S PATRIATION PROPOSALS ARE IN
BREACH OF THE CONVENTION REQUIRING PROVINCIAL ASSENT AND ARE
CONSEQUENTLY UNCONSTITUTIONAL, ALBEIT NOT ILLEGAL, MAY I RESPECT-
FULLY SUGGEST FIRSTLY THAT PRIME MINISTER TRUDEAU'S ATTENTION BE
DRAWN TO THE WIDESPREAD CONCERN AMONG COLLEAGUES IN PARLIAMENT
LEST THEY BE ASKED TO PASS LEGISLATION WHICH IS STRONGLY OPPOSED
BY EIGHT OUT OF TEN PROVINCES AND BY THE ABORIGINAL PEOPLES OF
CANADA; AND SECONDLY THAT PRIME MINISTER TRUDEAU SHOULD ONCE
AGAIN SEEK TO NEGOTIATE WITH BOTH PROVINCIAL AND ABORIGINAL
REPRESENTATIVES IN CANADA SO THAT AN AGREED SOLUTION BE FOUND
TO A DISPUTE OF GREAT POTENTIAL DANGER TO BOTH CANADA AND TO THE
COMMONWEALTH AS A WHOLE UNQUOTE.

CARRINGTON

NNNN



10 DOWNING STREET

With the compliments of

For favour of onward
transmission

1/10/81

0112372

File No.
Department 10 DOWNING STREET
Drafted by
(Block Capitals) MIKE PATTISON
Tel. Extn. 01-930-4433

OUTWARD
TELEGRAM

Security Classification
UNCLASSIFIED
Precedence
PRIORITY
DESKBYZ

FOR
COMMS. DEPT.
USE

Despatched

(Date)
(Time)Z

POSTBYZ

PREAMBLE

(Time of Origin)Z(G.M.T.) (Restrictive Prefix)
(Security Class.) UNCLASSIFIED (Caveat/
Privacy Marking)
(Codeword) (Deskby)Z

TO PRIORITY UKOZ MELBOURNE Tel. No. 115 of 1/10/81
(precedence) (post)

AND TO (precedence/post)

AND SAVING TO

REPEATED TO (for info)

SAVING TO (for info)

Distribution:-

None

NO DISTRIBUTION

B/1/10

Copies to:-

No 16

[TEXT]

FOLLOWING FOR ALEXANDER, PRIME MINISTER'S PARTY, FROM
PATTISON, NO. 10

Following is text of a telegram which Sir Bernard
Braine has asked should be transmitted to the Prime
Minister:

QUOTE

In the light of the ruling by the Supreme Court
of Canada that the Canadian Government's patriation
proposals are in breach of the convention requiring
provincial assent and are consequently unconstitutional,
albeit not illegal, may I respectfully suggest firstly
that Prime Minister Trudeau's attention be drawn to the
widespread concern among colleagues in Parliament lest
/ they

they be asked to pass legislation which is
strongly opposed by eight out/^{of}ten provinces
and by the Aboriginal peoples of Canada; and
secondly that Prime Minister Trudeau should
once again seek to negotiate with both pro-
vincial and Aboriginal representatives in
Canada so that an agreed solution be found to
a dispute of great potential danger to both
Canada and to the Commonwealth as a whole."

UNQUOTE

~~MESSAGE ENDS~~

MP

NOTHING TO BE WRITTEN IN THIS MARGIN

B/F request

010



*Mr Alexander
(or)*

**With the compliments of
NORTH AMERICA DEPARTMENT**

**Foreign and Commonwealth Office
London, S.W.1.**

CONFIDENTIAL

CALLS BY CANADIAN HIGH COMMISSIONER, THE HON MRS JEAN WADDS -
3.15 PM TUESDAY 29 SEPTEMBER 1981 ON THE LORD PRIVY SEAL,
MR LUCE AND LORD TREFGARNE

1. Mrs Wadds was accompanied by Mr Reeves Haggan, special adviser on the Constitution, and Mr Gagnier, First Secretary.

2. After initial courtesies Mrs Wadds said that her Government was obviously pleased about the Supreme Court's seven to two verdict on the legality of Mr Trudeau's proposals. She hoped that the Provinces would take a more moderate line than had originally been thought and that they would take up the opening which Mr Trudeau had left in his press conference in Seoul for the possibility of more talks. The talks would have to last only days though, not weeks or months. Mr Haggan re-emphasised this later in the talks.

3. The Lord Privy Seal said that it was clearly early days yet and that the Supreme Court decision would be carefully studied in the immediate future. However, from the little he had learned about the detail of the judgment, it did not appear to have made passage of the proposals through the UK Parliament any easier. Mrs Wadds replied that the decision on legality had made the position easier for the Federal Government and that ought to make it easier for the UK too. The Lord Privy Seal observed that parliamentary opinion here was likely to take account of the judgment as a whole and not just one part of it. It was agreed that it was important that the High Commission keep in close touch with us in the ensuing weeks.

4. In further discussions with Mr Luce and Lord Trefgarne, Mrs Wadds repeated that she hoped that in any further talks between the Provinces and the Federal Government, which could take place before or during the next Canadian Parliamentary session (re-opening on 14 October) the Provinces might be more willing to come to terms. Their immediate reaction to the Court's decision had not been as dramatic or hostile as might have been expected and there was evidence of a wish to have the matter settled. At a meeting earlier

/in the

CONFIDENTIAL

CONFIDENTIAL

in the day chaired by the Premier of British Columbia, Mrs Wadds thought she detected a more conciliatory tone and that from this meeting it looked unlikely (at the moment anyway) that Provincial Premiers would decide to come to the UK to lobby for their cause. Mrs Wadds said that in radio and press interviews with 'John Citizen' following the Court's decision the mood of the country was one of 'Lets get it finished' and allow the Government to get down to more important issues such as the economy, interest rates, etc.

Distribution:

PS
PS/LPS
PS/Mr Luce
PS/Lord Trefgarne
PS/PUS
NAD
CCD
News Dept
Mr Day
Mr Ure
Cabinet Office
Mr Freeland
Dr Parry
PS/Chancellor of Duchy of Lancaster
PS/Lord Chancellor
PS/Lord President
No 10 ✓
Chancery, Ottawa

CONFIDENTIAL

Arch u fco

Canadian High Commission



Haut Commissariat du Canada

London,
September 29, 1981

25/10

The Rt Hon Margaret Thatcher MP
Prime Minister
House of Commons
London SW1A 0AA

My Dear Prime Minister,

I am pleased to send you herewith a summary of the judgement of the Supreme Court of Canada in the matter of the patriation of the Canadian Constitution.

Should you require any further information please contact Mr. Reeves Haggan of my office at 629-9492, extension 360.

Yours sincerely,

Jean Casselman Wadds
High Commissioner

The Canadian Constitution 1981

Summary of the Supreme Court of Canada
Decision on the Proposed Amendments to the
Canadian Constitution.

The Supreme Court of Canada has held
that the consent of the Canadian provinces is
not legally required for the enactment of the
amendments to the Constitution of Canada,
which have been the subject of extensive

The Decision of the Supreme Court of Canada

The decision notes that in the
of provision in the British North
for amending the most significant parts
thereof, such as the United Kingdom
resolution of the two Houses of the
Parliament. While it notes that
when changes to provincial
have been made the political practice
followed has been to obtain the consent of
the provinces, there is no legal requirement
for such consent.

The decision agrees in that respect with
the decisions of the Manitoba Court of Appeal
and the Quebec Court of Appeal, both of which
held that provincial consent was not legally

required.

Canada



September 28, 1981

Summary of the Supreme Court of Canada
Decision on the Proposed Amendments to the
Canadian Constitution.

The Supreme Court of Canada has held that the consent of the Canadian provinces is not legally required for the enactment of the amendments to the Constitution of Canada, which have been the subject of extensive debate during the past nine months in the Senate and House of Commons of Canada.

The decision notes that in the absence of provision in the British North America Act for amending the most significant parts thereof, such amendment can only be made by the United Kingdom Parliament pursuant to a resolution of the two Houses of the Canadian Parliament. While it notes that in the past when changes to provincial legislative powers have been made the political practice followed has been to obtain the consent of the provinces, there is no legal requirement for such consent.

The decision agrees in that respect with the decisions of the Manitoba Court of Appeal and the Quebec Court of Appeal, both of which held that provincial consent was not legally required.

The second question asked by the provinces was whether there was a political convention that the consent of the provinces be sought before amendments are made which affect provincial legislative powers, or the status of provinces in the Constitution.

Although six of the nine judges found that there is a constitutional convention that amendments to the Constitution affecting provincial legislative powers required provincial consent, they made it clear that this is not a legal requirement. As with the disregard of any conventions, the political consequences are for the Canadian government to assess and are not legal issues for the Courts.

Thus the procedure for patriation of the Constitution initiated by the Government of Canada last October, and more formally initiated by the introduction of the resolution in January, 1981, can now be completed.

Equally, the Court's decision means there is no impediment to the United Kingdom Parliament proceeding to enact the Canada Act if requested by the two Houses of the Canadian Parliament.

The decision of the Supreme Court was in response to three reference cases initiated by the provinces in three different Courts of Appeal: Manitoba (October 24, 1980), Newfoundland (December 5, 1980), and Quebec (December 17, 1980). Identical questions were asked by Manitoba and Newfoundland, with Newfoundland adding an additional question specifically related to the interpretation of the Constitution Act, 1981, should it come into force, as it would apply to the Terms of Union with Newfoundland. Quebec's questions, while not identical to those of the other two provinces in substance, dealt with the same issues.

The first question in all three references essentially asked whether the proposed Canada Act, if enacted, would affect federal-provincial relationships or the rights and privileges of the provinces. The Court held that it would and, indeed, the position of the Attorney General of Canada before the Supreme Court was that this was so. Nevertheless, the Court held this was irrelevant to whether or not the consent of the provinces was legally required. As noted above, the answer to the third and only important question was that such consent is not required.

CF

25 September 1981

In the Prime Minister's absence en route to the Commonwealth Heads of Government meeting in Australia, I am writing to thank you for your letter of 15 September (which only arrived today). I am sure the Prime Minister will be interested in the information contained in your letter.

TPL

Mr. G.B. Gardom.

20



CABINET OFFICE

Am

With the compliments of
Sir Robert Armstrong KCB, CVO
Secretary of the Cabinet

M. O'D. B. Alexander, Esq

70 Whitehall, London SW1A 2AS
Telephone: 01-233 8319

Canada



CABINET OFFICE

70 Whitehall, London SW1A 2AS Telephone 01-233 8319

From the Secretary of the Cabinet: Sir Robert Armstrong KCB, CVO

Ref. A05623

22nd September, 1981

At a lunch given by the Australian High Commissioner yesterday I had a brief conversation with the Canadian High Commissioner, Mrs. Wadds, about the Canadian Constitution question.

She said that there were strong indications that the Supreme Court's judgment was to be expected about 30th September; but one had to be cautious, because such indications had been wrong in the past. I said that I feared that the long delay might mean a judgment on a very narrow majority, which would make the handling of the issue in this country more difficult. Mrs. Wadds was not sure that it would be so: she said that the Supreme Court appeared to be making considerable arrangements to publicise their judgment, in order to assert the importance of the Supreme Court in the Canadian Constitution, and this suggested to her that there might well be a clear cut decision: her impression was that the Chief Justice had been working hard for that outcome.

I am sending copies of this letter to Michael Alexander and David Heyhoe.

ROBERT ARMSTRONG

Sir Michael Palliser, GCMG

PPS

Province of
British Columbia

Ministry of
Intergovernmental
Relations

Parliament Buildings
Victoria
British Columbia
V8V 1X4



OFFICE OF THE MINISTER

R25/9

September 15, 1981

The Rt. Hon. Mrs. Margaret H. Thatcher,
Prime Minister,
House of Commons,
London SW1A 0AA,
England.

Dear Mrs. Thatcher:

Further to our earlier exchange of correspondence, I am most appreciative of your interest in the issues involving Canada's constitution and the United Kingdom's role as its trustee.

A recent development I believe you should be aware of is that a nation-wide opinion poll asked Canadians what they thought of their central government's unilateral action concerning their constitution.

The result was, in effect, an overwhelming condemnation of the federal government's action.

When the poll results were announced, there was some initial speculation that the poll questions themselves may have been inadequate because the poll was sponsored by the eight premiers who are opposed to the unilateral action. This was quite unfounded, as you will see from the enclosed material.

In view of the serious opposition across our nation to the central government's unilateral action, we believe it would be most unfortunate should the Parliament of the United Kingdom accede to the Canadian government's request without giving full consideration to these provincial concerns.

I am enclosing for your reference, the original Gallup Poll questions, a summary of the poll results, and a statement by Premier William R. Bennett at the time he announced the poll results on behalf of himself and the seven other premiers.

.../2

If you wish further information on this matter, please do not hesitate to communicate with myself or British Columbia's Agent-General, Mr. Alexander H. Hart, Q.C., at British Columbia House, No. 1 Regent Street, London SW1Y 4NS.

Yours sincerely,

A handwritten signature in black ink, appearing to read "M. Gagnon" followed by a flourish.

Garde B. Gardom,
Minister,
Intergovernmental Relations.

Dictated by Mr. Gardom and
signed in his absence.



PREMIER W.R. BENNETT'S REMARKS AT HIS PRESS CONFERENCE CONCERNING THE NATIONWIDE GALLUP POLL ON THE CONSTITUTION SPONSORED BY EIGHT PREMIERS, VANCOUVER, AUGUST 19, 1981.

- I will not dwell at great length on the results of the Gallup Poll being released today because the numbers are self-evident.
- The conclusions of the Poll are clear: by overwhelming majorities, Canadians in all parts of the country and in every province believe that Ottawa's current Constitutional initiative is divisive. They wish to see further meetings to ensure that all changes to our Constitution are made in Canada, and they hold to the view that Canada is a federation in which Constitutional changes affecting the rights of provinces should require their consent.
- I believe the results of this Poll should indicate to all that the position taken by the eight Provincial Premiers has the overwhelming support of the Canadian people in every province.
- However, now is not the time for one side or the other to gloat about the public opinion scorecard, nor is it the time to speak of winners and losers. The process of reforming Canada's Constitution is not akin to a football game, nor is it a partisan affair like an election.
- My concern -- and one that I think is shared by all Canadians -- is that by keeping score on the issue of Constitutional reform as if there were winners and losers, and in the all-out search for victory at any price, Canada, my country, will be the ultimate loser.
- Now is the time for non-partisan reflection on the things we hold in common as Canadians and for the re-affirmation of our desire to continue in harmony the experiment in nation-building.
- If the Gallup Poll indicates anything it is that Canadians are a reasonable and fair-minded people. They have strong regional as well as national loyalties. Canadians do not wish to be forced to choose between their federal and provincial governments. Canadians across the country wish to see their governments getting along and reaching co-operative solutions to their everyday concerns.
- I cannot believe that the bitterness and acrimony that will result if Ottawa continues on its current unilateral course is what is needed at this time in our history.

- The concern uppermost in the minds of most Canadians -- and my priority as Premier of British Columbia -- is the economy. The BNA Act is not responsible for punitive interest rates, the BNA Act is not responsible for double-digit inflation, the BNA Act is not responsible for a falling Canadian dollar.
- Surely what is needed now is a pause in the Constitutional tangle -- a cooling-off period to give us time to reflect on where we have been and where we are going as Canadians -- and to give us time to address the serious economic problems that are the chief concern of Canadians.
- Last week, on behalf of the nine other provincial Premiers, I called on Prime Minister Trudeau to join with us in showing national leadership and a renewal of the spirit of co-operation in arriving at common-sense solutions to the problems of the day.
- As you know, the Premiers represent four different political parties that span the Canadian political spectrum. Today with the release of this poll, I renew my call to the Prime Minister to join with us and add a fifth political party to our deliberations in a sincere exercise in non-partisanship.
- Fifty years from now -- when historians look back upon this period -- they will reach one of two conclusions. Either they will conclude that Canadians, despite their bountiful resources and natural advantages, were so internally divided that they were led to squander their common heritage, or they will conclude that through national leadership they succeeded in overcoming temporary internal division and returned to the Canadian way of compromise, co-operation and conciliation.
- The next few months will be critical for determining which of these versions is portrayed by future historians.
- On behalf of my fellow Canadians, I sincerely hope it is the latter.

Hello. I'm...of the Canadian Gallup Poll. May I speak to the youngest (MALE/FEMALE - CHECK QUOTA) who is at home and is 18 years of age and over.

INTRODUCTION:

There has been considerable talk recently about the patriation of the B.N.A. Act which is Canada's Constitution.

1. How familiar would you say you are with these discussions - have you followed them fairly closely, somewhat closely or really not closely at all?

FAIRLY CLOSELY-----1
SOMEWHAT CLOSELY-----2
NOT CLOSELY AT ALL-----3

May I just tell you about some of it....

The Federal Government has proposed that the British Parliament enact a bill which will give Canadians the authority to change the B.N.A. Act in Canada. As part of this proposal, the Federal Government wants the British Parliament to change the B.N.A. Act to include an amending formula - a formula for future changes in the Constitution - and to include a Charter of Human Rights. The proposal would also ask the British Parliament to give the Canadian Senate a permanent veto - that is, a power to reject all future Constitution changes, including changes affecting the Senate itself. This Federal proposal has the support of two provinces, Ontario and New Brunswick.

Eight of the ten provinces - Newfoundland, Prince Edward Island, Nova Scotia, Quebec, Manitoba, Saskatchewan, Alberta and British Columbia - are opposed to this Federal proposal, and in response, in April 1981, an agreement was signed by the Premiers of these eight provinces in support of an alternative proposal. This agreement among the Premiers calls for patriation of the Canadian Constitution from the United Kingdom, with a different amending formula as the only change to be made by the British Parliament.

The Premiers' agreement specifies that any further changes to the Constitution, such as the proposed Charter of Human Rights, must be made in Canada, by Canadians.

The eight Premiers also called on the Prime Minister to meet with them to discuss their proposal.

Now I'd like to get your opinions on some questions about the Constitution.

2. First, do you agree or disagree that meetings should be held between the Prime Minister and all of the Provincial Premiers in order to try to reach agreement on the issue of the Constitution.

YES, AGREE-----1
NO, DISAGREE-----2
CAN'T SAY-----3

3. Do you agree or disagree that all changes to our Constitution except for an amending formula should be made in Canada, by Canadians?

YES, AGREE-----1
NO, DISAGREE-----2
CAN'T SAY-----3

4. The Federal Government - through its legal representative before the Supreme Court - has acknowledged that its patriation proposal would affect Provincial powers and rights.

a. Should changes to the Constitution which affect the powers and rights of Provinces as now established in the B.N.A. Act require the consent of these Provinces or not?

YES-----1-----ASK Q.4b
NO-----2-----
DON'T KNOW-----3-----SKIP TO Q.5

b. IF "YES" ASK:

b. Should this have to be unanimous consent, consent of a majority of the provinces or is there some other way you would suggest?

UNANIMOUS CONSENT-----1
MAJORITY CONSENT-----2

OTHER(SPECIFY) _____

_____3
CAN'T SAY-----4

ASK EVERYONE:

5. The Prime Minister has proposed that the Senate have an absolute veto, or power of rejection, over future constitutional change. The Premiers of the eight Provinces would like to see the Senate have only a power of delay for a limited period of time.

Which of these would you prefer to see happen - an absolute veto for the Senate or a power of delay?

ABSOLUTE VETO-----1
POWER OF DELAY-----2
DON'T KNOW-----3

6. From your experience with this topic, do you think the Federal Government's action to patriate the B.N.A. Act without the agreement of all provinces is working to divide or to unite Canadians?

TO DIVIDE-----1
TO UNITE-----2
CAN'T SAY-----3

7. Now on a different topic. Which of the following forms of government do you think would prove most appropriate for Canada?

A federation of two levels of government - Federal and Provincial-----1

Or:

One central government to be located in Ottawa-----2

CAN'T SAY-----3

A STUDY IN ATTITUDES TOWARDS THE CANADIAN CONSTITUTION

By:

THE CANADIAN GALLUP POLL LIMITED

August, 1981

HIGHLIGHTS

1. Nationally, a solid majority of Canadians are in agreement with the Constitutional issues raised by the Premiers of eight of the ten provinces in April, 1981.
2. Almost nine-in-ten (88%) Canadians believe there should be meetings between the Prime Minister and all of the Provincial Premiers to try to reach agreement on the issue of the Constitution.
3. Nine-in-ten Canadians believe that all changes to our Constitution - except for an amending formula should be made in Canada, by Canadians.
4. Four-in-five (77%) think changes which affect the powers and rights of Provinces - as now established in the B.N.A. Act - should require the consent of these provinces - 21% would prefer unanimous consent; while 48% would want majority consent; and another 8% either have some other solution or are unable to voice an opinion.
5. Two-thirds of Canadians (67%) agree with the eight Premiers that the Senate should have only a power of delay over future constitutional change. This compares with 18% who would grant the Senate an absolute veto over future changes.
6. When Canadians were asked if the Federal Government's action to patriate the B.N.A. Act without the agreement of all provinces is working to divide or to unite Canada, 60% feel it is divisive, while 26% believe it is unifying.
7. Finally, almost seven-in-ten Canadians believe the more appropriate form of government for our country is a federation of two levels of government - Federal and Provincial. About one-in-four (24%) opted for one central government to be located in Ottawa.

SUMMARY OF RESULTS

1. Meetings Between the Prime Minister and the Premiers

Nationally, almost nine-in-ten (88%) believe there should be meetings between the Prime Minister and all of the Provincial Premiers to try to reach agreement on the issue of the Canadian Constitution.

There is little difference in opinion on this point between regions - it ranges from a low of 84% agreement in Ontario, to a high of 93% in the Prairie Provinces.

	<u>Nat'l</u>	<u>Atl.</u>	<u>Que.</u>	<u>Ont.</u>	<u>Pr.</u>	<u>B.C.</u>
NUMBER OF RESPONDENTS	1064 100%	102 100%	291 100%	386 100%	182 100%	103 100%
Yes, agree	88	87	91	84	93	89
No, disagree	8	9	7	12	6	5
Can't say	3	4	2	4	1	6

Q.2 First, do you agree or disagree that meetings should be held between the Prime Minister and all of the Provincial Premiers in order to try to reach agreement on the issue of the Constitution.

2. Changes in the Constitution

Nine-in-ten Canadians believe that all changes to our Constitution - except for an amending formula - should be made in Canada, by Canadians.

Regionally, there is little variation in response on this question. It ranges from a low of 86% in the Atlantic Provinces to a high of 93% in the Prairies.

	<u>Nat'l</u>	<u>Atl.</u>	<u>Que.</u>	<u>Ont.</u>	<u>Pr.</u>	<u>B.C.</u>
<u>NUMBER OF RESPONDENTS</u>	1064 100%	102 100%	291 100%	386 100%	182 100%	103 100%
Yes, agree	90	86	89	89	93	91
No, disagree	6	7	5	8	4	5
Can't say	5	8	6	4	3	4

Q.3 Do you agree or disagree that all changes to our Constitution except for an amending formula should be made in Canada, by Canadians?

3. Changes Affecting Powers and Rights of Provinces

Four-in-five (77%) think changes which affect the powers and rights of Provinces - as now established in the B.N.A. Act - should require the consent of these provinces - 21% would prefer unanimous consent; while 48% would want majority consent; and another 8% either have some other solution or are unable to voice an opinion.

Again, there is little regional difference - Ontarians are least likely to agree (72%), while British Columbians are most likely (86%).

	<u>Nat'l</u>	<u>Atl.</u>	<u>Que.</u>	<u>Ont.</u>	<u>Pr.</u>	<u>B.C.</u>
NUMBER OF RESPONDENTS	1064	102	291	386	182	103
	100%	100%	100%	100%	100%	100%

Should require:

Unanimous consent	21	24	25	16	22	28
Majority consent	48	42	50	47	52	47
Other response	3	5	2	3	4	5
Can't say	5	6	2	6	5	7
Total, should require provincial consent	77	78	79	72	84	86
No, should not require provincial consent	12	9	10	17	9	6
Don't know	11	14	11	12	7	8

Q.4a. Should changes to the Constitution which affect the powers and rights of Provinces as now established in the B.N.A. Act require the consent of these provinces or not?

b. (IF "YES" ASK) Should this have to be unanimous consent, consent of a majority of the provinces or is there some other way you would suggest?

4. Senate's Position on Future Constitutional Change

Two-thirds of Canadians (67%) agree with the eight Premiers that the Senate should have only a power of delay over future Constitutional change. This compares with 18% who would grant the Senate an absolute veto over future changes.

Eastern provinces are less likely to agree with a power of delay, especially Quebec (56%). In the Prairie Provinces and in British Columbia three-quarters would give the Senate only a power of delay.

	<u>Nat'l</u>	<u>Atl.</u>	<u>Que.</u>	<u>Ont.</u>	<u>Pr.</u>	<u>B.C.</u>
NUMBER OF RESPONDENTS	1064	102	291	386	182	103
	100%	100%	100%	100%	100%	100%

Senate should have:

An absolute veto	18	16	22	20	10	10
A power of delay	67	70	56	67	75	75
Don't know	16	14	21	13	15	15

Q.5 Which of these would you prefer to see happen - an absolute veto for the Senate or a power of delay?

5. Federal Government's Action

When Canadians were asked if the Federal Government's action to patriate the B.N.A. Act without the agreement of all provinces is working to divide or to unite Canada, 60% feel it is divisive, while 26% believe it is unifying.

Those in the eastern provinces - particularly in Quebec (51%) are less likely to say the Federal Government's action was divisive, still a majority in each feel this way. In the Prairies (74%) and in British Columbia (67%) a greater proportion feel the Federal Government's action is likely to divide Canada.

	<u>Nat'l</u>	<u>Atl.</u>	<u>Que.</u>	<u>Ont.</u>	<u>Pr.</u>	<u>B.C.</u>
NUMBER OF RESPONDENTS	1064	102	291	386	182	103
	100%	100%	100%	100%	100%	100%

Federal Government's Action
is Working:

To divide Canada	60	56	51	59	74	67
To unite Canada	26	30	31	26	18	19
Can't say	15	14	17	15	8	15

Q.6 From your experience with this topic, do you think the Federal Government's action to patriate the B.N.A. Act without the agreement of all provinces is working to divide or to unite Canadians?

6. Most Appropriate Government for Canada

Almost seven-in-ten Canadians (69%) believe the more appropriate form of government for our country is a federation of two levels of government - Federal and Provincial. About one-in-four (24%) opted for one central government to be located in Ottawa.

In the Prairie Provinces and in British Columbia, 82% backed a federation of two levels of government for Canada. In Quebec, only 60% did so; while Ontarians and Maritimers closely matched the national average on this question.

	<u>Nat'l</u>	<u>Atl.</u>	<u>Que.</u>	<u>Ont.</u>	<u>Pr.</u>	<u>B.C.</u>
NUMBER OF RESPONDENTS	1064	102	291	386	182	103
	100%	100%	100%	100%	100%	100%

Preferred form of government:

One central government to be located in Ottawa	24	27	27	28	13	14
A federation of two levels of government - federal and provincial	69	67	60	65	82	82
Can't say	8	6	13	7	4	5

Q.7 Now on a different topic. Which of the following forms of government do you think would prove most appropriate for Canada?

7. Familiarity with Constitutional Discussions

Seventeen percent of Canadians say they have followed discussions on patriation of the B.N.A. Act fairly closely; while another 29% claim to have followed "somewhat closely". The majority, however, have not followed the discussions closely at all (54%).

Regionally, there is little difference - Quebec has slightly fewer who have not followed the discussions closely at all (49%); while the Atlantic has slightly more (60%).

	<u>Nat'l.</u>	<u>Atl.</u>	<u>Que.</u>	<u>Ont.</u>	<u>Pr.</u>	<u>B.C.</u>
NUMBER OF RESPONDENTS	1064	102	291	386	182	103
	100%	100%	100%	100%	100%	100%

Have followed discussions:

Fairly closely	17	19	17	18	15	15
Somewhat closely	29	21	35	27	27	31
Not closely at all	54	60	49	55	57	54

Q.1 How familiar would you say you are with these discussions - have you followed them fairly closely, somewhat closely or really not closely at all?

GRS 274

RESTRICTED

Canada

RESTRICTED

FM FCC 201600Z AUGUST 1981

TO ROUTINE OTTAWA

TELEGRAM NUMBER 303 OF 20 AUGUST 81

MS

CANADIAN CONSTITUTION

YOUR TELNO 438, PARA 3

1. THERE IS NO SINGLE BODY CALLED 'THE JUDICIAL COMMITTEE OF THE HOUSE OF LORDS'. THIS CANADIAN REFERENCE SEEMS TO BE AN AMALGAM OF 'THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL' AND 'THE APPELLATE COMMITTEE OF THE HOUSE OF LORDS'.
2. THE POSSIBILITY OF APPEAL FROM CANADIAN COURTS TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL WAS ABOLISHED SOME THIRTY YEARS AGO. THE ONLY WAY A MATTER CONCERNING CANADA COULD NOW COME BEFORE A COMMITTEE OF THE PRIVY COUNCIL WOULD BE BY SPECIAL REFERENCE BY THE QUEEN. THIS WOULD REQUIRE A PETITION TO HER MAJESTY WHO WOULD ONLY MAKE A SPECIAL REFERENCE IF ADVISED TO DO SO BY HER MINISTERS IN THE UNITED KINGDOM. THUS THE DECISION WOULD BE A POLITICAL ONE AND HER MAJESTY IS MOST UNLIKELY TO BE ADVISED TO MAKE A SPECIAL REFERENCE IN THIS CASE.
3. THE TWO 'APPEAL COMMITTEES' OF THE HOUSE OF LORDS, WHICH CONSIDER PETITIONS FOR LEAVE TO APPEAL AND DEAL WITH PROCEDURAL MATTERS CONCERNING APPEALS IN THE UNITED KINGDOM, AND THE TWO 'APPELLATE COMMITTEES' OF THE HOUSE OF LORDS, WHICH ACTUALLY HEAR APPEALS, ARE SOMETIMES DESCRIBED AS 'JUDICIAL' COMMITTEES IN THE GENERAL SENSE. THEY HAVE NO JURISDICTION TO HEAR APPEALS FROM CANADIAN COURTS.
4. WHAT MAY BE INTENDED IS SIMPLY SOME KIND OF AD HOC PRESENTATION OF LEGAL ARGUMENTS TO THE LAW LORDS WHO MAKE UP THE APPELLATE COMMITTEES. WE ARE CONSULTING THE OFFICERS OF THE HOUSE OF LORDS AS TO THE LIKELIHOOD OF SUCH A PRESENTATION OR PETITION BEING ENTERTAINED AND WILL LET YOU KNOW THEIR OPINION AND THE IMPLICATIONS OF SUCH A MOVE.

CARRINGTON

CANADIAN CONSTITUTION LIMITED

NAD
 CCD
 P & CD
 PCCU
 PARLIAMENTARY UNIT
 NEWS D
 INFORMATION D
 PS
 PS/LPS
 PS/MR RIDLEY

 PS/MR HURD
 PS/PUS
 SIR E YOUDE
 MR DAY
 MR URE
 LORD N G LENNOX
 CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
 MR FREELAND } LEGAL ADVS.
 DR PARRY }

PS/CHANCELLOR OF THE DUCHY OF LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

RESTRICTED

RESTRICTED

3. IT IS NOT CLEAR AT THIS STAGE HOW MUCH SUBSTANCE THERE IS IN THESE LEAKS AND HOW FAR THE PREMIERS ARE MERELY ATTEMPTING TO ENCOURAGE A CLIMATE OF UNCERTAINTY WHICH COULD LATER BE EXPLOITED. IT WOULD BE USEFUL TO KNOW WHETHER AN APPEAL TO THE JUDICIAL COMMITTEE (PRESUMABLY THROUGH THE GOOD OFFICES OF UK PARLIAMENTARIANS) WOULD BE FEASIBLE AND WHAT THE IMPLICATIONS WOULD BE FOR THE PASSAGE OF UK LEGISLATION ON THE SUBJECT.

MORAN

CANADIAN CONSTITUTION LIMITED

NAD

CCD

P & CD

PCCU

PARLIAMENTARY UNIT

NEWS D

INFORMATION D

PS

PS/LPS

PS/MR RIDLEY

PS/MR LUCE

PS/MR HURD

PS/PUS

MR DAY

MR URE

LORD N G LENNOX

CABINET OFFICE

COPIES TO:

SIR I SINCLAIR

MR FREELAND

DR PARRY

LEGAL ADVS.

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

**THIS TELEGRAM
WAS NOT
ADVANCED**

[COPIES SENT TO NO 10 DOWNING ST]

-2-

RESTRICTED



10 DOWNING STREET

From the Private Secretary

31 July 1981

THE CANADIAN CONSTITUTION: CONVERSATION IN OTTAWA

The Prime Minister has seen your letter to me of 28 July on this subject.

The Prime Minister recalls the "conversation" as a couple of sentences exchanged while she and Mr. Trudeau walked across the lawn at Montebello from the helicopter to the hotel. She and Mr. Trudeau agreed that there was no need for the bilateral meeting, which had been provisionally arranged, to take place as nothing new had happened. The Prime Minister told Mr. Trudeau that, whatever happened, patriation could not be taken during the "spill-over" here in October. Both Heads of Government agreed that they would have to consult as to how best to proceed once the Canadian Supreme Court had given its decision.

The Prime Minister told Mr. Trudeau that she naturally wished to get the legislation through the UK Parliament and that she, therefore, must be the judge of the best time to make the attempt.

I am sending copies of this letter to David Wright (Cabinet Office) and David Heyhoe (Chancellor of the Duchy's Office).

M. O'D. B. ALEXANDER

R.M.J. Lyne, Esq.,
Foreign and Commonwealth Office.



Foreign and Commonwealth Office

London SW1A 2AH

Pompey Pinder

28 July 1981

I presume that the account in the attached telegram is more or less accurate.

Ans 28/7

Dear Michael,

This "conversation" was a couple of sentences exchanged while sitting from trip returned to the hotel!

The Canadian Constitution: Conversation in Ottawa

For ease of reference, I attach a copy of the Ottawa telegram number 400 of 24 July asking whether the Constitution was in fact discussed informally at Montebello.

Constitution - need - then

The Canadian High Commission have indicated to us that there was an informal conversation in which (they say) the Prime Minister reiterated her 'commitment' and Mr Trudeau re-emphasised the need for speed in the UK, once the request for patriation reached this country. The High Commission added that Mr Trudeau had indicated his willingness to delay the request until it was in the right time relationship to the new session of the UK Parliament ie perhaps till October.

c) no need for bit detail - as nothing new had happened
b) could do anything in overkill.

I would be grateful if you could let me know whether the account of the Canadian High Commission is accurate so that we can reply to Lord Moran.

c) I need that we need to consult as has led to proceed when the decision

I am copying this letter to David Wright (Cabinet Office), Wilfred Hyde (Cabinet Office) and David Heyhoe (Chancellor of the Duchy of Lancaster's Office).

Yours ever
Rodric Lyne

(R M J Lyne)
Private Secretary

Naturally, I need to get the legislation through our Parliament and must help the Executive - not

M O'D B Alexander Esq
10 Downing St

RESTRICTED

GRS 100

RESTRICTED
FM OTTAWA 241440Z JUL 81
TO PRIORITY FCO
TELEGRAM NUMBER 400 OF 24 JULY

CONSTITUTION

1. REPORT IN TODAY'S GLOBE AND MAIL SAYS QUOTE BRITISH PRIME MINISTER MARGARET THATCHER WAS "NONCOMMITTAL BUT SUPPORTIVE" DURING A BRIEF DISCUSSION THIS WEEK WITH PRIME MINISTER PIERRE TRUDEAU ABOUT THE PASSAGE OF HIS PATRIATION PACKAGE IN WESTMINSTER. A SPOKESMAN FOR MR TRUDEAU SAID IN AN INTERVIEW YESTERDAY THE TWO LEADERS CHATTED ABOUT THE CONSTITUTION OVER A MEAL DURING THE THREE-DAY ECONOMIC SUMMIT AT NEARBY MONTEBELLO. UNQUOTE.

2. GRATEFUL TO KNOW WHETHER THE CONSTITUTION WAS IN FACT DISCUSSED INFORMALLY AT MONTEBELLO AND, IF SO, WHAT WAS SAID.

MORAN

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
~~PS/MR LUCC~~
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

RESTRICTED

Canada

CONFIDENTIAL

18805 - 1

PP OTTAWA

GRS 326

CONFIDENTIAL

FM FCO 101710Z JUL 81

TO PRIORITY OTTAWA

TELEGRAM NUMBER 244 OF 10 JULY

Handwritten signature

MY TELEGRAM NUMBER 243 OF 9 JULY 1981
CANADIAN CONSTITUTION

1. REEVESHAGGAN CALLED AGAIN TODAY ON HYDE ON INSTRUCTION FROM PITFIELD. HE MADE IT CLEAR THAT THE CANADIAN GOVERNMENT WERE EXTREMELY WORRIED ABOUT THE PRESENT STATE OF RELATIONS BETWEEN THEM AND THE PROVINCES. THEY FORESAW EVEN GREATER DIFFICULTIES IF THERE WAS ANY SIGNIFICANT GAP BETWEEN THE END OF THE PARLIAMENTARY PROCEEDINGS IN CANADA AND THE BEGINNING OF THE BRITISH PARLIAMENTARY PROCESS.
2. IT ALSO EMERGED THAT THE CANADIANS WERE ANXIOUS THAT A CONTINUANCE OF DISTURBANCES IN BRITAIN COULD LEAD TO THE NEED FOR FURTHER LEGISLATION AND RESULT IN DELAY FOR THE CANADIAN BILL. FOR THESE REASONS, AND TO TRY AND AVOID THERE BEING TIME FOR THE PROVINCIAL REFERENDA TO TAKE PLACE BEFORE THE BRITISH PARLIAMENTARY PROCESS IS COMPLETE, MR TRUDEAU WILL DEFINITELY PRESS MRS THATCHER HARD TO DEAL WITH THE MATTER DURING THE SPILL-OVER.
3. HYDE SPOKE IN SIMILAR TERMS TO THOSE USED AT THE LAST MEETING. HE EMPHASISED THE DIFFICULTIES OF DEALING WITH THE QUESTION DURING THE SPILL-OVER. TO TRY TO RUSH MATTERS THROUGH DURING THIS LIMITED PERIOD, FOR WHICH OTHER BUSINESS WAS ALREADY COMMITTED, WOULD NOT GIVE THE CANADIAN BILL THE BEST CHANCE. SUCH AN ATTEMPT WOULD BE USED BY OPPOSITION ELEMENTS TO SPIN OUT THE SPILL-OVER PERIOD AND THUS DELAY THE OPENING OF THE NEW SESSION. THIS WOULD HAVE SERIOUS EFFECTS ON THE PARLIAMENTARY TIMETABLE. HE ALSO INDICATED TACTFULLY THAT IT MIGHT BE HARD TO GET MPS TO TREAT THE MATTER AS VERY URGENT BECAUSE OF

CONFIDENTIAL

18805 - 1

UNGOVERNABILITY IN CANADA.

4. HYDE ENDED BY SAYING THAT MR TRUDEAU WAS OF COURSE AT LIBERTY TO PUT THIS TO MRS THATCHER: BUT HE COULD NOT HOLD OUT HOPE OF MINISTERS AGREEING TO ANY CHANGE OF THE PROCEDURE SET OUT IN MY TUR. THE MORE THIS WAS TREATED AS A NORMAL BILL IN PROCEDURAL TERMS RATHER THAN SOMETHING EXCEPTIONAL AND URGENT, THE BETTER ITS CHANCE OF AN EASY PASSAGE.

CARRINGTON

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY

PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

2
CONFIDENTIAL

CONFIDENTIAL

Handwritten initials and circled number 2.

Ref: A05226



Handwritten initials.

Bonnie Minister

MR. ALEXANDER

I think you are aware of most of this already. It would be v. difficult to raise a Patnam Bill during the spillover.

Handwritten date: 10/7

I took the opportunity of my visit to Canada to have a word yesterday with Mr. Michael Pitfield, the Secretary to the Cabinet, about the problem of the Canadian Constitution.

2. He said that the Supreme Court had reconvened, and he supposed that the object was for the Chief Justice to "bang their heads together"; but he seemed resigned to the fact that they would not be handing down a judgment this week. He said that the Canadian Government would have to accommodate themselves to that. He hoped that the Court would hold on to their judgment and not hand it down until after Labour Day. From the Canadian Government's point of view the worst thing that could happen would be that it should be handed down about the end of July, after their Parliament had gone into Recess, because this would give time for the Provincial Governments to try to whip up further opposition to the proposals.

(In fact the Canadian Parliament is going into recess in the next day or two.)

3. Mr. Pitfield then asked whether, if the judgment was handed down in September, there was any possibility of the British Parliament taking the Bill before the Party Conferences. I said that I thought there was absolutely none. The House of Commons would not be meeting until after the Party Conferences; it would not take kindly to being recalled for the purpose of taking the Canada Bill, and that could affect the prospects of carrying the Bill. The House of Commons was not likely to resume before 19th or 20th October. On present plans it would then sit for about a fortnight and be prorogued on 29th or 30th October. The new Session might then start on Wednesday, 4th November. Mr. Pitfield asked about the prospects for getting the Canada Bill through in the spillover. I said that I understood the merits of getting the Bill through as early as possible, but there might well be quite a bit to do in the spillover to complete legislation already in hand. It could well not be possible to find enough Parliamentary time to carry the Bill through during that period. If it was not, Ministers might be prepared to contemplate setting aside one day for a Parliamentary Debate on the Foreign Affairs Committee Report and the Government reply to it; such a Debate could be used as an opportunity for the Government to make a clear and full

CONFIDENTIAL

CONFIDENTIAL

statement of its position. On this scenario the Bill itself would then be taken in the new Session. There would of course be no introduction of legislation until after the Debate on the Address.

4. Mr. Pitfield was obviously dismayed about the prospect of the Bill being delayed as long as that, though he recognised that the British Government had to be the best judges of the timing and the Canadian Government were not in a position, after all that had happened, to bring much pressure to bear. Nevertheless he hoped that I would convey the sense of his view, which he knew was his Prime Minister's also, that it was desirable to get the Bill through Westminster with the least possible delay.

5. We left it that we could take matters no further for the time being. If there were any developments to report, on either side, we could be in touch by telephone. Mr. Trudeau would in any case have an opportunity of discussing the matter with the Prime Minister at Montebello in the margins of the Ottawa Economic Summit.

6. I think that it would be useful if a supplementary brief could be prepared for the Prime Minister on this matter. As it is primarily a matter of Parliamentary handling I am asking Mr. Hyde to arrange that.

7. I am sending copies of this minute to the Private Secretaries to the Foreign and Commonwealth Secretary, the Chancellor of the Duchy of Lancaster, the Lord Privy Seal and the Chief Whip.

RIA

Robert Armstrong

9th July, 1981

-2-
CONFIDENTIAL

OUT TELEGRAM

Canada ✓

		Classification and Caveats SECRET	Precedence/Deskby PRIORITY IMMEDIATE
--	--	---	---

ZCZC
GRS
CLASS
CAVEATS
DESKBY
FM FCO
PRE/ADD
TEL NO

1 ZCZC
2 GRS
3 SECRET
4
5
6 FROM FCO
IMMEDIATE
7 TO ~~PRIORITY~~ OTTAWA
8 TELEGRAM NUMBER
9 **CANADIAN CONSTITUTION**

10 1. Your telegram number 318. In the light of what the Chief
11 Justice of the Supreme Court said at the Canada Day celebration
12 yesterday, it now seems unlikely that we shall face the sort of
13 situation envisaged by Pitfield in which the Canadians would be
14 pointing a gun at our heads and asking us to pass constitutional
15 legislation through Parliament before the summer recess.
16 2. The Chief Justice spoke to Sir Michael Havers, the Attorney
17 General. Some of the conversation was in the hearing of
18 Richardson, Counsellor at the Canadian High Commission. The
19 latter has indicated to North America Department that he will
20 be treating the conversation in strict confidence. He fully
21 took the point which we put to him that it might be most
22 embarrassing for the Chief Justice if the Canadian Government
23 heard that he had been speaking in this manner in the UK. He
24 clearly spoke more frankly to Sir Michael Havers than to others,
25 in confidence and as between lawyers. Please therefore protect

///
//
/

NNNN ends telegram	BLANK	Catchword fully.
File number	Dept NAD	Distribution Minimal: NAD Private Secretary PS/LPS PS/Mr Ridley PS/PUS Mr Freeland Legal Advisers PS/Chancellor of the Duchy of Lancaster Mr Henry Steel Law Officers Dept Private Secretary No 10 ✓ Sir R Armstrong Cabinet Office Mr Day Mr Ure
Drafted by (Block capitals) M S BERTHOUD		
Telephone number 233 4557		
Authorised for despatch <i>M.S.B.</i>		
Comcen reference	Time of despatch	

OUT TELEGRAM (CONT)

	Classification and Caveats SECRET	Page 2
--	--------------------------------------	-----------

<<<<

1 <<<<
 2 fully.
 3 3. The Chief Justice said there was a major disagreement among
 4 the members of the Supreme Court. He was returning shortly to
 5 Ottawa but clearly did not expect this would bring about the
 6 immediate resolution of their difficulties. If no quick solution
 7 was found, he did not expect judgement to appear until the end
 8 of August. We needed to bear in mind that the judgement needed
 9 to be carefully polished and produced in both languages. The
 10 Attorney General commented that he could well see that a historic
 11 verdict of this kind needed to be meticulously prepared and
 12 polished.
 13 4. In view of the confidentiality of the Chief Justice's
 14 conversation with the Attorney General, it would clearly be
 15 wrong for you to reveal at this stage that we now have a clear
 16 indication of further likely delay by the Supreme Court. You
 17 will therefore want to respond to Pitfield's queries which were
 18 put on the basis of a possible judgement in early July. On his
 19 question whether there was any hope of early action here in the
 20 event of a clear line from the Supreme Court, I see no need for
 21 you to go beyond the language you have already used, quoting
 22 the Prime Minister and Lord Privy Seal.
 23 5. On the Government reply to the FAC, you should say that
 24 our position remains that this will not issue until the
 25 Parliamentary proceedings in Canada are at an end and until we
 26 know that the FAC themselves will not be producing a further
 27 report. In this connection, you might ask Pitfield whether he
 28 believes that Parliament is likely to reconvene early if the
 29 Supreme Court judgement is given after the beginning of their
 30 summer recess. (The Canadian High Commission here believe they
 31 are at present likely to reconvene on 13 or 14 October).
 32
 33 CARRINGTON
 34 NNNN

///

//

/

NNNN ends telegram	BLANK	Catchword
--------------------	-------	-----------

Code

[Ltd Distr]
ADVANCE COPY

Htd/NAD

Mr. Freeland
Leg. Adv.

Htd/CCD

Htd/PCCU

PS/Chancellor of
the Duchy of
Lancaster

Htd/Parliamentary Unit

PS

PS/Ld Chancellor
PS/Ld President

PS/LPS

PS/Mr Ridley

Mr. H. Steel - Law
Officers' Dept

PS/PUS

WONFO 032/01

PP FCO

GRS 750

~~NO 10 DS~~

Sir R Armstrong - Cabinet Office

~~Mr. Day
Mr. Ure~~

(X-16)
1924/01

CONFIDENTIAL

FM OTTAWA 11750Z JUL 81

TO PRIORITY FCO

TELEGRAM NUMBER 318 OF 1 JULY

ms.

CANADIAN CONSTITUTION

1. I DISCUSSED THIS YESTERDAY WITH PITFIELD, CLERK OF THE PRIVY COUNCIL AND SECRETARY OF THE CABINET IN THE LIGHT OF MR TRUDEAU'S TALK WITH THE PRIME MINISTER ON 26 JUNE. IT WAS VERY HELPFUL TO ME TO HAVE HAD YOUR TELNO'S 202 AND 204. HIS EXPECTATIONS ABOUT WHAT WAS PRACTICABLE IN LONDON DID NOT SEEM TO ME REASONABLE, BUT IN VIEW OF HIS KEY POSITION AND HIS CLOSENESS TO MR TRUDEAU I AM REPORTING EXACTLY WHAT HE SAID.

2. PITFIELD SAID THAT IF THE COURT DID HAND DOWN A JUDGEMENT SUPPORTING THE FEDERAL GOVERNMENT ON 7 OR 8 JULY HE WOULD AT ONCE CONSULT MR TRUDEAU AND THEN RING SIR ROBERT ARMSTRONG WHO WOULD, HE EXPECTED, CONSULT THE PRIME MINISTER AND RING HIM BACK SAYING WHAT HMG WERE PREPARED TO DO. THIS WAS BECAUSE WHEN WE HAD THE JUDGEMENT "WE MUST CAUCUS". (IN FACT SIR ROBERT ARMSTRONG MAY AT THAT TIME BE IN CANADA FOR THE SUMMIT PREPARATORY MEETING AT MONTEBELLO FROM 6-8 JULY.) THOUGH HE AND MR TRUDEAU RECOGNISED OUR DIFFICULTIES THEY STILL HOPED THAT DESPITE THESE IF WE RECEIVED THE REQUEST BY ABOUT 10 JULY WE WOULD BE ABLE TO PUT IT THROUGH BOTH HOUSES BEFORE THEY ADJOURNED FOR THE SUMMER RECESS. THIS WAS BECAUSE A DELAY TILL NOVEMBER OR THEREABOUTS WOULD BE FRAUGHT WITH DANGER FOR BOTH GOVERNMENTS. HE SPOKE OF THE RISKS OF REFERENDUM

BOTH HOUSES BEFORE THEY ADJOURNED FOR THE SUMMER RECESS. THIS WAS BECAUSE A DELAY TILL NOVEMBER OR THEREABOUTS WOULD BE FRAUGHT WITH DANGER FOR BOTH GOVERNMENTS. HE SPOKE OF THE RISKS OF REFERENDUM CAMPAIGNS IN THE PROVINCES (AS MR TRUDEAU DID TO THE PM) OR OTHER TACTICS AND OF SCOPE FOR WRECKING ACTIVITIES BY PEOPLE LIKE CLAUDE MORIN OF QUEBEC. HE SAID THAT TO HIM IT WAS UNTHINKABLE THAT THE BRITISH PARLIAMENT SHOULD NOT DO WHAT THE CANADIAN GOVT. WANTED IF THEY WERE SUPPORTED BY COURT.

3. I SAID THAT SPEAKING PERSONALLY IT SEEMED TO ME THAT IN THE LIGHT OF WHAT THE PRIME MINISTER AND THE LORD PRIVY SEAL HAD TOLD MR TRUDEAU IT MIGHT BE BETTER IF THE THE REQUEST WERE NOT SENT TO US UNTIL OCTOBER. PITFIELD ASKED WHEN WE PLANNED TO PUBLISH OUR REPLY TO THE KERSHAW REPORT. I SAID NOT BEFORE THE JUDGEMENT. CAN I TELL HIM WHEN WE WOULD PLAN TO PUBLISH IF THE COURT DOES RULE EARLY NEXT MONTH?

4. PITFIELD THOUGHT THAT IF THE COURT DID PRODUCE A FAVOURABLE RULING THE CANADIAN GOVT WERE BOUND TO PROCEED. WHETHER THEY COULD SIT ON THE REQUEST UNTIL THE AUTUMN WOULD HAVE TO BE DETERMINED BY THE CABINET. THE CANADIAN PARLIAMENT WAS LIKELY TO SIT UNTIL 10 OR 12 JULY.

5. HE REVERTED TO FLESH CREEPING REMARKS ABOUT THE DIRE CONSEQUENCES OF ANY FAILURE ON OUR PART TO COMPLY WITH THE CANADIAN GOVT'S WISHES, AT ONE POINT SAYING THAT IF WE DID NOT COMPLY WE WOULD HAVE A TRANSATLANTIC ULSTER ON OUR HANDS (THIS SEEMES TO ME FAR-FETCHED.)

6. I TOLD HIM THAT THINGS WOULD UNDOUBTEDLY BE EASIER FOR US IF THE COURT'S DECISION WAS CLEAR CUT. HE WONDERED WHAT WE WOULD REGARD AS CLEAR-CUT. SIR ROBERT ARMSTRONG HAD TOLD HIM THAT A 6-3 VOTE MIGHT BE ALL RIGHT BUT 5-4 WOULD BE MORE TRICKY. IF THE JUDGEMENT WERE MURKY THEN WHAT MATTERED, AND WHAT WE MUST PAY ATTENTION TO, WAS THE CANADIAN GOVERNMENT'S INTERPRETATION OF IT. THAT COULD NOT BE CHALLENGED. WE MUST NOT LOOK BEHIND THE CANADIAN GOVT. BUT HE DID NOT THINK THE JUDGEMENT WOULD BE CLOUDY. ON PAST FORM THE ANSWER TO SUCH A REFERENCE WAS USUALLY A CLEAR YES OR NO.

7. IF THE ADVICE THEY RECEIVED THROUGH SIR ROBERT ARMSTRONG WAS TO POSTPONE THE REQUEST TILL THE AUTUMN THEY WOULD HAVE TO CONSIDER THIS. IN THAT EVENT IT MIGHT HELP IF WE COULD (A) PUBLISH OUR REPLY TO KERSHAW (B) TAKE A RATHER MORE POSITIVE LINE IN MINISTERIAL STATEMENTS THAN HITHERTO (IE AN ADVANCE ON THE " DEAL WITH IT AS EXPIDITIOUSLY AS POSSIBLE " FORMULA.) BUT THERE WERE COMPLICATIONS.

STATEMENTS THAN HITHERTO (IE AN ADVANCE ON THE " DEAL WITH IT AS EXPEDITIOUSLY AS POSSIBLE" FORMULA.) BUT THERE WERE COMPLICATIONS. FOR EXAMPLE FROM 20 SEPT TO 18 OCTOBER THEY WOULD BE AWAY FOR THE COMMONWEALTH MEETING IN AUSTRALIA.

8. PITFIELD EMPHASISED AGAIN THAT TRUDEAU WITH WHOM HE HAD JUST BEEN CLOSETED STILL CLUNG TO THE HOPE THAT IT WAS NOT ENTIRELY OUT OF THE QUESTION THAT WE WOULD GET IT THROUGH BY THE END OF JULY. I POINTED OUT THAT THE LORD PRIVY SEAL HAD TOLD MR TRUDEAU THAT THERE WAS NO HOPE OF THIS. PITFIELD WONDERED IF THIS WAS REALLY THE LAST WORD. IT WOULD BE IN THE STRONG INTERESTS OF BOTH GOVTS TO GET IT OVER AND DONE WITH. I SAID MINISTERS COULD HARDLY DECIDE UNTIL THEY SAW THE COURT JUDGEMENT. HE ACCEPTED THIS BUT ASKED IF THERE WAS A GLIMMER OF HOPE OF EARLY ACTION IF THE COURT CAME OUT LOUD AND CLEAR. IS THERE? IF NOT, AND WE HAD TO DELAY TILL NOVEMBER WE MUST HE SAID BOTH RECOGNISE THAT THE SITUATION WAS "LIKELY TO BE NASTY". AT SOME POINT HMG MUST MAKE UP THEIR MINDS. WHATEVER THEY DID THEY WERE BOUND TO BE CRITICISED. WE SHOULD RECOGNISE THAT ALL CANADIANS WANTED THE CONSTITUTION BACK. BY EVERY NORMAL CRITERION THE TRUDEAU GOVT SHOULD BE IN DEEP TROUBLE WITH HIGH INFLATION AND HIGH INTEREST RATES. BUT IT WAS NOT. WHY? BECAUSE OF NATIONAL POPULAR SUPPORT FOR ITS ATTITUDE ON THE CONSTITUTION. THEREFORE IT WOULD PLAY ON THAT.

PLEASE PASS COPY TO SIR ROBERT ARMSTRONG.

MORAN

NNNN

CONFIDENTIAL

*Original filed in
Canada April 80
sent to hon. J. Trudeau*

Ref. A05171

MR. ALEXANDER

Canadian Constitution

I know that the Prime Minister and Mr. Trudeau discussed this issue before lunch, and that the Chief Whip and Mr. Pitfield discussed it over lunch; but I should nonetheless record the discussion which Mr. Pitfield and I had on the matter after lunch.

2. Mr. Pitfield said that he had had a call from the Chief Justice of the Supreme Court to say that he was cutting short his holiday in this country and returning to Canada at the beginning of July to meet with his colleagues on the Supreme Court for two or three days. The Chief Justice had said to Mr. Pitfield: "You know what that means", and had then rung off. Mr. Pitfield took it to mean that the Supreme Court could be expected to hand down its judgment on the Canadian Constitutional question about 7th July.

3. Mr. Pitfield then represented to me the disadvantages which would accrue, to us as well as to the Canadian Government, if the matter hung around until the autumn without a decision at Westminster. The Provincial Governments would use the interval for intense lobbying; referenda would be conducted in the Provinces; and the whole issue would become thoroughly muddled. There would be great advantage in completing the process as quickly as possible, before the summer holiday.

4. Mr. Pitfield said that the Canadian Parliament had had to extend its Session in order to deal with the estimates, which had been set back in some way. Assuming - as he still did - that the Supreme Court's judgment was by a majority in favour of the Federal Government, the matter would come back to the Canadian Parliament as soon as the judgment was handed down, and could be taken through by, say, 10th or 11th July. He thought that it would still be in the interests of us as well as of them that it should be taken through Parliament at Westminster before the Summer Recess. He said that the Chief Whip had indicated to him at lunch that that could be very difficult indeed.

CONFIDENTIAL

CONFIDENTIAL

5. I said that I thought that that was indeed the case. He could be assured that we were not less alive than they were to the advantages of dealing with the issue quickly, once the judgment was received. Until today, however, we had been assuming that, since the Supreme Court had risen for its vacation without having handed down a judgment, we should not now see it until the autumn. It was hoped that the House of Commons would rise for the Summer Recess before the Royal Wedding. The programme had in any case been made more congested by the need to deal with the Representation of the People Bill which had just completed its progress through the House of Commons. While it might in theory be possible for the House of Commons to sit again after the Royal Wedding, there would be great reluctance to do that; and, if the Canadian Bill was thought to be the reason for it, that would not provide a good climate in which to try to get the Bill through. If the Canadian Bill was to be taken before 29th July, some other business would now have to be postponed until the "spillover" session in October. The alternative would be to take the Canadian Bill in the spillover; the House of Commons would not resume before 19th October, because of the Party Conferences in the earlier part of the month. In these circumstances I did not know what the Parliamentary managers would think was the best thing to do, if the Supreme Court judgment was handed down early in July, and the Bill became available to Westminster about the middle of July.

6. Mr. Pitfield and I agreed to keep in close touch. I shall in fact be in Canada from 6th to 8th July for a meeting of Personal Representatives, and shall see Mr. Pitfield then. He will let me know by telephone early, if there is anything new to report.

7. I am sending copies of this minute to Mr. Fall, Mr. Heyhoe and Mr. MacLean.

ROBERT ARMSTRONG

ROBERT ARMSTRONG

26th June, 1981

CONFIDENTIAL

CONFIDENTIAL

15753 - 1

GRS 397
CONFIDENTIAL
FM FCO 191600Z JUN 81
TO PRIORITY OTTAWA
TELEGRAM NUMBER 185 OF 19 JUNE
CONSTITUTION

*I have pointed out to B.L.O.
that the sidelined passage does
not accurately reflect the Gov's
position, as I understand it.*

9

1. DR MICHAEL KIRBY, SECRETARY TO THE CABINET FOR FEDERAL PROVINCIAL RELATIONS, CALLED ON DAY AND OTHERS AT THE FCO YESTERDAY. HE SAID THE SUPREME COURT'S INDICATION THAT THERE WOULD BE NO DECISION BEFORE THEIR SUMMER RECESS WAS DISAPPOINTING. IT WAS POSSIBLE THAT THE REASON FOR THE DELAY WAS PURELY TECHNICAL: FOR INSTANCE, THE BASIC DECISIONS MIGHT HAVE BEEN TAKEN BUT NOT YET WRITTEN UP OR THEY MIGHT AWAIT TRANSLATION INTO FRENCH. UNDER THESE CIRCUMSTANCES, IT WAS POSSIBLE THAT THE COURT MIGHT RECONVENE BRIEFLY DURING THEIR RECESS IN ORDER TO HAND DOWN A DECISION. WE MIGHT KNOW THE POSITION WHEN THE COURT MADE A PRE-RECESS ANNOUNCEMENT NEXT THURSDAY 25 JUNE. WE MADE THE POINT THAT THE WORST SITUATION AT THIS END MIGHT BE TO RECEIVE THE REQUEST WHILE PARLIAMENT WAS IN RECESS OR SO LATE THAT PARLIAMENT COULD NOT DEAL WITH IT BEFORE THE RECESS. WE INDICATED THAT THERE WAS STILL A POSSIBILITY OF THE LEGISLATION GOING THROUGH IF THE REQUEST WAS RECEIVED BEFORE THE END OF JUNE. IF IT CAME AFTER THAT AN EXTRA WEEK WOULD NEED TO BE ADDED TO THE CURRENT SUMMER SESSION. WE COULD SEE POSSIBLE ADVANTAGES AND DISADVANTAGES IN ADOPTING THIS COURSE RATHER THAN LEAVING MATTERS OVER TILL THE AUTUMN.

*f.a. And
n/s*

2. KIRBY WAS AT PAINS TO STRESS THAT THE REASON FOR THE SUPREME COURT DELAY WAS NOT NECESSARILY ANY DEADLOCK OF OPINION AMONG THE JUDGES. HE CITED A CASE IN WHICH THERE HAD BEEN LONG DELAYS AND THE EVENTUAL JUDGEMENT HAD BEEN 8-1.

3. WE SAID THERE WAS STILL A POSSIBILITY OF A PRELIMINARY DEBATE ON THE FAC REPORT AND THE GOVERNMENT REPLY. ON THE LATTER,

1
CONFIDENTIAL

/WE

CONFIDENTIAL

15753 - 1

WE INDICATED THAT PUBLICATION WAS STILL LINKED TO THE TERMINATION OF (PARLIAMENTARY) PROCEEDINGS IN CANADA:

BUT BEFORE GOING AHEAD WITH OUR REPLY WE WOULD NEED TO KNOW WHETHER (AS WAS POSSIBLE) THE FAC THEMSELVES PROPOSED TO PUBLISH A THIRD REPORT, AFTER THE SUPREME COURT HAD PRONOUNCED.

4. KIRBY SAID THEY HAD ALREADY EXPERIENCED SOME DIFFICULTY IN RESTRAINING MINISTERS (PARTICULARLY CHRETIEN) FROM PLANS TO COME TO THE UK TO LOBBY ON THE CONSTITUTIONAL ISSUE, EG IN THE CONTEXT OF THE RESOLUTION (EMBODYING THE REQUEST) COMING TO THIS COUNTRY. HE SAID THAT THE CANADIAN GOVERNMENT WOULD, HOWEVER, ABIDE STRICTLY BY MR PYM'S SUGGESTION THAT THE CANADIANS SHOULD NOT SEND MINISTERS UNLESS WE HAD FIRST MADE IT CLEAR THAT THIS WAS DESIRABLE.

CARRINGTON

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY

PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

LORD MORAN C/O HDS OF MISSION POD
PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

2

CONFIDENTIAL

Canada

CONFIDENTIAL

GRS 170

MF

CONFIDENTIAL

FM OTTAWA 172218Z JUN 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 288 OF 17 JUNE

YOUR TELNO 178: MR TRUDEAU'S VISIT TO LONDON: PUBLICITY

1. I HAVE SPOKEN TO DEPARTMENT OF EXTERNAL AFFAIRS, WHOSE PRELIMINARY REACTION IS TO AGREE WITH PRESS LINE WE SUGGEST BUT THEY WILL CHECK WITH PRIME MINISTER'S OFFICE AND CONFIRM THIS.

2. DEA HAD JUST LEARNED THAT SUPREME COURT ARE ABOUT TO ANNOUNCE THAT THEY WILL HAND DOWN 12 DECISIONS NEXT WEEK BUT THAT THE OPINION ON THE CONSTITUTIONAL QUESTION WILL NOT REPEAT NOT BE AMONG THESE. AS THE COURT HAD BEEN EXPECTED TO ADJOURN AT THE END OF NEXT WEEK THIS HAS POTENTIALLY SERIOUS IMPLICATIONS FOR THE FEDERAL GOVERNMENT BUT THEY DO NOT YET KNOW WHETHER THE COURT WILL DECIDE TO SIT LONGER. THE DEPARTMENT OF EXTERNAL AFFAIRS THOUGHT THAT THIS MEANT THAT MR TRUDEAU'S TRIP TO EUROPE WAS ON.

3. MR TRUDEAU WILL ALSO BE SEEING CHANCELLOR SCHMIDT PROBABLY OVER DINNER ON 25 JUNE, BUT THIS IS NOT YET CONFIRMED. THE DELAY IN CONFIRMATION IS DUE TO PUBLIC HOLIDAYS IN GERMANY. THEY WOULD LIKE IF POSSIBLE TO ANNOUNCE ALL THREE MEETINGS TOGETHER.

MORAN

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:
SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

PS/CHANCELLOR OF THE DUCHY OF LANCASTER
PS/LORD CHANCELLOR
PS/LORD PRESIDENT
MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

ERD

LORD BRIDGES
MR EVANS

CONFIDENTIAL

GRS 645
CONFIDENTIAL

CONFIDENTIAL

Canada
[Handwritten signature]

FM OTTAWA 162155Z JUN 81
TO PRIORITY FCO
TELEGRAM NUMBER 283 OF 16 JUNE

MEETING WITH MR TRUDEAU

1. MR TRUDEAU RECEIVED ME THIS AFTERNOON, LESS THAN 24 HOURS AFTER MY ARRIVAL IN OTTAWA AND I HANDED OVER THE PRIME MINISTER'S LETTER OF INTRODUCTION. OFFICIALS WERE PRESENT. HE WAS VERY FRIENDLY. I FOUND HIM A GOOD DEAL BETTER TO MEET THAN TO READ ABOUT.

2. I SAID THAT I DID NOT WANT TO BOTHER HIM IN THE FUTURE UNLESS I HAD REAL PROBLEMS TO DISCUSS BUT IF I DID, AND NOT MERELY ON THE CONSTITUTION, I HOPED I MIGHT BE ABLE TO SEE HIM. HE SAID THAT HE THOUGHT THIS WAS ENTIRELY REASONABLE. I SAID THAT PERHAPS WE MIGHT MEET QUITE INFORMALLY OVER LUNCH ON OCCASION. HE COULD NOT REMEMBER OFFHAND WHEN HE HAD LAST LUNCHEDED AT THE HIGH COMMISSION BUT WENT ON TO SAY, AS I HOPED HE WOULD, THAT IN THIS RESPECT HE THOUGHT THE BRITISH HIGH COMMISSIONER AND THE AMERICAN AND FRENCH AMBASSADORS SHOULD BE IN A SPECIAL POSITION.

3. IN HIS ONLY MENTION OF THE EVENTS OF FEBRUARY HE SAID THAT HE HAD ALWAYS GOT ON WELL WITH MY PREDECESSOR, THOUGH HE THOUGHT THAT SIR JOHN FORD HAD NOT ALWAYS APPROVED OF HIS POLICIES. BUT HE SAID HE WAS NOT A MAN TO HARBOUR GRUDGES. I SAID THAT I THOUGHT THAT WAS NOW ALL WATER OVER THE DAM.

4. MR TRUDEAU SPOKE MAINLY ABOUT THE CONSTITUTION. HE DID NOT KNOW HOW OR WHEN THE COURT WOULD DECIDE, BUT HOPED FOR AN EARLY DECISION. IN THAT EVENT HE HOPED THAT WE WOULD BE ABLE TO DEAL WITH THE MATTER WITH REASONABLE DESPATCH. NOW THAT THE FEDERAL GOVERNMENT HAD SUBMITTED ITS CASE TO THE COURT, HE THOUGHT THAT A FAVOURABLE RULING SHOULD HAVE A CORRESPONDINGLY POSITIVE EFFECT IN WESTMINSTER. HE REPEATED THE POINT WHICH HE HAS MADE SEVERAL TIMES IN PUBLIC THAT THE WHOLE ISSUE WOULD NOT GET ANY EASIER WITH THE PASSAGE OF TIME. I ASSURED HIM THAT HMG WOULD DO THEIR BEST TO DEAL WITH THE MATTER AS RAPIDLY AS POSSIBLE BUT SAID THAT ALTHOUGH A CLEAN-CUT DECISION IN FAVOUR OF THE FEDERAL GOVT. WOULD UNDOUBTEDLY HELP, ALL WOULD STILL NOT BE ENTIRELY PLAIN SAILING AND THE RECESS WAS NOT ALL THAT FAR AWAY. MR TRUDEAU THEN DISARMINGLY ASKED WHAT TONE MRS THATCHER WOULD ADOPT WHEN SHE MET HIM "I IMAGINE SHE WON'T WANT TO HAVE AN ARGUMENT WITH ME". HE RECOGNISED THAT MR PYM HAD MADE IT CLEAR THAT TO MEET THE 1 JULY DEADLINE THE RESOLUTION NEEDED TO BE WITH WESTMINSTER BY JANUARY OR FEBRUARY AT THE LATEST. IN VIEW OF THE LONG DELAY HE WONDERED WHETHER MRS THATCHER MIGHT BE SARCASTIC. I SAID THAT I WAS SURE THAT THE PRIME MINISTER WOULD WISH TO DEAL WITH THE PRACTICAL ASPECTS OF

CONFIDENTIAL

/ THE

CONFIDENTIAL

THE PROBLEM. MR TRUDEAU MADE IT CLEAR THAT HE WAS BY NO MEANS CERTAIN OF A FAVOURABLE DECISION. HOWEVER, ASSUMING THAT IT WAS FAVOURABLE, HE THOUGHT IT INCONCEIVABLE TO HIM THAT THE BRITISH HOUSE OF COMMONS WOULD FAIL TO PASS A RESOLUTION PROPERLY PUT TO THEM. HE COULD NOT UNDERSTAND THE KERSHAW COMMITTEE'S ATTITUDE. I POINTED OUT THAT SOME MPS WERE A LAW UNTO THEMSELVES AND REMINDED HIM OF THE AMOUNT OF LOBBYING WHICH HAD BEEN UNDERTAKEN BY THE PROVINCES. MR TRUDEAU WONDERED WHETHER PARLIAMENTARIANS HAD NOT BEEN TOLD OF THE CONSEQUENCES OF NOT PASSING A RESOLUTION: IN HIS MIND THE ADVERSE CONSEQUENCES OF NOT DOING SO FAR OUTWEIGHED THOSE OF ACCEDING TO THE CANADIAN GOVERNMENT REQUEST. IN THE LATTER CASE THERE WOULD BE GRUMB- LING BUT THIS WOULD SETTLE DOWN. ALTHOUGH PEOPLE LIKE THE LEADER OF THE OPPOSITION INDULGED IN RHETORIC TO THAT EFFECT, NOBODY REALLY BELIEVED THAT HE INTENDED TO SET UP A UNITARY STATE ON THE BASIS OF THE NEW CONSTITUTION. IF THE OPPONENTS OF HIS CONSTITUTIONAL PROPOSALS SUCCEEDED WHAT WOULD THEIR VICTORY CRY BE? HE (TRUDEAU) WAS JUST WAITING TO MAKE A SPEECH IN WHICH HE WOULD CONGRATULATE HIS OPPONENTS FOR FAILING TO SUPPORT HIS PROPOSALS AND THEREBY ENSURING THAT MINORITY RIGHTS SUCH AS THOSE OF THE INDIANS AND THE FRENCH CANADIANS WERE NOT SAFEGUARDED. HE WAS SURE THAT THE SUPREME COURT WAS REFLECTING NOW ON THE SERIOUS CONSEQUENCES OF AN ADVERSE DECISION IF THEY DECIDED THAT PROVINCIAL APPROVAL FOR SOME OF THE CHANGES WAS NEEDED HOW WOULD THEY DECIDE HOW MUCH CONSENT WAS REQUIRED - UNANIMITY OR A MAJORITY OR WHAT? THEY WOULD ALSO HAVE TO DECIDE ON AN AMENDING FORMULA. HE CONCLUDED BY SAYING "IT IS A GREAT FIGHT - SORRY YOU'RE ON THE RECEIVING END OF IT".

MORAN

CANADIAN CONSTITUTION LIMITED

NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

2

CONFIDENTIAL

RESTRICTED

FM OTTAWA 151359Z JUNE 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 274 OF 15 JUNE

CONSTITUTION

1. AT A PRESS CONFERENCE ON 12 JUNE MR TRUDEAU WAS ASKED ABOUT THE TIMING OF THE CONSTITUTIONAL PROCESS ON THE ASSUMPTION THAT A FAVOURABLE SUPREME COURT DECISION ISSUED WITHIN TEN DAYS OR SO. MR TRUDEAU REPLIED QUOTE I, MANY MONTHS AGO, REPEATED THE ASSURANCE RECEIVED FROM THE BRITISH PRIME MINISTER THAT SHE WOULD DEAL EXPEDITIOUSLY WITH A DOCUMENT, A RESOLUTION WHICH SHE RECEIVED IN PROPER FORM FROM THE CANADIAN PARLIAMENT, BUT HOW LONG IT WOULD TAKE IS SOMETHING THAT SHE NEVER WAS ABLE TO MAKE PRECISE HERSELF. I MUST SAY -- WAS IT AT THE LAST PRESS CONFERENCE THAT I RECALL THAT -- THAT FROM LAST FALL, THE BRITISH GOVERNMENT AND ITS REPRESENTATIVES WERE TELLING US THAT THEY WOULD HAVE TO RECEIVE THE RESOLUTION BY JANUARY, FEBRUARY AT THE LATEST, IF WE EXPECTED IT TO BE PASSED FOR THE 1ST OF JULY.

YOU ARE ASKING ME TO REPEAT MY LAST WEEK'S ANSWER. I THINK I SAID HISTORICALLY THEY HAVE ALWAYS TAKEN NO MORE THAN A FEW DAYS TO PASS IT. SO, I STILL HOPE THAT THE SUPREME COURT WILL COME OUT VERY SOON WITH ITS DECISION, THAT IT WILL BE FAVOURABLE, AND THAT THE BRITISH PARLIAMENT WILL ACT EXPEDITIOUSLY ON IT. THAT IS A HOPE. I HAVE ABSOLUTELY NO CERTAINTY THAT IT WILL HAPPEN. I AM BASING THAT HOPE, IN THE CASE OF THE COURT, ON THE FACT THAT THE COURT OF ITSELF DECIDED TO SPEED UP THE HEARINGS, AS YOU WILL RECALL, WHEN THEY DECIDED TO HEAR THE THREE CASES TOGETHER AT THE END OF APRIL. THAT WAS A DECISION WHICH, QUITE FRANKLY, SUPRISED ME AND CAUSED ME TO REVERSE MY WHOLE STRATEGY AND SAY, "WELL, IF IT IS GOING TO COME THAT SOON, WE WILL WAIT UNTIL THE DECISION COMES OUT TO SEND THE DOCUMENT TO GREAT BRITAIN." BUT THAT WAS THE END OF APRIL, AND IT HAS BEEN A MONTH AND A HALF, AND I IMAGINE THE WORD FROM THE SUPREME COURT, AS I READ IT--- BECAUSE I HAVEN'T SPOKEN TO THE CHIEF JUSTICE OR ANY OF THE OTHER JUDGES-- IS THAT WE CAN'T EXPECT A JUDGEMENT FOR, WHAT WAS IT, A FEW MORE DAYS OR SEVERAL DAYS, OR WHATEVER THE EXPRESSION WAS.

SO, APPARENTLY THEY ARE STILL STRUGGLING WITH IT. BUT ONCE AGAIN, IN THE FACT THAT THEY DECIDED TO HEAR IT SO SOON, RATHER THAN STAGGER IT OUT OVER MAY AND JUNE AND SAY, "EXPECT IT IN THE FALL," I TOOK THAT AS AN INDICATION, WHICH I THINK WAS PROBABLY CLEAR IN THEIR INTENT, THAT THEY WOULD COME UP WITH A DECISION BEFORE THEY ADJOURNED FOR THE SUMMER.

RESTRICTED

IN THE CASE OF BRITAIN, ONCE AGAIN, MRS THATCHER SAID SHE WOULD DEAL EXPEDITIOUSLY. SHE TOLD ME SHE WOULD PUT THE WHIPS ON, AND I EXPECT THAT WILL HAPPEN. BUT WE ALL KNOW ENOUGH ABOUT THE IMPONDERABLES OF OPPOSITION TACTICS THAT-- OR OF UPPER CHAMBERS. I IMAGINE SHE WILL DO HER VERY BEST, BUT I CAN'T GUARANTEE THAT IT WILL BE HERE FOR 1ST OF JULY. I AM STILL HOPING, AND WE ARE STILL CONTINGENCY PLANNING ON THAT BASIS. UNQUOTE

2. MR TRUDEAU'S REFERENCE TO THE IMPONDERABLES OF UPPER CHAMBERS WAS IN PART AN ALLUSION TO THE FACT THAT ON 10 JUNE A MIXED BAG OF 13 SENATORS (8 LIBERALS, 1 INDEPENDENT LIBERAL, 1 CONSERVATIVE, 2 INDEPENDENTS AND 1 SOCIAL CREDIT) DECLARED THAT HENCEFORTH THEY WOULD VOTE ACCORDING TO THEIR CONVICTIONS AND NOT THE PARTY LINE. MR TRUDEAU AT HIS PRESS CONFERENCE DOWNPLAYED THE IMPORTANCE OF THIS MOVE AND EXPRESSED THE HOPE THAT THE LIBERAL SENATORS WOULD ATTEND CAUCUS MEETINGS AND ATTEMPT TO INFLUENCE GOVERNMENT POLICY FROM WITHIN. THE "DEFECTIONS" DO NOT ENDANGER THE GOVERNMENT POSITION IN THE SENATE. OF 104 SEATS, LOYAL LIBERALS STILL HOLD 56 AND 11 ARE VACANT.

3. THERE IS STILL NO HARD INFORMATION ABOUT THE SUPREME COURT RULING. SINCE THE LAWYERS CONCERNED ARE NORMALLY GIVEN 24 HOURS NOTICE, WE SHOULD BE ABLE TO ASSUME THAT IT WILL NOT EMERGE BEFORE TUESDAY 16 JUNE.

DAVIES

CANADIAN CONSTITUTION LIMITED

NAD

CCD

P & CD

PCCU

PARLIAMENTARY UNIT

NEWS D

INFORMATION D

PS

PS/LPS

PS/MR RIDLEY

PS/MR BLAKER

PS/MR HURD

PS/PUS

SIR E YOUDE

MR DAY

MR URE

LORD N G LENNOX

CABINET OFFICE

COPIES TO:

SIR I SINCLAIR

MR FREELAND

DR PARRY

LEGAL ADVS.

LORD MORAN C/O HDS OF MISSION POD

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

-2-

RESTRICTED

CONFIDENTIAL

Canada JS

SIR ROBERT ARMSTRONG

CANADIAN CONSTITUTION

The Prime Minister has seen and taken note of your minute to me of 10 June on this subject.

MODBA

15 June 1981

e

020
CONFIDENTIAL

Canada

(2)

Prime Minister

We are far from out of this woods!

Paul 10/6

Ref. A05036

MR. ALEXANDER

In the course of a meeting which I had yesterday with Mr. Michael Pitfield, the Secretary to the Canadian Cabinet, the subject of the Canadian Constitution came up.

2. Mr. Pitfield said that it was now hoped that the Supreme Court would report very early next week - perhaps on Monday, 15th June. Mr. Trudeau was very confident that the Supreme Court would find in favour of the Federal Government's position, but Mr. Pitfield thought that this might well not be unanimous: the verdict might be on the basis of a six to three or seven to two majority.

3. Mr. Pitfield said that, if the Supreme Court found against the Federal Government, the Federal Parliament would not be asked to approve the Resolution with the Constitutional package, and the next stage would be another Federal-Provincial conference, probably some time in the autumn.

4. If the Supreme Court found in favour of the Federal Government, there would be a two-day debate in the Canadian Parliament within a week after the judgment was received, and the package would be sent across to Westminster.

5. If the Supreme Court generally found in favour of the Federal Government but found against certain elements in the package, there would be immediate talks between the Government and the Opposition in Ottawa, with a view to introducing a Resolution embodying the parts of the package which the Supreme Court had blessed. The object would be to complete that process within a week of receiving the judgment.

6. Thus the expectation is that the Canadian Parliament's Resolution may reach Westminster before the end of June, perhaps in the week beginning 22nd June.

7. It had been reported in the Canadian newspapers that Mr. Trudeau had made a speech indicating that he still expected the British Parliament to pass the legislation by 1st July. I asked Mr. Pitfield if Mr. Trudeau really expected that.

CONFIDENTIAL

CONFIDENTIAL



Mr. Pitfield made it clear that he did not expect it, on the timetable now foreseen. But he would be extremely keen to have the legislation through Parliament at Westminster by the time Parliament rose for the Summer Recess. There are two reasons for this:

- (a) Mr. Trudeau has in mind some "wound-healing" process, once the main issue is settled, and he wants to make a start on this process as soon as the Canadian Parliament comes back after its Summer Recess.
- (b) It is expected that the Provincial Government in Quebec will challenge some of the language provisions in the new Bill of Rights.

Mr. Trudeau attaches great importance to the Federal Government facing this challenge and surmounting it while he is still Prime Minister. It was clear from my conversation with Mr. Pitfield that Mr. Trudeau did not expect to be in office for more than a year or 18 months from now. He believes that the challenge from Quebec is best faced while there is a French-speaking Prime Minister in Ottawa.

8. Mr. Pitfield said that Mr. Trudeau continued to place great faith in the undertakings which he had received from the Prime Minister, and this faith had grown, with his admiration of the way in which she had dealt with the problem in the British Parliament. He had wondered whether to make direct contact with her, but had decided that, while the issue was still under consideration by the Supreme Court, any such contact could be embarrassing to both of them.

Mr. Pitfield said that Mr. Trudeau would not dream of "taking on" the British Government; but, if he thought that the House of Commons at Westminster was deliberately delaying the passage of the legislation, in order to prevent its passing before the Summer Recess, he would not hesitate to "take on" the British Parliament. This "taking on" would take the form of "raising the ante" in Ottawa; by which I took Mr. Pitfield to mean calling in question Canadian membership of the Commonwealth and perhaps even the Monarchy in Canada.

9. I said that my understanding of our position when I left London last week was that Ministers did not propose to make any moves until the Supreme Court had published its decision. My expectation was that the Government reply to the

CONFIDENTIAL

CONFIDENTIAL

report of the Select Committee on Foreign Affairs would be published very shortly after the Supreme Court decision was known. How the matter was handled thereafter would depend upon the judgment of the Parliamentary managers. I thought that Ministers were of the view that, if they could be sure of carrying the legislation, there would be a good deal to be said, from the point of view of the British Government as well as of the Canadian Government, for passing the legislation before the Summer Recess. The Parliamentary managers would have to assess the possibility of doing this: that would be a head-counting exercise, and I could not say what the outcome would be, though I thought that on the whole opinion had been shifting towards the view that Parliament ought to pass the legislation, if the Canadian Government's proposals were blessed by the Supreme Court. The Parliamentary managers might decide that the best course would be in the first instance to have a debate on the FAC report and the Government's reply to it; that would enable Members of Parliament to express their views, without there needing to be a decisive vote at the end of that debate. This might enable the legislation itself to go through more easily when the time came. It would again be up to the Parliamentary managers to decide what tactics were most likely to ensure the passage of the Bill: it did not necessarily follow that a three-line whip on the Government's supporters would be the best way of achieving this result. If the business managers came to the conclusion that it would not be possible to carry the legislation, it would probably be better not to try to press it at the risk of a defeat, and hope to be able to do better with it when Parliament returned after the Summer Recess; if that seemed to be at all a likely outcome, we should clearly need to make early contact with the Canadian Government.

10. Mr. Pitfield said that, if the Supreme Court found in favour of the Federal Government, at least some of the Provincial Governments were likely to continue their opposition. He expected that they would arrange for at least two Provincial Ministers to be in London at any one time from now on until the legislation was introduced at Westminster, seeking to lobby support for the opposition of the Provincial Governments to the measure. The Federal

CONFIDENTIAL

CONFIDENTIAL



Government did not intend to send a Minister to London, because it would not in their view be seemly for a row between the Federal Government and the Provincial Governments to be conducted in London. They would, however, probably send over a highly-qualified information officer, to make sure that the facts of the situation and the basis of the Government's position were got across to the British media and public.

11. Mr. Pitfield said that he hoped that he and I could keep in contact on these matters through the coming weeks.

12. I am sending copies of this minute to the Private Secretaries to the Foreign and Commonwealth Secretary and the Chancellor of the Duchy of Lancaster.

A handwritten signature in black ink, consisting of the letters 'R' and 'A' in a stylized, cursive font.

ROBERT ARMSTRONG

10th June, 1981

CONFIDENTIAL



With the compliments of
NORTH AMERICA DEPARTMENT

Foreign and Commonwealth Office
London, S.W.1.

IMMEDIATE

CONFIDENTIAL

Chris Stephens

GRS 45

CONFIDENTIAL
FM OTTAWA 092037Z JUN 81
TO ROUTINE FCO
TELEGRAM NUMBER 269 OF 9 JUNE

MY TELNO 258: VISIT OF MR TRUDEAU.

1. STILL NO DECISION. FROM WHAT THE CANADIANS HAVE TOLD SIR R ARMSTRONG IT LOOKS AS IF MR TRUDEAU IS ATTEMPTING TO LINE UP A WHOLE SERIES OF VISITS BEFORE THE SUMMIT, AND IS HAVING DIFFICULTY JUGGLING WITH DATES.

DAVIES

LIMITED

NAD

ERD

PCD

PS

PS/KPS

PS/MR RIDLEY

PS/AWS

MR DAY

LORD BRIDGES

MR URE

MR EVANS

THIS TELEGRAM
WAS NOT
ADVANCED

Copy to No. 10 Downing St.

CONFIDENTIAL

RESTRICTED

GRS 140

RESTRICTED

FM OTTAWA 081600Z JUN 81
TO PRIORITY FCO
TELEGRAM NUMBER 261 OF 8 MAY

CANADIAN CONSTITUTION

1. THE 8 DISSENTING PREMIERS MET PRIVATELY ON THURSDAY 6 JUNE AT WINNEPEG.
2. ACCORDING TO QUEBEC'S INTERGOVERNMENTAL AFFAIRS MINISTER CLAUDE MORIN, THE PREMIERS DECIDED THAT IF THE SUPREME COURT RULES THAT THE PACKAGE IS LEGAL, THEY WILL TAKE THEIR CASE TO THE BRITISH PARLIAMENT. HE SAID THAT THE TIMING OF THE TRIP WOULD PROBABLY HINGE ON THE DATE OF THE ADJOURNMENT OF THE BRITISH HOUSE OF COMMONS AND THAT PREMIER LEVESQUE WAS ALMOST CERTAIN TO MAKE THE TRIP.
3. ACCORDING TO THE PRESS, ARRANGEMENTS FOR THE VISIT ARE BEING MADE BY CIVIL SEVANTS FROM THE ALBERTA GOVERNMENT. IT IS CLEAR TO OUR CONSUL GENERAL IN EDMONTON THAT DESPITE ADVICE FROM HIM AND SIR JOHN FORD ON HIS FAREWELL VISIT THAT LOBBYING IN THE UK WOULD BE UNDESIRABLE AND THAT THE PREMIERS COULD EXPECT NO SPECIAL ACCESS TO MINISTERS, THE ALBERTA GOVERNMENT ARE DETERMINED TO PRESS AHEAD.

DAVIES

[THIS TELEGRAM WAS NOT ADVANCED]

CANADIAN CONSTITUTION LIMITED

NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY

PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

LORD MORAN C/O HDS OF MISSION POD
PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR
PS/LORD PRESIDENT
MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

RESTRICTED

CAS 300
RESTRICTED

RESTRICTED

FM OTTAWA 051545Z JUN 81
TO ROUTINE FCO
TELEGRAM NUMBER 260 OF 5 JUNE

MJ

CONSTITUTION

1. AT A PRESS CONFERENCE YESTERDAY IN WINNIPEG, MR TRUDEAU SAID THAT HE HAD NO KNOWLEDGE OF HOW THE SUPREME COURT WAS GETTING ON WITH THE CONSTITUTIONAL CASE, BUT THAT HE HOPED THE DECISION WOULD BE HANDED DOWN SOON "BECAUSE THE 1ST OF JULY IS NOT SO FAR AWAY". WHEN PRESSED, HE ADDED THAT HE WAS "STILL HOPING FOR THAT DATE", BUT "WOULDN'T WANT TO USE THIS OCCASION TO PUT ANY PRESSURE ON THEM (THE COURT). I THINK THEY SHOULD TAKE THEIR TIME BECAUSE IT'S AN IMPORTANT JUDGEMENT. BUT, AS YOU KNOW, IT WILL ONLY TAKE TWO MORE DAYS IN PARLIAMENT, ONCE THE MATTER HAS BEEN DECIDED POSITIVELY BY THE COURTS, IF IT IS, AND THEN IT CAN BE OVER IN FRONT OF THE UNITED KINGDOM PARLIAMENT WITHIN 24 HOURS. TRADITIONALLY, THE UNITED KINGDOM PARLIAMENT HAS NEVER TAKEN MORE THAN A FEW DAYS TO DEAL WITH AN AMENDMENT TO THE CANADIAN CONSTITUTION. I BELIEVE THE PASSING OF THE BNA ACT ITSELF, IF MY MEMORY IS CORRECT, ONLY TOOK A FEW DAYS IN THE UK PARLIAMENT. BUT, THAT WILL DEPEND ON THEM: IT WILL DEPEND ON THEIR TIMETABLE. I REALIZE THAT THE BRITISH GOVERNMENT TOLD US LONG AGO, WAY LAST FALL, THAT IF WE WANTED TO BE SURE TO HAVE IT FOR THE 1ST OF JULY, WE'D HAVE TO GET IT IN SOMETIME IN JANUARY OR FEBRUARY, OR SOMETHING, AND I REALIZE WE'RE WAY BEHIND THEIR DEADLINES. BUT I STILL HOPE THAT SINCE THEY'LL HAVE TO PASS IT SOMETIME, THAT THEY MAY AS WELL PASS IT NOW AS QUICKLY AS POSSIBLE."
2. WHEN ASKED WHAT WOULD HAPPEN IF THE SUPREME COURT GAVE BROAD APPROVAL BUT INDICATED SOME MINOR ILLEGALITY, IN THE LIGHT OF THE AGREEMENT IN THE HOUSE OF COMMONS THAT THERE WOULD BE NO FURTHER AMENDMENT OF THE PACKAGE, MR TRUDEAU WAS EVASIVE AND MERELY POINTED TO THE FACT THAT THE LAWYERS REPRESENTING THE PROVINCES AT THE SUPREME COURT HEARING HAD ARGUED THAT THE COURT SHOULD DECIDE FOR ALL OR NOTHING.
3. THERE IS NO HARD INFORMATION ABOUT THE COURTS DELIBERATIONS: THE DECISION COULD STILL BE DELIVERED NEXT WEEK.

DAVIES

CANADIAN CONSTITUTION LIMITED

NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

THIS TELEGRAM
WAS NOT
ADVANCED

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

LORD MORAN C/O HDS OF MISSION POD
PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

RESTRICTED



Gouvernement du Québec
Délégation générale
de Londres

V.C. Mr. Pattison *Canada*

Le délégué général

5th June 1981 *KL*

KL *h.g.* *Am*
The Rt Hon Mrs Margaret Thatcher MP
Prime Minister
House of Commons
London
SW1A 0AA

Dear Mrs Thatcher,

The Vice Premier of Quebec, M. Jacques-Yvan Morin, will be visiting London shortly. The All Party Group on the Canadian Constitution has kindly invited him to address Members of both Houses of Parliament on Thursday, June 11th at 4pm.

I am sure you will find his presentation informative and useful and I look forward to seeing you in Committee Room 8 on that day.

Prior to entering politics, M. Morin was Professor of International and Constitutional Law at Montreal University and a member of the Permanent Court of Arbitration at The Hague. He is a leading Canadian scholar on questions of constitutional law and practice.

Yours sincerely,

GILLES LOISELLE
Agent-General for Quebec

P.S. If by any chance the room should be changed on the day, please consult the Attendant in the Committee Corridor for the alternative venue.

CONFIDENTIAL

Paris Stephen
C. 3/6/81

GRS 60

CONFIDENTIAL
FM OTTAWA 042028Z JUN 81
TO ROUTINE FCO
TELEGRAM NUMBER 258 OF 4 JUNE

MY TELNO 241: VISIT BY MR TRUDEAU

1. OFFICIALS HAVE NOT BEEN ABLE TO EXTRACT A DECISION FROM MR TRUDEAU DESPITE REPEATED REMINDERS. THEY ARE UNABLE TO OFFER A REASON. IT MAY BE THAT THERE ARE DIFFICULTIES OVER TIMING WITH THE FRENCH, BUT IT IS MORE LIKELY THAT MR TRUDEAU IS AWAITING A FIRM INDICATION OF THE TIMING OF A SUPREME COURT DECISION.

DAVIES

[THIS TELEGRAM WAS NOT ADVANCED]

LIMITED
NAD
ERD
PS
PS/LPS
PS/MR RIDLEY
PS/PUS
MR DAY
LORD BRIDGES
MR URE
MR EVANS

Copy to No. 10 Downing St
PCD
Lord Moran

with tel under ref.

M 2/6

CONFIDENTIAL

TOP COPY (13)

AMC 02616

RECEIVED	
29 MAY 1981	
INDEX	

GRS 60

CONFIDENTIAL

CONFIDENTIAL
FM OTTAWA 272050Z MAY 81
TO ROUTINE FCO
TELEGRAM NUMBER 241 OF 27 MAY

YOUR TELNO 143: VISIT BY TRUDEAU

1. CANADIANS HOPE TO RESPOND DEFINATELY BY THE END OF THIS WEEK. MR TRUDEAU HAS APPARENTLY INDICATED WILLINGNESS IN PRINCIPLE TO SUCH A VISIT. ANDERSON (DEA) HAS RAISED AGAIN THE POSSIBILITY OF 27/28 JUNE, BUT DID NOT PUSH WHEN I REITERATED THE PROBLEMS OF MRS THATCHER'S DIARY AT THAT PERIOD.

DAVIES

LIMITED
NAD
ERD
PS
PS/LPS
PS/MR RIDLEY
PS/PUS
MR DAY
LORD BRIDGES
MR EVANS
MR URE

CONFIDENTIAL



Gouvernement du Québec
Délégation générale
Londres

2nd June 1981

The Rt Hon Mrs Margaret Thatcher MP
Prime Minister
House of Commons
London
SW1A 0AA

fg
-
Mud

Dear Mrs Thatcher,

As you will be aware, the Supreme Court of Canada is shortly expected to give its judgment on the Canadian Federal Government's proposals unilaterally to "patriate" and substantially amend the Canadian constitution despite the opposition of eight of the ten provincial governments and a majority of the Canadian people.

It seems to be widely believed in this country that the Supreme Court judgment will indicate a clear course of action for Westminster. However, this forthcoming judgment will deal exclusively with the legality in Canada of the federal government's proposals. Such a ruling will not change the constitutional responsibilities of the United Kingdom Parliament, as defined by the Statute of Westminster in 1931.

During the hearings before the Supreme Court, several significant arguments emerged which give a clearer insight into the nature of the current proposals and the way they are planned to be presented to Westminster. The more important of these are summarised in the enclosed Background Brief.

If there are any matters arising from the brief on which you would like additional information, I will do my best to provide it or to discuss the matter with you personally.

Yours sincerely,

Gilles Loiselle
Agent-General for Quebec



THE CANADIAN CONSTITUTION

Background Brief No. 6

The Current Status : The Supreme Court Hearings

1. Introduction

- 1.1 The Canadian Supreme Court has now concluded hearing appeals by the federal and provincial governments against the judgments of provincial courts in recent cases on the legality of the federal government's proposals to "patriate" and substantially amend the Canadian constitution.
- 1.2 The Supreme Court is expected to give its judgment shortly and the arguments advanced at these hearings give important insights into the situation that is likely to face Westminster, should the court's judgment allow the federal government to proceed with its plans.
- 1.3 This paper outlines the more important arguments advanced at these hearings, as they affect the role of Westminster in granting amendments to the Canadian constitution at the unilateral request of the federal parliament.

2. The effect of the proposed package on Federal - Provincial relations and the powers of the Provinces

- 2.1 It has been a central plank of the federal government's position from the outset that the proposed amending formula and Charter of Rights did not affect federal-provincial relations other than positively in that, for the first time, the provinces would have a legal role in the amendment of the Canadian constitution.

- 2.2 This position has been challenged by the provinces in legal actions before the courts of appeal of Manitoba, Newfoundland and Quebec.
- 2.3 At the hearings before the Supreme Court, the federal government elected not to appeal against provincial court judgments which opposed their position on this question; furthermore, it was expressly admitted by Mr J J Robinette, QC, for the federal government, that the federal proposals **did** affect federal-provincial relations, as well as the powers, rights and privileges secured to the provinces by the Canadian constitution.
- 2.4 Thus, for the first time, the federal authorities admitted what every judge from the courts of appeal had previously decided: that the exclusive provincial legislative powers would be diminished by the enactment of the proposed federal package.
- 2.5 This admission by the federal government has important consequences not only for the federal position on the constitutional convention requiring provincial consent, but also for Westminster when eventually faced with assessing the wishes of Canada as a federally constructed whole.

3. The nature of the Federal Resolution

- 3.1 The federal government has consistently claimed in Canada that the measure which will be voted on finally by the Senate and Commons of Canada, and which will be transmitted to Westminster, is no more than a 'mere resolution'.
- 3.2 The federal position is that, in passing this Resolution, the Canadian parliament:

'does no more than what any person may do; that is, make a request to the Queen.'

(Federal Government Factum: Newfoundland Court of Appeal, p 76.)

- 3.3 The admitted implication of this position is that the proposed package has the same constitutional gravitas as a resolution wishing Her Majesty 'Happy Birthday'.
- 3.4 This federal position was further discussed orally before the Supreme Court by federal government counsel, Maître Raynold Langlois. He affirmed that the Resolution was merely a mechanism by which the federal parliament made known its wishes. The subject matter of the Resolution would not change its nature; it would not be an Act of Parliament, but would remain a resolution.
- 3.5 Under cross-examination, the federal government counsel also conceded that when formed as a resolution, any 'request' was possible, even to the extent of a resolution requesting the abolition of the provinces.
- 3.6 The federal government also conceded that if what presently appears in the proposed Resolution were to appear as a statute, it would be justiciable and could be declared ultra vires. Mr J J Robinette, QC, admitted that the only reason a resolution enjoys an immunity that a statute does not have, is purely because it is a resolution.
- 3.7 It is, therefore, clear that the federal government is attempting to achieve indirectly through a resolution precisely that which it would be unable to achieve directly through a statute. Westminster is, therefore, forced into the position of being asked to enact a measure which would be illegal in Canada, were the federal government to act independently in Canada.
- 3.8 If the Canadian Supreme Court rules in favour of the federal government, it will only imply that the federal parliament is **legally entitled to submit such a Resolution** without the consent of the provinces and despite the active opposition of eight of the ten provinces.

3.9 Such legal entitlement to submit a mere resolution has, however, no bearing whatsoever on Westminster's role and responsibilities in relation to such a request from Canada.

4. A convention requiring automatic action in Westminster?

4.1 It is the central contradiction of the federal government's position that on the one hand Westminster has **full and sole legislative authority** to amend the Canadian constitution but that on the other hand it **may not look behind** the substance of any request from Canada for amendment and that there is a binding requirement on Westminster of automatic action. It is difficult to see how full legislative authority can be reconciled with no discretion in the exercise of this authority.

4.2 Furthermore, the existence of a constitutional convention requiring automatic action by Westminster is not borne out by the historical evidence.

4.3 In 1907 no such convention existed, as evidenced by the statements of Lord Elgin and Mr Churchill in discussions of a proposed amendment which was opposed by British Columbia. On this occasion, Westminster changed the wording of the amendment.

4.4 In 1920, a request made by the federal government to amend the Canadian constitution was delayed for 11 years.

4.5 Since 1931 there are no precedents to indicate the existence of such a convention. Furthermore, the federal government has been very careful since then not to request any amendment to the Canadian constitution which would affect enumerated provincial legislative powers, except with the concurrence of the provinces.

4.6 Thus we may conclude that no requirements for automatic action by Westminster have ever existed.

4.7 At the Supreme Court hearings, it was further admitted by the federal authorities that the present proposal is **unprecedented**, in that never before has any amendment been requested by the federal parliament which encroached on the sovereignty of the provinces without first obtaining their consent. It must therefore be concluded that even if such a convention existed it would not be at all applicable in the present circumstances.

5. Conclusion

5.1 In advance of the publication of the judgment of the Supreme Court, it is already possible to state that the only judgment which would give a clear indication of action to Westminster would be a judgment favourable to the provincial case.

5.2 Any Supreme Court ruling in favour of the federal government would exclusively confirm Ottawa's legal authority to submit a resolution to Her Majesty. Westminster's sovereign role in this matter is determined by the responsibilities of the UK Parliament, as set out in the Statute of Westminster, 1931, and by the nature of the request.

5.3 The federal authorities have made the following significant admissions during the Supreme Court hearings:

- the proposed package is unprecedented;
- the proposed package affects federal-provincial relations and diminishes the powers of the provinces;
- the proposed package would be illegal in Canada, were the federal parliament to enact it in the form of a statute.

- 5.4 Speaking in the House of Commons debate on the Statute of Westminster on 20th November 1931, The Rt. Hon. L. S. Amery accurately described the role of Westminster:

"No one has dreamed for 50 years past of legislating here for any Dominion except with its consent and at its request The other point kept is at the desire, within the Dominions, where you have a constitution based upon an internal pact in a Dominion, that that pact should not be at the mercy of the Dominion Government alone, but that the Provincial or State Governments should have their position respected."

Mr Amery was Secretary of State for the Colonies and for Dominion Affairs from 1925-29, the period which covered the Imperial Conferences leading to the Statute of Westminster.

- 5.5 During a House of Lords debate on the same measure, Viscount Hailsham described the origin and purpose of the restrictive clauses which allowed the sovereign amending power to remain at Westminster:

"In each case that restriction (as in s.7 relating to Canada) was inserted by the Dominion itself, and it has requested us to pass that restriction In each case it has been inserted to protect the rights of the states which form part of the Dominion, against a possible encroachment on those rights by Dominion legislation which might be thought otherwise to override the ordinary authority of their constitution."

- 5.6 Consequently, Westminster has a right and indeed a duty to reject any requested amendment which affects the sovereignty of the provinces and which does not have the approval of Canada as a federally constructed whole.

JUNE 1981



Province of Nova Scotia

Canada

OFFICE OF THE AGENT GENERAL IN THE UNITED KINGDOM AND EUROPE

er
2nd June 1981

Honourable Members:

Enclosed is material relative to the legislation which would have the effect of materially amending the British North America Act. This material is entitled "Constitutional Accord - Canadian Patriation Plan" and is the proposal made by eight Canadian Provinces to the Prime Minister of Canada, the Right Honourable Pierre Trudeau, on 16th April 1981. This Accord was rejected by Mr. Trudeau.

The decision on the legality or not of the Federal Government's unilateral approach to the British Parliament has been submitted to the Supreme Court of Canada, and an early judgement is expected.

In the meantime, I am forwarding the Accord and also the proposed Amending Formula for your attention to impress upon you the alternative, acceptable to eight Provinces, to the Federal Government's controversial legislation.

Respectfully submitted,

DONALD M. SMITH
Agent General

Enclosure
ams

CONSTITUTIONAL ACCORD
CANADIAN PATRIATION PLAN

OTTAWA

April 16, 1981.

CONSTITUTIONAL ACCORD
CANADIAN PATRIATION PLAN

WHEREAS Canada is a mature and independent country with a federal system of government,

AND WHEREAS the Parliament of the United Kingdom has retained, at the request of the Parliament of Canada and with the approval of the Provinces, residual power to amend certain parts of the British North America Acts upon receiving a proper request from Canada,

AND WHEREAS it is fitting and proper for the Constitution of Canada to be amendable in all respects by action taken wholly within Canada,

AND WHEREAS the full exercise of the sovereignty of Canada requires a Canadian amending procedure in keeping with the federal nature of Canada,

NOW THEREFORE, the Governments subscribing to this Accord agree as follows:

1. To patriate the Constitution of Canada by taking the necessary steps through the Parliament of Canada and the Legislatures of the Provinces;
2. To accept, as part of patriation, the amending formula attached to this Accord as the formula for making all future amendments to the Constitution of Canada;
3. To embark upon an intensive three-year period of constitutional renewal based on the new amending formula and without delay to determine an agenda following acceptance of this Accord; and
4. To discontinue court proceedings now pending in Canada relative to the proposed Joint Address on the Constitution now before Parliament.

The Canadian Patriation Plan is conditional upon the Government of Canada withdrawing the proposed Joint Address on the Constitution now before Parliament and subscribing to this Accord.

The Provinces of New Brunswick and Ontario are invited to sign this Accord.

Dated at Ottawa this 16th Day of April, 1981.

Signed on behalf of the under-mentioned Governments, to be followed by ratification by the respective Legislatures or National Assembly.

ALBERTA

Signed
.....
Peter Lougheed, Premier

BRITISH COLUMBIA

Signed
.....
William R. Bennett, Premier

MANITOBA

Signed.
.....
Sterling R. Lyon, Premier

NEWFOUNDLAND

Signed
.....
Brian A. Peckford, Premier

NOVA SCOTIA

Signed
.....
John M. Buchanan, Premier

PRINCE EDWARD ISLAND

Signed
.....
J. Angus MacLean, Premier

QUÉBEC

Signed
.....
René Lévesque, Premier

SASKATCHEWAN

Signed
.....
Allan E. Blakeney, Premier

AMENDING FORMULA
FOR THE
CONSTITUTION OF CANADA

Text and Explanatory Notes

Ottawa
April 16, 1981

PART A

AMENDING FORMULA FOR THE CONSTITUTION OF CANADA

EXPLANATORY NOTES

General Comment

The amending formula which is part of the Canadian patriation plan agreed to by eight governments in Ottawa on April 16, 1981, is the result of intensive discussions among the governments of Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan.

In developing the formula several important principles were recognized:

1. All amendments to the Constitution of Canada, except those related to the internal constitution of the provinces, require the agreement of the Parliament of Canada.
2. Any formula must recognize the constitutional equality of provinces as equal partners in Confederation.
3. Any amending formula must protect the diversity of Canada.
4. Any constitutional amendment taking away an existing provincial area of jurisdiction or proprietary right should not be imposed on any province not desiring it.
5. Any amending formula must strike a balance between stability and flexibility.
6. Some amendments are of such fundamental importance to the country that all eleven governments must agree.

During discussions it was recognized that more than one method of amending the Constitution would be necessary. Accordingly, this formula contains different methods depending on the nature of the amendment.

The eleven sections described as "Part A - Amending Formula for the Constitution of Canada" are designed to contain a full and complete procedure for the future amendment of the Constitution of Canada in all other respects. The provisions contained in Part A would replace both the limited amending formulas now contained in sections 91(1) and 92(1) of the B.N.A. Act as well as the United Kingdom Parliament's residual responsibility for amending certain aspects of the Canadian Constitution.

This amending formula would apply not only to the B.N.A. Act, 1867, and amendments made to it since that date, but also to the other parts of the Constitution of Canada, including the constitutional statutes and Orders-in-Council which relate to the entry into Canada of particular provinces, for example, The Manitoba Act, 1870, the Terms of Union admitting British Columbia in 1871, and Prince Edward Island in 1873, The Alberta Act, 1905, the Saskatchewan Act, 1905, and the Terms of Union with Newfoundland, 1949.

This amending formula is clearly preferable to the one proposed by the federal government for a number of reasons:

- 1) it recognizes the constitutional equality of each of Canada's provinces;
- 2) it gives the Senate only a suspensive rather than an absolute veto over constitutional amendment;
- 3) it omits the referendum provision opposed by many as being inappropriate to the Canadian federal system.

PART A

AMENDING FORMULA FOR THE
CONSTITUTION OF CANADA

EXPLANATORY NOTES

1. (1) Amendments to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by:

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the Legislative Assemblies of at least two-thirds of the provinces that have in the aggregate, according to the latest decennial census, at least fifty per cent of the population of all of the provinces

(2) Any amendment made under subsection (1) derogating from the legislative powers, the proprietary rights or any other rights or privileges of the Legislature or government of a province shall require a resolution supported by a vote of a majority of the Members of each of the Senate, of the House of Commons, and of the requisite number of Legislative Assemblies.

(3) Any amendment made under subsection (1) derogating from the legislative powers, the proprietary rights, or any other rights or privileges of the Legislature or government of a Province shall not have effect in any province whose Legislative Assembly has expressed its dissent thereto by resolution supported by a majority of the Members prior to the issue of the proclamation, provided, however, that Legislative Assembly, by resolution supported by a majority of the Members, may subsequently withdraw its dissent and approve the amendment.

1. (1) This provision is known as the general amending formula. It would apply to all amendments to the Constitution of Canada unless another method of amendment is specifically provided for elsewhere in Part A.

This provision requires that an amendment be supported by the Parliament of Canada and by at least seven provincial Legislatures representing at least 50% of the total population of all of the provinces.

(2) Any amendment which diminishes provincial rights or powers must be supported by a majority of the actual membership of each of the Senate, the House of Commons, and the requisite number of Legislatures.

(3) If an amendment, proposed under the general amending formula, would diminish the existing Legislative powers, proprietary rights or any other rights or privileges of provincial legislatures or governments, a province has two decisions to make:

(a) whether or not to approve the amendment, and

(b) if the amendment is approved under subsection (1), whether to retain its existing powers, rights or privileges by dissenting from its application within that province.

In this case, the Legislature of the province would have to express its dissent by adopting a Resolution supported by a majority of the total numbers of members of the Assembly. Such a procedure is commonly designated an "opting-out" provision.

AMENDING FORMULA

EXPLANATORY NOTES

cont. of (2)

A province wishing to use this "opting-out" procedure must do so before the proclamation making the amendment is issued. Also the opting-out provision applies only where the proposed amendment derogates from, or diminishes, the legislative powers, proprietary rights or any other rights and privileges of the Legislature or government of a province. Proprietary rights includes natural resources and assets. Broadly speaking, those powers, rights and privileges are assigned to the provinces by sections 92, 93 and 109 of the British North America Act.

In summary, no single province should be able to block an amendment desired by at least seven other provinces and the federal government. Conversely, that particular province would not be required to have this kind of amendment apply to it if it found the amendment to be unacceptable.

2. (1) No proclamation shall issue under section 1 before the expiry of one year from the date of the passage of the resolution initiating the amendment procedure, unless the Legislative Assembly of every province has previously adopted a resolution of assent or dissent.

(2) No proclamation shall issue under section 1 after the expiry of three years from the date of the passage of the resolution initiating the amendment procedure.

(3) Subject to this section, the Government of Canada shall advise the Governor General to issue a proclamation forthwith upon the passage of the requisite resolutions under this Part.

2. (1) This provision ensures that a proposed amendment cannot come into force before one year has expired from the time of initiation unless all provinces have expressed their views by resolution prior to that time, and the necessary consents have been obtained. Thus, no amendment can be made until all Legislatures have had an opportunity to debate the proposed amendment.

(2) This provision ensures that a proposed amendment must gain the requisite level of support within a reasonable length of time from initiation or it will lapse.

(3) This provision ensures that a proposed amendment, enjoying the requisite level of support, is proclaimed.

AMENDING FORMULA

3. In the event that a province dissents from an amendment conferring legislative jurisdiction on Parliament, the Government of Canada shall provide reasonable compensation to the government of that province, taking into account the per capita costs to exercise that jurisdiction in the provinces which have approved the amendment.

4. Amendments to the Constitution of Canada in relation to any provision that applies to one or more, but not all, of the provinces, including any alteration to boundaries between provinces or the use of the English or the French language within that province may be made only by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and the House of Commons and the Legislative Assembly of every province to which the amendment applies.

EXPLANATORY NOTES

3. If a province dissents under section 1(2) from a constitutional amendment that confers legislative jurisdiction on Parliament, then this provision requires the Government of Canada to provide reasonable compensation to the government of that province. Such compensation would take into account the per capita costs incurred by the federal government in those provinces where the federal jurisdiction is exercised.

This provision is designed to prevent a taxpayer, resident in a province to which the amendment does not apply, from paying twice: first, in his or her federal tax bill and second, to the province which continues to exercise the jurisdiction.

4. The purpose of this provision is to allow the Parliament of Canada and the Legislature of a province or provinces to amend the Constitution in relation to any provision that applies to one or more, but not all, of the provinces. Such an amendment would only require the approval of the provincial Legislatures affected and Parliament. Instances of matters falling within that category are, for example, the provisions of the Manitoba Act, the Terms of Union of Prince Edward Island and British Columbia, The Saskatchewan Act, The Alberta Act, and the Terms of Union with Newfoundland. This provision ensures that any such amendment has the consent of the affected province or provinces.

Alterations to boundaries between provinces would also be dealt with under this section and could be made by the approval of the Legislatures of those provinces affected and the Parliament of Canada.

Any amendments to the Constitution in relation to the use of the English or French language within a province could be made by resolution of the Legislature of the province affected and the federal Parliament. This provision would apply to those portions of section 133 of the B.N.A. Act which relate to the province of Quebec and

AMENDING FORMULA

EXPLANATORY NOTES

cont. of 4

5. An amendment may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the passage by the House of Commons of a resolution authorizing its issue, the Senate has not passed such a resolution and if, after the expiration of those one hundred and eighty days, the House of Commons again passed the resolution, but any period when Parliament is dissolved shall not be counted in computing the one hundred and eighty days.
6. (1) The procedures for amendment may be initiated by the Senate, by the House of Commons, or by the Legislative Assembly of a province.
(2) A resolution authorizing an amendment may be revoked at any time before the issue of a proclamation.
(3) A resolution of dissent may be revoked at any time before or after the issue of a proclamation.
7. Subject to sections 9 and 10, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

those language provisions of the Manitoba Act which apply to Manitoba. This provision could make section 133 applicable to a province where it does not apply now but which wishes it to be applicable therein.

5. Under this provision, the Senate of Canada will have only a suspensive veto over constitutional amendments. If the Senate refuses or fails to authorize the issue of a proclamation within one hundred and eighty days of the House of Commons passing a resolution authorizing its issue, the amendment may still proceed provided the matter is again submitted to and passed by the House of Commons.
6. (1) Self-explanatory.
(2) This section permits either of the Houses of Parliament or any Legislature to revoke an affirmative resolution before the proclamation implementing the proposed amendment is issued. However, once the proclamation is issued, an affirmative resolution may not be revoked.
(3) This provision allows a resolution disapproving a proposed amendment to be revoked at any time either before or after the issue of a proclamation. This is designed to allow provinces which have dissented from an amendment to revoke their dissent subsequently and be subject to the amendment.
7. This provision allows Parliament, acting alone, to amend those parts of the Constitution of Canada that relate solely to the operation of the executive government of Canada at the federal level or to the Senate or House of Commons. Some aspects of certain institutions important for maintaining the federal-provincial balance, such as the Senate and the Supreme Court, are

AMENDING FORMULA

EXPLANATORY NOTES

cont. of 7

8. Subject to section 9, the Legislature of each province may exclusively make laws amending the constitution of the province.
9. Amendments to the Constitution of Canada in relation to the following matters may be made only by proclamation issued by the Governor General under the Great Seal of Canada when authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of all of the provinces:
 - (a) The office of the Queen, of the Governor General or of the Lieutenant Governor;
 - (b) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province at the time this provision comes into force;
 - (c) the use of the English or French language except with respect to section 4;
 - (d) the composition of the Supreme Court of Canada;
 - (e) an amendment to any of the provisions of this Part.

excluded from this provision and are covered in sections 9 and 10. This provision is intended to replace section 91(1) of the B.N.A. Act.

8. This provision allows the Legislature of a province, acting alone, to amend the provincial Constitution and is intended to replace section 92(1) of the B.N.A. Act. Exceptions to this provision include the office of the Lieutenant-Governor.
9. This section recognizes that some matters are of such fundamental importance that amendments in relation to them should require the consent of all the provincial Legislatures and Parliament.
 - (a) Self-explanatory.
 - (b) This clause relates to the protection provided to provinces under section 51 A of the B.N.A. Act.
 - (c) This clause would require any changes to the Constitution related to the use of the English or French language either within the institutions of the federal government or nationwide to require the unanimous approval of Parliament and all the Legislatures.
 - (d) This clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or Bench of Quebec and are, therefore, trained in the civil law. Other aspects of the Supreme Court of Canada are dealt with in section 10.
 - (e) This clause provides that any amendment to the amending formula itself requires unanimous approval of Parliament and all of the provincial Legislatures.

AMENDING FORMULA

10. Amendments to the Constitution of Canada in relation to the following matters shall be made in accordance with the provisions of section 1 (1) of this Part and sections 1 (2) and 1 (3) shall not apply:

- (a) the principle of proportionate representation of the provinces in the House of Commons;
- (b) the powers of the Senate and the method of selection of members thereto;
- (c) The number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
- (d) the Supreme Court of Canada, except with respect to clause (d) of section 9.

- (e) the extension of existing provinces into the Territories;
- (f) notwithstanding any other law or practice, the establishment of new provinces;
- (g) an amendment to any of the provisions of Part B.

EXPLANATORY NOTES

10. Amendments to the Constitution in respect of the matters listed in section 10 may be achieved if approved by 1) the House of Commons and Senate of Canada and 2) at least seven provinces having, in the aggregate, at least 50% of the total population of all the provinces according to the latest decennial census. The types of amendments listed in this section are not subject to provincial non-application and, therefore, apply nationwide.

- (a) Self-explanatory.
- (b) Self-explanatory.
- (c) Self-explanatory.
- (d) This clause refers to all amendments relating to the Supreme Court of Canada except the composition of the Court which is dealt with in section 9, clause (d). The Supreme Court of Canada is established by a law of Parliament under section 101 of the B.N.A. Act and not by the Constitution itself. This clause anticipates constitutional amendments relating to the Court. Such amendments would apply nationwide.
- (e) and (f) The alteration of boundaries between provinces is dealt with in section 4. The extension of existing provinces or the establishment of new provinces are dealt with in clauses (e) and (f).
- (g) This clause deals with amendments to the delegation of legislative authority provisions contained in Part B.

AMENDING FORMULA

11. A constitutional conference composed of the Prime Minister of Canada and the First Ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years of the enactment of this Part to review the provisions for the amendment of the Constitution of Canada.

EXPLANATORY NOTES

11. This section provides that the First Ministers of Canada shall meet within fifteen years to review the amending formula itself. This is a minimum requirement and does not preclude other constitutional conferences.

PART B

DELEGATION OF LEGISLATIVE AUTHORITY

EXPLANATORY NOTES

General Comments

Part B allows for the delegation of legislative authority from one order of government to the other, something which is not now provided for in the B.N.A. Act. Delegation of legislative authority would add considerable flexibility to Canada's constitutional arrangements and could reduce the duplication of administrative services.

This Part would permit the Parliament of Canada to consent to the making of a provincial law in an area of federal responsibility. Conversely, it would permit one or more provinces to consent to the making of a federal law in an area of provincial responsibility. There is also provision for the consents to relate to all laws in relation to a particular matter of jurisdiction, as distinct from a particular statute. In the event of delegation, financial compensation is payable to the governments exercising delegated power.

Delegation could conceivably be used to test the effect of transferring responsibility for a certain jurisdictional area before proceeding in a more general way through the amending formula itself. Finally, a delegation of power may be revoked upon two years' notice.

PART B

DELEGATION OF LEGISLATIVE AUTHORITY

1. Notwithstanding anything in the Constitution of Canada, Parliament may make laws in relation to a matter coming within the legislative jurisdiction of a province, if prior to the enactment, the Legislature of at least one province has consented to the operation of such a statute in that province.
2. A statute passed pursuant to section 1 shall not have effect in any province unless the Legislature of that province has consented to its operation.
3. The Legislature of a province may make laws in the province in relation to a matter coming within the legislative jurisdiction of Parliament, if, prior to the enactment, Parliament has consented to the enactment of such a statute by the Legislature of that province.
4. A consent given under this Part may relate to a specific statute or to all laws in relation to a particular matter.
5. A consent given under this Part may be revoked upon giving two years' notice, and
 - (a) if the consent was given under section 1, any law made by Parliament to which the consent relates shall thereupon cease to have effect in the province revoking the consent, but the revocation of the consent does not affect the operation of that law in any other province;
 - (b) if the consent was given under section 3, any law made by the Legislature of a province to which the consent relates shall thereupon cease to have effect.
6. In the event of a delegation of legislative authority from Parliament to the Legislature of a province, the Government of Canada shall provide reasonable compensation to the government of that province, taking into account the per capita costs to exercise that jurisdiction.

EXPLANATORY NOTES

1. This section permits one or more provinces to consent to Parliament enacting a law in an area of provincial jurisdiction
2. Statutes passed by the federal Parliament pursuant to section 1 only have effect in those provinces that have consented to their operation.
3. This is the converse of section 1. It permits Parliament to consent to one or more provinces enacting a law in an area of federal jurisdiction.
4. This section provides that the delegation may be in respect to either a whole matter of constitutional jurisdiction or merely a specific statute.
5. This section allows for the delegation of authority to be revoked provided two years' notice is given. After the two years, the law ceases to have force and effect within those jurisdictions that have revoked the consent. In the case of a delegation to the Parliament of Canada by several provinces, the federal law ceases to have effect only in those provinces which have revoked consent.
6. and 7. These are reciprocal sections which would provide that the order of government that acquires the right to pass a law through the delegation process is entitled to be provided with reasonable compensation from the other order of government for the exercise of that jurisdiction. The definition of reasonable compensation must take into account the per capita costs of exercising that jurisdiction.

DELEGATION OF LEGISLATIVE AUTHORITY

EXPLANATORY NOTES

7. In the event of a delegation of legislative authority from the Legislature of a province to Parliament, the government of the province shall provide reasonable compensation to the Government of Canada, taking into account the per capita costs to exercise that jurisdiction.

(See page 11)

Case

RESTRICTED

GRS 110

RESTRICTED

FM OTTAWA 201607Z MAY 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 247 OF 29 MAY

CONSTITUTION: SUPREME COURT

1. THERE IS VIRTUALLY NO POSSIBILITY THAT THE COURT WILL ISSUE ITS DECISION NEXT WEEK: IT IS PLANNING AN ADJOURNMENT OF A WEEK DURING WHICH IT WILL CONSIDER A NUMBER OF CASES. (THE COURT HAS A VERY FULL SCHEDULE OF OTHER CASES INCLUDING A MAJOR CONSTITUTIONAL ONE CONCERNING FEDERAL TAXATION OF GAS WHICH IT WILL HEAR ON 18 JUNE).

2. THERE IS A "DECENT POSSIBILITY" THAT THE DECISION WILL ISSUE IN THE WEEK BEGINNING 8 JUNE. IF IT DOES NOT, IT MAY WELL MEAN THAT THE DIFFERENCES OF VIEW WITHIN THE COURTS ARE SUCH THAT A DECISION WILL BE DELAYED UNTIL THE AUTUMN.

DAVIES

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }
LORD MORAN C/O HDS OF MISSION POD
PS/CHANCELLOR OF THE DUCHY OF LANCASTER
PS/LORD CHANCELLOR
PS/LORD PRESIDENT
MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

RESTRICTED

Canada

A04954PRIME MINISTERParliamentary Affairs: Canada

BACKGROUND

The Chancellor of the Duchy of Lancaster wishes to report briefly under Parliamentary Affairs on the present state of play on the Canadian constitutional issue.

The Supreme Court of Canada is expected to deliver its judgement on the questions referred to it by the Federal Government and certain of the Provinces not later than the first week in June. If the judgement is (unexpectedly) unfavourable to the Federal Government they will drop the proposed Resolution for an address to The Queen requesting the enactment at Westminster of legislation to patriate the Canadian Constitution. If the judgement is favourable, there will be a further two day debate in each House of the Canadian Parliament on the Resolution. Under procedural orders already adopted by both Houses, no further amendment of the Resolution will be possible at that stage. If the Resolution is approved, as seems certain, the request will be sent to London without delay.

In the last ten days, there have been further messages from Mr Trudeau via the High Commission and emissaries from Ottawa that, if all goes well in the Supreme Court and the Canadian Parliament, he expects the proposed Canada Bill to be enacted at Westminster in time for the celebrations to mark Canada's National Day and the 50th anniversary of the Statute of Westminster on 1 July, to which The Queen has been invited. The Chancellor of the Duchy has made it clear to the Canadians that this is a wholly unrealistic timetable, and has reminded them of the repeated warnings last year that the request would have to be in the hands of the United Kingdom Government not later than January 1981 in order for the proposals to be dealt with at Westminster by the end of the current Session. Any attempt to force the legislation through to Mr Trudeau's timetable would excite avoidable opposition, and would create unacceptable difficulties for the Government's domestic legislative programme. Mr Pym has accepted that a "more conceivable" aim would be for the legislation to be passed before the Summer Recess, provided that the Government were prepared

if necessary to give the Canada Bill priority over other legislation requiring Royal Assent by the end of July and/or to keep Parliament sitting after the Royal Wedding. He has, however, emphasised to the Canadians that even this timetable would be at risk if there was any further delay in sending the request to London, or if the ruling of the Supreme Court left any room for doubt about its constitutional propriety.

OD decided in February that it would be in the best interests of the United Kingdom to accept the Canadian request and pass it through Parliament unamended. Since then the Federal Government's timing has slipped badly, but their decision to go to the Supreme Court first has been helpful from our point of view. It seems likely that the Canadians would reluctantly accept our inability to act by 1 July, but would be in grave difficulties if we cannot act before the summer holidays. Delay until the autumn would give maximum scope for further opposition to build up, both in Canada and here. Both Anglo-Canadian relations and the prospects at Westminster would therefore be damaged if a Canadian request were left unanswered until after the summer holidays. So Mr Pym's present thinking is very welcome. But the Cabinet will in due course need to decide what price it is prepared to pay, in terms of deferring other legislation and/or the date of the recess, in order to achieve what is agreed to be a major foreign policy objective.

The Chancellor of the Duchy has agreed with the Foreign Secretary that the Government's reply to the two reports by the Select Committee on Foreign Affairs should be postponed until after the Supreme Court verdict, though it might be published before the end of the final Canadian Parliamentary proceedings. The Chancellor of the Duchy (unlike the Lord Privy Seal) is inclined to favour a preliminary two day debate following the publication of the Government's reply in order to clear the air before the Canada Bill itself is introduced, but accepts that this question will need to be re-examined in the light of the nature of the Supreme Court verdict.

HANDLING

The Parliamentary handling of any Canadian request will depend on its timing and the precise terms of the judgement of the Supreme Court, and you will wish to avoid any detailed discussion in Cabinet until the position on these two

points is clearer. After the Chancellor of the Duchy has made his report, you may wish to ask the Foreign Secretary to comment, and also (because of the House of Commons angle) the Lord Privy Seal. The Lord President may have views on the implications for the legislative programme in the House of Lords of finding time for the Canada Bill before the Summer Recess. Cabinet noted last week that the existing pressures on the timetable meant that the Employment and Training and Education (Scotland) Bills could not now receive Royal Assent until the autumn; might other measures have to be postponed to make room for the Canada Bill? The main candidate for deferment seems to be the Transport Bill, but a final decision can be taken when the Supreme Court judgement is available.

CONCLUSION

The conclusions of the Cabinet might be -

- i. To note the Chancellor of the Duchy's report;
- ii. To agree that Canadian representatives should continue to be told that it is unrealistic to think in terms of passing a Canada Bill at Westminster by 1 July;
- iii. To invite the Foreign Secretary to circulate (to OD members) the final draft of the Government's reply to the two reports by the Select Committee on Foreign Affairs, and to settle the timing of its publication with the Chancellor of the Duchy after the Supreme Court has delivered its judgement;
- iv. To invite the Chancellor of the Duchy, in consultation with the Foreign Secretary and the Lord President, to bring further proposals on the handling of any Canadian request before the Cabinet as a matter of urgency as soon as the Supreme Court judgement is available, dealing, in particular, with the implications for the Government's own legislative programme, and the desirability of arranging preliminary debates in both Houses.



Robert Armstrong

20 May 1981



Foreign and Commonwealth Office

London SW1A 2AH

20 May 1981

Dear Mike, ^{MAF}

Canadian Constitution

Michael Alexander wrote on 15 May, enclosing a letter from the Canadian High Commissioner with a copy of the proposed Resolution on the Canadian constitution.

We have indeed already received a copy of the Resolution from the Canadians. We shall be producing comment when the time comes to brief the Prime Minister about the Canadian request for patriation (on which the telegrams are being copied to you).

yours ever
Roderic Lyne

(R M J Lyne)
Private Secretary

Mike Pattison Esq
10 Downing Street
LONDON SW1

CONFIDENTIAL

GRS 125

CONFIDENTIAL

FM OTTAWA 191545Z MAY 81
TO ROUTINE FCO
TELEGRAM NUMBER 226 OF 19 MAY

YOUR TELNO 144: CONSTITUTION

1. YOU WILL HAVE SEEN FROM PARAGRAPH ONE OF MY TELNO 223 THAT KIRBY HAD SEEMED TO PUT A HOPEFUL CONSTRUCTION ON WHAT MR PYM HAD SAID TO MR COLLENETTE LAST WEEK. I WENT OVER THE GROUND WITH HIM TODAY. HE HAS IN FACT PERFECTLY UNDERSTOOD THAT A MIRACLE IS UNLIKELY TO OCCUR AND IS MAKING ALTERNATIVE PLANS, PUTTING MOST HOPE ON A CONCLUSION BY THE SUMMER RECESS. I AM SURE THAT HE WILL REPORT ACCURATELY TO MR TRUDEAU BUT WOULD NOT EXPECT THE LATTER TO CHANGE HIS TUNE UNTIL THE SUPREME COURT HAS DELIVERED ITS VERDICT. NEVER THELESS, I SHALL TAKE ANY OTHER OPPORTUNITIES WHICH PRESENT THEMSELVES TO ENSURE THAT THOSE CONCERNED NEAREST TO MR TRUDEAU ARE AWARE OF THE FACTS OF THE MATTER AT WESTMINSTER.

DAVIES

CANADIAN CONSTITUTION LIMITED

NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUNG
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

LORD MORAN C/O HDS OF MISSION POD
PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

CONFIDENTIAL

*(From Minister -
thw*

GRS 230
CONFIDENTIAL

CONFIDENTIAL

FM FCO 181400Z MAY 81
TO ROUTINE OTTAWA
TELEGRAM NUMBER 149 OF 18 MAY

YOUR TELEGRAM NUMBER 223 CROSSED MY TELEGRAM NUMBER 144

1. OUR FEARS THAT MR PYM'S MESSAGE MIGHT GET GARBLED APPEAR TO HAVE BEEN REALISED. IT IS IMPORTANT THAT THE CANADIANS SHOULD BE UNDER NO MISAPPREHENSION ABOUT THE CHANCES OF THEIR LEGISLATION GOING THROUGH PARLIAMENT BY 1 JULY. YOU WILL NO DOUBT THEREFORE TAKE AN EARLY OPPORTUNITY OF RUBBING THE MESSAGE HOME WITH KIRBY. AT THIS END, WE WILL SPEAK APPROPRIATELY TO THE HIGH COMMISSION AND ALSO TO GEORGE ANDERSON (HEAD OF WESTERN EUROPEAN DIVISION AT THE DEA) WHO IS SAID TO BE RETURNING TO LONDON LATER THIS WEEK.

2. IT HAS NOW BEEN DECIDED TO DELAY OUR RESPONSE TO THE FAC REPORT UNTIL AFTER THE SUPREME COURT VERDICT. RECORD OF RELEVANT MINISTERIAL DISCUSSION CONCERNED FOLLOWS BY BAG. IN TELLING THE CANADIANS OF THIS YOU WILL NATURALLY WANT TO RECOGNISE THEIR DESIRE THAT WE SHOULD, IF POSSIBLE PUBLISH SOONER RATHER THAN LATER. NONETHELESS, I THINK THERE IS NO NEED TO GO INTO GREAT DETAIL: IT SHOULD BE SUFFICIENT TO SAY TO THEM THAT THIS IS VERY MUCH A MATTER OF POLITICAL JUDGMENT AT THIS END TAKING THE PARLIAMETARY SITUATION INTO ACCOUNT. YOU COULD ADD THAT IT SEEMED INCREASINGLY IRRELEVANT TO PUBLISH SO NEAR TO THE LIKELY DATE OF A SUPREME COURT VERDICT.

3. WE ARE SEEING WHETHER LORD MORAN WILL BE AVAILABLE OVER MR GRAY'S VISIT.

CARRINGTON

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMETARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

LORD MORAN C/O HDS OF MISSION POD
PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

CONFIDENTIAL

Canada

GRS 490

CONFIDENTIAL

From: Minister
/ M

CONFIDENTIAL

FM OTTAWA 151530Z MAY 81

TO ROUTINE FCO

TELEGRAM NUMBER 223 OF 15 MAY

CONSTITUTION

1. KIRBY AND GIBSON CALLED ON ME AT SHORT NOTICE THIS MORNING AT THEIR REQUEST. THEY HAD SEEN THE PRIME MINISTER LAST EVENING TO DISCUSS THE CONSTITUTION. HE HAD MADE IT CLEAR TO THEM THAT WHATEVER DOOMSDAY SCENARIOS THEY WISHED TO DRAFT FOR THEIR OWN CONSIDERATION, HE IS QUITE DETERMINED THAT EVERYTHING POSSIBLE SHOULD BE DONE TO MEET HIS DEADLINE OF 1 JULY. THE POINT IN CALLING ON ME THEREFORE WAS TO UNDERLINE THE PRIME MINISTER'S COMMITMENT AND TO ENSURE THAT THERE IS NO MISUNDERSTANDING OF THE CANADIAN POSITION IN LONDON. I SAID THAT I WAS SURE THAT THERE WAS NO SUCH MISUNDERSTANDING AND THAT HMG WERE COMMITTED TO TAKING ACTION AS EXPEDITIOUSLY AS POSSIBLE. WHEN I POINTED TO THE CROWDED PARLIAMENTARY TIMETABLE AND OTHER POSSIBLE DIFFICULTIES AT WESTMINSTER, KIRBY SAID THAT HE HAD SPOKEN WITH COLLENETTE, PARLIAMENTARY SECRETARY TO THE PRESIDENT OF THE PRIVY COUNCIL (THAT IS THE HOUSE LEADER) BEFORE AND AFTER HIS CALL ON MR PYM. KIRBY THOUGHT MR PYM'S MESSAGE WAS PERHAPS LESS BLEAK THAN HITHERTO.

See att'ch
telegram.

2. KIRBY THEN WENT ON TO SAY THAT SHOULD THE CANADIAN RESOLUTION LINGER IN WESTMINSTER FOR 2 OR 3 MONTHS, THE SITUATION IN CANADA COULD BECOME EXTREMELY DIFFICULT AND INEVITABLY THE BLAME FOR THE DIFFICULTIES WOULD BE ATTRIBUTED PARTLY AT LEAST TO THE UK. HIS INTELLIGENCE WAS THAT AT A RECENT MEETING OF REPRESENTATIVES OF THE EIGHT DISSENTING PREMIERS, IT HAD BEEN AGREED THAT THEIR TACTICS WOULD BE TO SEEK DELAY IN WESTMINSTER (RATHER THAN IMMEDIATE DEFEAT WHICH THEY THOUGHT THEY COULD NOT ACHIEVE) WHICH WOULD ALLOW THEM TO UNDERTAKE PROVINCIAL REFERENDA WHICH COULD QUITE POSSIBLY GO AGAINST THE FEDERAL POSITION. ARMED WITH THESE RESULTS THE PROVINCES WOULD THEN URGE WESTMINSTER TO REJECT THE RESOLUTION IN THE AUTUMN. IF THERE WERE DELAY IN WESTMINSTER AND REFERENDA WERE LAUNCHED IN THE PROVINCES, KIRBY WAS NOT AT ALL SURE THAT THE FEDERAL GOVERNMENT WOULD ATTEMPT TO FIGHT THEM: WHETHER OR NOT TO DO SO WOULD BE A FINE POLITICAL JUDGEMENT.

3. GIBSON SAID THEY WERE STILL HOPING FOR AN EARLY AND FAVOURABLE DECISION FROM THE SUPREME COURT BUT HAD HAD NO INDICATIONS YET OF THE TIMING OF A DECISION. KIRBY SAID THAT MR TRUDEAU STILL HAD IN MIND A VISIT TO LONDON AFTER A SUPREME COURT DECISION AND IN CONNECTION WITH A VISIT TO PARIS.

CONFIDENTIAL

/4.

CONFIDENTIAL

4. KIRBY ENQUIRED ABOUT HMG'S RESPONSE TO THE FAC REPORT. I SAID THAT I HAD NOTHING RECENT BUT BELIEVED THAT IT STILL HAD NOT BEEN CLEARED WITH MINISTERS. I SHOULD LIKE TO BE ABLE TO INFORM KIRBY AS EARLY AS POSSIBLE OF A DECISION ON THE TIMING OF HMG'S RESPONSE AND I WOULD SEE CONSIDERABLE ADVANTAGE IN BEING ALLOWED TO SHOW THEM DISCREETLY A COPY OF THE RESPONSE BEFORE IT BECOMES PUBLIC.

5. MINISTERIAL VISITS TO THE UK HAVE BEEN RECENTLY VERY CAREFULLY ORCHESTRATED (EG MR WHELAN WAS PERSUADED TO DELAY HIS VISIT) IN ORDER NOT TO HAVE UNQUALIFIED MINISTERS SPEAKING IN THE UK ABOUT THE CONSTITUTION. KIRBY WAS UNAWARE OF MR GRAY'S VISIT IN JUNE AND HAS GONE AWAY WITH THE THOUGHT THAT HE MIGHT WELL ARRANGE FOR IT TO BE POSTPONED. IF IT IS NOT, MAY I ASSUME THAT LORD MORAN WILL BE INVOLVED AND HAVE A CHANCE TO MEET MR GRAY?

DAVIES

THIS TELEGRAM
WAS NOT
ADVANCED

CANADIAN CONSTITUTION LIMITED

NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

LORD MORAN C/O HDS OF MISSION POD
PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

2

CONFIDENTIAL

OO OTTAWA
GRS 584
CONFIDENTIAL
FROM FCO 151400Z MAY 1981
TO IMMEDIATE OTTAWA
TELEGRAM NUMBER 144 OF 15 MAY

CALL ON MR PYM BY MR COLINETTE

1. COLINETTE (PARLIAMENTARY SECRETARY OF THE SPEAKER OF THE CANADIAN HOUSE OF COMMONS) ACCOMPANIED BY HAGGAN (CANADIAN HIGH COMMISSION) CALLED THIS MORNING ON MR PYM AFTER SPENDING HALF A HOUR WITH OFFICIALS. HE BORE A MESSAGE FROM MR TRUDEAU TO THE EFFECT THAT HE WAS ''ADAMANT'' THAT THE UK PARLIAMENT SHOULD PASS THE CANADIANS MEASURES THROUGH BY 1 JULY. THIS WAS ASSUMING A FAVOURABLE SUPREME COURT RULING AND ONE WHICH DID NOT SUGGEST A DIMINUTION OF THE PRESENT CONSTITUTIONAL PACKAGE. IN THE LATTER CIRCUMSTANCES, COLINETTE SAID THE CANADIAN PARLIAMENT WOULD NEED TO DEBATE THE WHOLE QUESTION AFRESH AND THERE WOULD BE NO QUESTION OF CANADIAN PROPOSALS REACHING US IN THE NEAR OR EVEN PREDICTABLE FUTURE.
2. COLINETTE SAID THAT HE HAD BEEN ASKED TO CONVEY THIS MESSAGE (WHICH HAD BEEN REINFORCED FROM OTTAWA LAST NIGHT) DESPITE APPRECIATION IN CANADA OF DIFFICULTIES AT THIS END. THEY REALISED THAT IT HAD TAKEN TIME TO COMPLETE PROCESSES IN CANADA: THEY STILL HOPED TO GET THE RESOLUTION TO US SWIFTLY AFTER THE SUPREME COURT VERDICT WHICH WAS EXPECTED AT THE END OF MAY OR IN VERY EARLY JUNE. HE REEMPHASISED FEDERAL WORRIES ABOUT THE POLITICAL SITUATION IN CANADA IF THERE WAS DELAY IN THE UK PARLIAMENT. UNTIL OUR PARLIAMENT HAD ENACTED THE LEGISLATION, THE GOVERNMENT WOULD BE TREADING WATER IN CANADA AND THE HEALING PROCESS WITH THE PROVINCES COULD NOT BEGIN.
3. MR PYM SAID IT LOOKED AS THOUGH THE RIGHT MESSAGE ABOUT THE BRITISH PARLIAMENTARY SITUATION WAS NOT GETTING ACROSS TO THE CANADIANS. HE REMINDED COLINETTE OF HIS PREDECESSOR'S INDICATION THAT IF THE PROPOSALS DID NOT REACH US IN JANUARY THEY WOULD NOT GET THROUGH IN THE CURRENT SESSION. HE FULLY

UNDERSTOOD THE CANADIAN POSITION (BETTER THAN IT SEEMED THEY UNDERSTOOD OURS): BUT IT WAS THE CASE THAT THEIR REQUEST WAS TAKING UNCONSCIONABLY LONGER TO REACH US THAN ORIGINALLY PREDICTED. THE HOUSE OF COMMONS HAD NEVER BEEN A RUBBER STAMP AND HE EXPECTED DIFFICULTY WHATEVER THE SUPREME COURT SAID, THOUGH MUCH WOULD DEPEND ON THE NATURE OF ITS VERDICT AND THE DEGREE OF UNANIMITY.

4. AGAINST THIS BACKGROUND MR PYM MADE IT CLEAR THAT HE THOUGHT THE MESSAGE FROM MR TRUDEAU WAS UNREALISTIC. BARRING A MIRACLE HE DID NOT EXPECT THE LEGISLATION TO GO THROUGH BY 1 JULY. IT WAS MORE CONCEIVABLE THAT THE LEGISLATION COULD GO THROUGH BEFORE THE SUMMER RECESS (IE END JULY) AND HE ACCEPTED THAT THE MOOD IN PARLIAMENT MIGHT HAVE IMPROVED AS A RESULT OF THE POSITION OVER THE SUPREME COURT. BUT THERE WAS STILL A CHANCE OF FAILURE - SOMETHING HE HAD POINTED OUT FREQUENTLY INCLUDING TO MR CHRETIEN. JUST AS MR TRUDEAU HAD BEEN UNABLE TO GET HIS PROPOSALS THROUGH ON THE TIMESCALE HE WANTED IN CANADA, SO IT WAS LIKELY TO BE DIFFICULT FOR US. HE EMPHASISED HOWEVER THAT HMG WOULD OF COURSE EXERCISE THEIR BEST ENDEAVOURS, IN LINE WITH THE PRIME MINISTER'S STATEMENTS THAT THE MATTER WOULD BE DEALT WITH AS EXPEDITIOUSLY AS POSSIBLE.

5. COLINETTE UNDERTOOK TO PASS THIS MESSAGE CAREFULLY TO MR TRUDEAU. MY OWN GUESS IS IT MAY GET GARBLED ON THE WAY BECAUSE OF FEARS OF MR TRUDEAU'S REACTIONS TO MR PYM'S EXPOSITION OF THE REALITIES OF THE SITUATION HERE. I THEREFORE SUGGEST THAT YOU TAKE SUITABLE OPPORTUNITIES TO UNDERLINE MR PYM'S POINTS TO YOUR SENIOR AND RELIABLE CONTACTS. YOU SHOULD HOWEVER BE VERY CAREFUL TO AVOID SPEAKING TO ANYONE WHO MIGHT LEAK THIS MORNING'S CONVERSATION. MR PYM STRONGLY EMPHASISED THE NEED FOR TOTAL SECURITY.

CARRINGTON

CANADIAN CONSTITUTION LIMITED

NAD

CCD

P & CD

PCCU

PARLIAMENTARY UNIT

NEWS D

INFORMATION D

PS

PS/LPS

PS/MR RIDLEY

PS/MR BLAKER

PS/MR HURD

PS/PUS

SIR E YOUDE

MR DAY

MR URE

LORD N G LENNOX

CABINET OFFICE

COPIES TO:

SIR I SINCLAIR

MR FREELAND

DR PARRY

} LEGAL ADVS.

LORD MORAN C/O HDS OF MISSION POD

PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

Canada

Phil

1. MR. ALEXANDER
2. FILE

Trudeau Visit

I spoke to Roderic Lyne on the telephone this morning and offered him Thursday 25 June for dinner preceded by talks or Friday 26 June for lunch preceded by talks.

ed.

15 May 1981

FILE

VLB

15 May 1981

I enclose a copy of a letter which the Prime Minister has received from the Canadian High Commission. I imagine that you already have a copy of the proposed Resolution. No doubt you will let me have a note in due course of any points in it which should be brought to the Prime Minister's attention.

MICHAEL ALEXANDER

R. M. J. Lyne, Esq.,
Foreign and Commonwealth Office.

R

FILE

VLS



10 DOWNING STREET

From the Private Secretary

15 May 1981

I am writing on the Prime Minister's behalf to thank you for your letter of 11 May enclosing a proposed Resolution of the Senate and House of Commons of Canada for a Joint Address to Her Majesty The Queen respecting the Constitution of Canada. I have brought the Resolution to the Prime Minister's attention.

M. O'D. B. ALEXANDER

Her Excellency Mrs. Jean Casselman Wadds

CONFIDENTIAL

HS

14 May 1981

Possible meeting between the Prime Minister and
Mr. Trudeau

The Prime Minister has seen your letter to me of 11 May on this subject. She agrees that we should try to arrange a meeting between her and Mr. Trudeau in late June or early July. The date should in any case be after the Supreme Court verdict. I should be grateful if you could pursue the question of precise dates with Caroline Stephens.

MICHAEL ALEXANDER

R.M.J. Lyne, Esq.,
Foreign and Commonwealth Office.

CONFIDENTIAL

R14

Canadian High Commission



Haut Commissariat du Canada

May 11, 1981

The Rt Hon Margaret Thatcher MP
Prime Minister
House of Commons
London SW1A 0AA

My Dear Prime Minister

I am pleased to send you herewith a copy of the proposed Resolution of the Senate and House of Commons of Canada for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada.

This proposed Resolution has not yet been adopted by the Senate and House of Commons of Canada, but it cannot be further amended. Under the terms of an Order adopted unanimously by all parties in the House of Commons on April 8, 1981, all amendments to the Resolution moved in the House of Commons were disposed of on April 23. Under the terms of an Order adopted by the Senate on April 15, all amendments to the Resolution moved in the Senate were disposed of on April 24.

Following reference cases before the Manitoba Court of Appeal, the Newfoundland Court of Appeal and the Quebec Court of Appeal, the opinions of those Courts on questions related to the constitutionality of the proposed Resolution were appealed to the Supreme Court of Canada. The Canadian Supreme Court has concluded its hearings and is now deliberating.

After the Supreme Court of Canada has rendered its decision, provision is made in the Orders of both Houses of the Parliament of Canada for two further days of debate on the Resolution. However, during this debate, no further amendments are permitted. At the end of the second day in each House, a vote on the proposed resolution will be taken. The enclosed copy of the proposed Resolution is, therefore, in its final form. I thought that it would be useful for you to have, at this time, a copy of the Resolution, as amended, so that you might have ample opportunity to study it prior to any Joint Address being forwarded to Her Majesty the Queen.

Should you desire any information respecting the Resolution or the judicial process in Canada, officers of the Canadian High Commission would be pleased to be of assistance to you.

Yours sincerely,

Jean Casselman Wadds
Jean Casselman Wadds
High Commissioner



Prime Minister.

Foreign and Commonwealth Office

London SW1A 2AH

Shall we look for dates in
late June or early July? (it may
well prove impossible to find any)

11 May 1981

Yes - date
depending on
S.C. judgement.

Dear Michael,

And, 12/5

Possible Meeting Between the Prime Minister and Mr Trudeau

Thank you for your letter of 10 May. We put your suggestion of a meeting and dinner for Mr Trudeau on 20 May to the Canadians through our High Commission.

We now have a response from our own High Commission and from the Canadian High Commissioner in London. Mr Trudeau has indicated that for domestic political reasons he would much prefer his meeting with the Prime Minister to take place after the Supreme Court has produced its verdict on the Constitutional issues. An earlier meeting might suggest to Canadian opinion that Mr Trudeau wanted to by-pass the Supreme Court deliberations and come to some arrangement direct with Mrs Thatcher. This might in turn lead the Supreme Court to delay producing its verdict. Mr Trudeau would therefore prefer to think in terms of a June meeting.

A meeting in June/July might of course create complications here if Mr Trudeau were to appear in the UK during the parliamentary debate on the Canadian constitutional proposals. Another point on timing is that it would clearly be better (in order to demonstrate that this is not a meeting geared to the constitutional issue) for Mr Trudeau to combine a visit to the UK with another Summit-connected visit, e.g. to Mr Mitterrand.

These are not overriding considerations and Lord Carrington therefore believes that we should contemplate a meeting in June or the first week in July. If the Prime Minister agrees, you might wish to suggest alternative dates which we could offer to the Canadians.

yours ever

Roderic Lyne

(R M J Lyne)
Private Secretary

M O D' B Alexander Esq
10 Downing Street
LONDON
SW1

file

✓ Sme Goodchild

1) BY X
2) BF X

7 May 1981

As agreed on the telephone this morning the Prime Minister will host a working dinner for Prime Minister Trudeau on Wednesday 20 May. Tête à tête talks will start at 1830 hours and the dinner will be 1930 for 2000 hours - informal.

Could you please submit a guest list of say, 10, including the special note-taker whom we discussed together.

We will require a full brief to reach this office by close of play on Friday 15 May.

CAROLINE STEPHENS

Roderic Lyne, Esq.,
Foreign and Commonwealth Office

62

GRS 750
CONFIDENTIAL

CONFIDENTIAL

FROM ROME 050900Z MAY 81
TO PRIORITY FCO
TELNO 154 OF 5 MAY 81
INFO PRIORITY OTTAWA

SECRETARY OF STATE'S MEETING WITH CANADIAN FOREIGN MINISTER

FOLLOWING FROM PRIVATE SECRETARY

MR MCGUIGAN CALLED ON THE SECRETARY OF STATE FOR HALF AN HOUR
YESTERDAY EVENING.

1. HE THANKED LORD CARRINGTON FOR BRITAIN'S COOPERATION OVER THE CONSTITUTIONAL QUESTION. HE HAD NO COMPLAINTS AND WAS GRATEFUL FOR OUR FORBEARANCE. HE WAS VERY CONFIDENT ABOUT THE DECISION OF THE SUPREME COURT. LORD CARRINGTON WONDERED WHETHER THERE WAS ANY CHANCE OF THE CANADIANS AGREEING AN AMENDING FORMULA, WHICH WOULD GET US OFF THE HOOK. MCGUIGAN SAID THE CABINET HAD NOT DISCUSSED THIS, AND THE PRESENT INTENTION WAS TO SEND THE ORIGINAL REQUEST TO LONDON. IT WAS POSSIBLE, BUT NOT LIKELY, HOWEVER THAT THE COURT MIGHT SAY THAT ONE PART OF THE REQUEST WAS ACCEPTABLE, BUT NOT ANOTHER, IN WHICH CASE ONLY THE ACCEPTABLE PART WOULD BE SENT.
2. LORD CARRINGTON SAID THAT WE FACED TWO DIFFICULTIES: THERE WOULD BE LESS PARLIAMENTARY CRITICISM IF THE SUPREME COURT BACKED THE CANADIAN GOVERNMENT, BUT STILL SOME DIFFICULTY WITH BACK - BENCHERS: AND THERE WOULD STILL BE A PROBLEM OF PARLIAMENTARY TIME. MCGUIGAN CLAIMED THAT THE PRIME MINISTER HAD GIVEN A GENERAL ASSURANCE OVER THE LATTER, AND THAT MR PYM HAD SAID DURING HIS VISIT TO OTTAWA IN DECEMBER LAST YEAR THAT IT WAS A QUESTION OF WILL, AND THAT WITHIN REASON DATES WERE LESS IMPORTANT. LORD CARRINGTON SAID THAT THIS WAS NOT QUITE WHAT MR PYM HAD RECENTLY TOLD HIM.
3. MCGUIGAN EXPLAINED THAT THE NEW VERMONT COURT DECISION HAD PERSUADED THE FEDERAL GOVERNMENT TO CHANGE ITS POSITION ON REFERENCE TO THE SUPREME COURT. THEY STILL THOUGHT THAT THE MATTER WAS ESSENTIALLY A POLITICAL QUESTION. BUT SOME PEOPLE IN THE CABINET HAD ALWAYS THOUGHT THAT A REFERENCE TO THE SUPREME COURT WOULD EASE THE REAL DIFFICULTIES WHICH FACED THE BRITISH, AND THE GOVERNMENT ALSO WANTED COMPLETE LEGITIMACY. THEIR LAWYERS HAD ALWAYS PREDICTED OTHER PROVINCIAL HEARINGS CORRECTLY, AND HE THOUGHT THE SUPREME COURT'S DECISION WAS PRETTY WELL IN THE BAG.

CONFIDENTIAL

/WITHIN

CONFIDENTIAL

WITHIN DAYS AFTER THE COURT DECISION THE REQUEST WOULD BE IN LONDON . THE CANADIAN OPPOSITION WOULD NOT SUPPORT IT (THOUGH SOME OF THEM MIGHT LIKE TO). HE HOPED THAT OPPONENTS IN THE BRITISH PARLIAMENT WOULD BE "SUMMARILY DEALT WITH". WE HAD THE MEANS TO CURTAIL DEBATE. LORD CARRINGTON SAID THAT THE CANADIANS SHOULD NOT UNDER-ESTIMATE THE RESOURCEFULNESS OF CRITICS OF THE BILL IN THE UK PARLIAMENT.

4. MCGUIGAN HOPED THAT WE WOULD ISSUE OUR REPLY TO THE FAC REPORT SOON. THIS WOULD HELP TO TAKE THE STEAM OUT OF THE DEBATE. LORD CARRINGTON SAID THAT WE HAD A GOOD DRAFT, BUT WERE AFRAID IT MIGHT AGGRAVATE THE SITUATION TO ISSUE IT BEFORE THE DECISION OF THE SUPREME COURT. MCGUIGAN SAID THAT, IN THAT CASE, HE HOPED WE WOULD ISSUE THE REPLY AS SOON AS POSSIBLE AFTER THE COURT'S DECISION, WITHOUT WAITING FOR THE REFERENCE TO LONDON.

5. THREE MAIN REASONS DICTATED CANADIAN VIEWS ON TIMING: THE FIRST WAS THAT 1 JULY WAS THE 50TH ANNIVERSARY OF THE STATUTE OF WESTMINSTER, THE SECOND WAS THE DECISION TO CHANGE 1 JULY FROM "DOMINIONS DAY" TO "CANADA DAY" (THIS WOULD HAPPEN IN ANY EVENT), AND THE THIRD WAS THE QUEEN'S WISH TO VISIT CANADA AT THAT TIME. THIS VISIT WOULD DEMONSTRATE IN CANADA THAT THE PATRIATION OF THE CONSTITUTION WAS NOT MEANT TO WEAKEN BUT TO STRENGTHEN THE QUEEN'S POSITION.

6. LORD CARRINGTON SAID THAT WE WOULD DO OUR BEST ON TIMING, BUT WARNED AGAIN AGAINST UNDERESTIMATING THE DELAYING TACTICS OF BACK BENCHERS. THEY MIGHT ALSO BE A PROBLEM IN THE LORDS, WHERE THERE WAS NO GUILLOTINE, AND WHERE THE LONG TITLE ONLY WAS LEFT UNTIL THE END OF COMMITTEE PROCEEDINGS. MCGUIGAN SAID THAT THE FIRST CANADIAN FALL-BACK DATE WAS 17 JULY (IE JUST BEFORE THE OTTAWA SUMMIT), AND THE SECOND 28 JULY (JUST BEFORE ADJOURNMENT).

7. HE WONDERED WHETHER IT WOULD BE HELPFUL IF MR TRUDEAU WERE TO HAVE ANOTHER WORD WITH THE PRIME MINISTER. LORD CARRINGTON AGREED HAT THIS MIGHT BE USEFUL, BUT ONLY AFTER THE SUPREME COURT'S DECISION. MCGUIGAN RAISED THE POSSIBILITY THAT TRUDEAU MIGHT

CONFIDENTIAL

VISIT LONDON DURING HIS EUROPEAN TOUR IN MAY. LORD CARRINGTON MENTIONED THE PROBLEMS OF THE PRIME MINISTER'S TIMETABLE, AND OF THE TIMING OF THE SUPREME COURT'S DECISION. MCGUIGAN SAID THAT MR PYM HAD SUGGESTED THAT HE MIGHT SPEAK INFORMALLY TO MPS IN LONDON. LORD CARRINGTON THOUGHT THAT THIS MIGHT HAVE ARISEN IN A DIFFERENT CONTEXT, BUT UNDERTOOK TO ASK MR PYM'S ADVICE ON HIS RETURN. HE WOULD SEND THE HIGH COMMISSIONER A TELEGRAM ABOUT THE PRIME MINISTER'S TIMETABLE, A POSSIBLE VISIT TO LONDON BY MCGUIGAN, AND ON ANY OTHER MEASURES WHICH MIGHT HELP TO EASE THE PASSAGE OF THE BILL.

8. SEE MIFT.

ARCULUS

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

LORD MORAN C/O HDS OF MISSION POD
PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

3

CONFIDENTIAL

RESTRICTED

FM OTTAWA 271630Z APR 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 195 OF 27 APRIL

See over

MS

CONSTITUTION

1. THE CONSTITUTIONAL DEBATE RESUMED ON 21 APRIL, AMENDMENTS WERE TABLED BY ALL THREE PARTIES BY THE END OF THAT DAY (MY TELNO 186) AND VOTES WERE TAKEN ON THE AMENDMENTS IN THE HOUSE ON 23 APRIL AND IN THE SENATE ON 24 APRIL. THE CONSTITUTIONAL RESOLUTION IS NOW IN ITS FINAL FORM (A FACT ONLY RECORDED ON P.12 OF THE NATIONAL EDITION OF THE TORONTO GLOBE AND MAIL ON 25 APRIL). THE SUPREME COURT HEARINGS WILL COMMENCE ON 28 APRIL. IF IT DECIDES IN FAVOUR OF THE FEDERAL GOVERNMENT, THERE WILL BE TWO MORE DAYS OF DEBATE BEFORE A FINAL VOTE. IF IT DECIDES AGAINST, THE FEDERAL GOVERNMENT WILL WITHDRAW THE RESOLUTION (AS MR TRUDEAU CONFIRMED AT A PRESS CONFERENCE ON 24 APRIL) EVEN IF THE SUPREME COURT DECISION IS NO CLEARER THAT 5 TO 4 AGAINST.

2. THERE WERE NO SURPRISES IN THE DEBATE OR THE VOTES LAST WEEK. THE MAIN SPEAKERS WERE MESSRS. EPP AND CLARK FOR THE PROGRESSIVE CONSERVATIVES, MR BROADBENT FOR THE NEW DEMOCRATIC PARTY AND MESSRS. CHRETIEN AND MACHEACHEN FOR THE LIBERALS (THE LATTER BY THE VERY FACT OF PARTICIPATING AND BY WHAT HE HAD TO SAY SOUGHT TO UNDERLINE THAT THE RESOLUTION WAS NOT, AS ARGUED BY THE OPPOSITION, A PERSONAL AND IDIOSYNCRATIC PROJECT OF MR TRUDEAU).

3. IN THE HOUSE, MR EPP'S ORIGINAL AMENDMENT DELETING THE PROVISION FOR FUTURE AMENDMENTS BY REFERENDUM WAS DEFEATED BY 98 (INCLUDING 5 NDP) TO 170. THE NDP AMENDMENT ON WOMEN'S AND ABORIGINAL RIGHTS WAS AGREED BY 265 TO NIL. THE PC PACKAGE AMENDMENT WAS DEFEATED BY 93 TO 175 AND THE LIBERAL'S PACKAGE AGREED TO BY 173 TO 94 (INCLUDING THE NDP). IN THE SENATE, AN UNSUCCESSFUL ATTEMPT WAS MADE BY A PC SENATOR TO INSIST ON VOTING ON PARTS OF THE PACKAGE AMENDMENTS. THE LIBERAL AND NDP AMENDMENT WERE COMBINED AND ACCEPTED BY 46 TO 0 (21 PC, 8 LIBERALS AND 1 INDEPENDENT ABSTAINED). A FURTHER PC AMENDMENT, PROPOSING A CALL FOR OFFICIAL BILINGUALISM IN ONTARIO AND MAKING THE NEW CONSTITUTION CONDITIONAL ON APPROVAL BY SEVEN PROVINCES REPRESENTING 50% OF THE NATIONAL POPULATION WAS DEFEATED 44 TO 21 (SEVEN LIBERALS ABSTAINED AND ONE VOTED WITH THE PC).

4. IT WAS REVEALED AT THE END OF LAST WEEK THAT MR TRUDEAU HAD MADE ANOTHER EFFORT TO PERSUADE PREMIER DAVIS OF ONTARIO TO AGREE TO ENTRENCH LANGUAGE RIGHTS IN ONTARIO, WHICH HAS 600,000 FRANCOPHONES, AND JOIN QUEBEC, MANITOBA AND NEW BRUNSWICK AS OFFICIALLY BILINGUAL PROVINCES. DAVIS STATED PUBLICLY THAT EVEN WITH A HEALTHY MAJORITY IN THE LEGISLATURE HE WAS NOT PREPARED TO AGREE.

RESTRICTED

MR CLARK, SPEAKING DURING A FEDERAL BYE-ELECTION CAMPAIGN IN QUEBEC (THE VOTE IS DUE ON 4 MAY) SAID HE WAS READY TO RECOMMEND TO MR DAVIS TO MOVE IN THE DIRECTION OF OFFICIAL BILINGUALISM.

5. IN HIS PRESS CONFERENCE ON 24 APRIL, MR TRUDEAU ALSO CONFIRMED THAT HE WOULD NOT ALLOW A FREE FINAL VOTE, SINCE THE RESOLUTION WAS A GOVERNMENT MEASURE. IN RESPONSE TO A QUESTION ABOUT RECONCILIATION WITH THE PROVINCES, MR TRUDEAU SAID, IN PART, QUOTE ONCE WE HAVE OUR OWN CONSTITUTION, IT WILL BE IMPORTANT TO ADDRESS THE PROBLEMS OF ALIENATION INSOFAR AS THEY CAN BE SETTLED BY QUESTIONS LIKE PROPORTIONAL REPRESENTATION OR BY REFORM OF THE SENATE.... IT IS BETTER TO GOVERN WITH A CONSENSUS OF THE PREMIERS AND THE PRIME MINISTER THAT WITHOUT ONE UNQUOTE. BUT HE PROMISED TO REOPEN THE BATTLE WITH ONTARIO OVER LANGUAGE RIGHTS. QUOTE IF WE SHOULD LOSE IN THE COURTS AND IN BRITAIN, YOU KNOW, I WON'T CLAIM THAT I HAVE BEEN POISONED. I'LL JUST SAY MY POLITICAL JUDGEMENT WAS BAD, OR MY LEGAL JUDGEMENT WAS BAD, AND THEN WE'LL GO ON TO TRY AND SOLVE PROBLEMS AS BEFORE. UNQUOTE.

6. MR TRUDEAU'S CURIOUS AND UNCHARACTERISTIC ACKNOWLEDGEMENT THAT THINGS MIGHT GO WRONG AT WESTMINSTER HAS NOT BEEN PICKED UP BY THE MEDIA HERE (NOR OF COURSE IN THE HOUSE WHICH IS IN RECESS UNTIL 12 MAY). IT IS NOT IMMEDIATELY CLEAR WHY MR TRUDEAU SHOULD AT THIS LATE STAGE RAISE PUBLICLY THE POSSIBILITY OF FAILURE AND THEREBY ENCOURAGE THE PROVINCIAL GOVERNMENTS TO TAKE ACTION IN THE UK.

FORD

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

LORD MORAN C/O HDS OF MISSION POD
PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

2

RESTRICTED

Canada

GRS 185

UNCLASSIFIED

FM OTTAWA 082208Z APR 81

TO IMMEDIATE FCO

TELEGRAM NUMBER 169 OF 8 APRIL

CONSTITUTION

1. AFTER LENGTHY AND OBVIOUSLY DIFFICULT NEGOTIATIONS BETWEEN THE HOUSE LEADERS, AGREEMENT WAS REACHED EARLY THIS AFTERNOON ON THE CONDUCT OF THE DEBATE ON THE GOVERNMENT'S CONSTITUTIONAL PROPOSALS. IT IS IN BRIEF THAT THERE WILL BE DEBATE ON 21, 22 AND 23 APRIL DURING WHICH MEMBERS WILL BE LIMITED TO 30 MINUTES EACH. BY CLOSE OF PLAY ON 21 APRIL, EACH PARTY WILL HAVE BEEN ALLOWED TO TABLE ONE AMENDMENT (WHICH MAY AFFECT MORE THAN ONE PROVISION OF THE DRAFT RESOLUTION). ALL THE AMENDMENTS WILL BE VOTED ON AT 9.45PM ON 23 APRIL.

2. FOLLOWING THE SUPREME COURT RULING, THERE WILL BE TWO DAYS OF DEBATE DURING WHICH MEMBERS WILL BE RESTRICTED TO 20 MINUTES AND NO FURTHER AMENDMENTS WILL BE ACCEPTED.

3. THERE IS NO MENTION IN THE AGREEMENT NOR IS THERE ANY FURTHER NEWS OF A MEETING BETWEEN THE PRIME MINISTER AND THE PROVINCIAL PREMIERS, BUT THE TIMING OF THE DEBATE IN THE HOUSE WOULD ALLOW A MEETING TO TAKE PLACE BEFORE THE DEBATE RESUMES. PROVINCIAL PREMIERS HAVE MADE IT CLEAR THAT THEY WOULD NOT INVITE THE PRIME MINISTER TO THEIR MEETING ON 16 APRIL AT WHICH THEY HOPE TO PUT THE FINAL TOUCHES TO THEIR AGREEMENT.

FORD

CANADIAN CONSTITUTION LIMITED

NAD

CCD

P & CD

PCCU

PARLIAMENTARY UNIT

NEWS D

INFORMATION D

PS

PS/LPS

PS/MR RIDLEY

PS/MR BLAKER

PS/MR HURD

PS/PUS

SIR E YOUDE

MR DAY

MR URE

LORD N G LENNOX

CABINET OFFICE

COPIES TO:

SIR I SINCLAIR

MR FREELAND

DR PARRY

} LEGAL ADVS.

LORD MORAN C/O HDS OF MISSION POD

PS/CHANCELLOR OF THE DUCHY OF LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

GRS 220

UNCLASSIFIED

FM OTTAWA 072232Z APR 81

TO IMMEDIATE FCO

TELEGRAM NUMBER 167 OF 7 APRIL

CONSTITUTION

1. DURING QUESTION PERIOD TODAY, MR CLARK PRESSED MR TRUDEAU TO EXPLAIN WHY HE WAS REFUSING POINT BLANK TO MEET THE PROVINCES TO DISCUSS THEIR CONSTITUTIONAL PROPOSALS. MR TRUDEAU REPLIED ON FAMILIAR LINES, ARGUING, WITH QUOTATIONS FROM MR LYON OF MANITOBA THAT IT WAS CLEAR THAT THE EIGHT PROVINCES HAD NOT IN FACT REACHED AGREEMENT. BUT WHEN PRESSED ABOUT WHY HE WAS NOT PREPARED TO WAIT UNTIL 16 APRIL BEFORE PUSHING AHEAD WITH HIS CONSTITUTIONAL RESOLUTION, HE SUGGESTED THAT THIS MIGHT BE POSSIBLE IF IT WAS AGREED BY THE OPPOSITION THAT THEREAFTER THE RESOLUTION COULD BE DEALT WITH IN PARLIAMENT IN A DAY OR SO.

2. IMMEDIATELY AFTER QUESTION PERIOD, MR CLARK SOUGHT CLARIFICATION OF MR TRUDEAU'S NEW SUGGESTION. MR TRUDEAU SAID THAT THERE WERE NOW THREE SUGGESTIONS FOR CONSIDERATION, MR CLARK'S, MR BROADBENT'S COMPROMISE AND HIS OWN NEW ONE. AFTER SOME DEBATE IT WAS AGREED THAT THE HOUSE SHOULD ADJOURN FOR 1 HOUR TO ALLOW THE HOUSE LEADERS TO DISCUSS AGAIN THE VARIOUS POSSIBILITIES. HOWEVER THIS PROVED INSUFFICIENT, AND A FURTHER MEETING OF HOUSE LEADERS WAS ARRANGED FOR TONIGHT. MEANWHILE THE HOUSE AGREED TO DEAL WITH A BILL ON THE POST OFFICE.

3. DURING QUESTION PERIOD MR TRUDEAU AVOIDED ANSWERING MR BROADBENT'S ENQUIRY AS TO WHETHER HE WAS COMMITTED NOT TO SEND THE RESOLUTION TO WESTMINSTER UNTIL THE SUPREME COURT HAD DELIVERED JUDGEMENT.

FORD

CANADIAN CONSTITUTION LIMITED

NAD

CCD

P & CD

PCCU

PARLIAMENTARY UNIT

NEWS D

INFORMATION D

PS

PS/LPS

PS/MR RIDLEY

PS/MR BLAKER

PS/MR HURD

PS/PUS

SIR E YOUDE

MR DAY

MR URE

LORD N G LENNOX

CABINET OFFICE

COPIES TO:

SIR I SINCLAIR

MR FREELAND

DR PARRY

LEGAL ADVS.

LORD MORAN C/O HDS OF MISSION POD

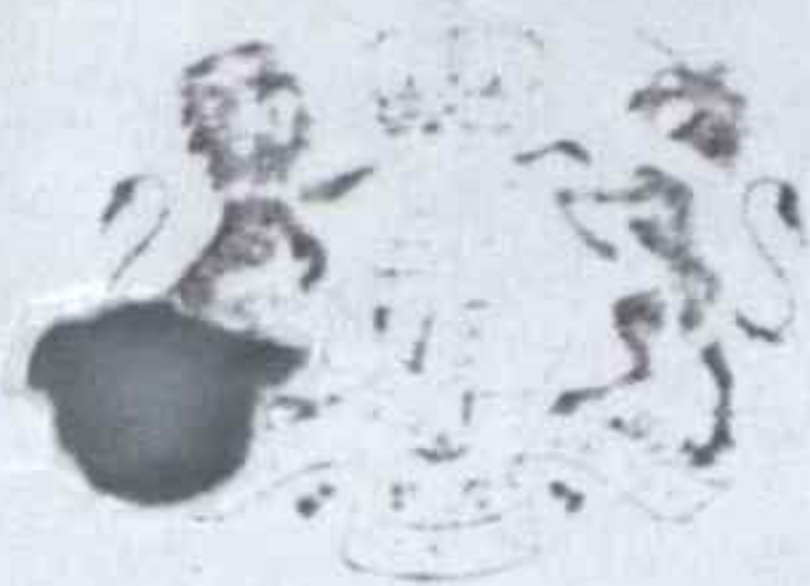
PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

Canada

Chancellor of the Duchy of Lancaster

PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

7th April 1981

*Dear Adam,**NBPA**Shaw 7/4*CANADA

Although the shift in attitude by the Federal Government has produced a new situation, Ministers will need, at an appropriate stage, to return to the question of when the Government's reply to the Foreign Affairs Committee's Report should be published.

I imagine that we cannot take this much further until the position in Ottawa is clear. At present, the Chancellor of the Duchy has told the House that publication would probably be at about the same time that the proceedings in Ottawa were concluded and, as you know, he subsequently explained the reasons for this privately to Sir Anthony Kershaw. If, in the new situation, the balance of argument is in favour of further delaying the reply, it will be necessary to consider carefully how to handle this.

The Chancellor of the Duchy would therefore be most grateful if he could be kept in close touch with developments.

✓ I am copying this letter to Nick Sanders (No 10), Henry Steel (Attorney General's Office), Wilfred Hyde (Cabinet Office), Murdo Maclean and David Wright.

*You are
fwd.*

D C R HEYHOE

Adam Wood Esq
Private Secretary to
The Lord Privy Seal
Foreign and Commonwealth Office
LONDON SW1

CONFIDENTIAL

GRS 370

CONFIDENTIAL

FM OTTAWA 062119Z APR 81

TO IMMEDIATE FCO

TELEGRAM NUMBER 166 OF 6 APRIL

CONSTITUTION

1. IN THE ABSENCE SO FAR OF ANY AGREEMENT BETWEEN HOUSE LEADERS ON A COMPROMISE FOR CONTINUING THE DEBATE ON THE GOVERNMENT'S CONSTITUTIONAL PROPOSALS, IT IS PROBABLE THAT THE PROGRESSIVE CONSERVATIVES' FILIBUSTER WILL RESUME TOMORROW.

2. AT QUESTION PERIOD TODAY, MR CLARK ASKED MR TRUDEAU WHETHER HE WOULD MEET WITH THE PROVINCIAL PREMIERS AGAIN BEFORE THE CONCLUSION OF THE PARLIAMENTARY DEBATE TO DISCUSS WITH THEM THE REVISED AMENDING FORMULA AND OTHER CONSTITUTIONAL PROPOSALS WHICH, IT WAS ANNOUNCED OVER THE WEEKEND, THEY WOULD HAVE READY FOR A MEETING IN OTTAWA ON 16 APRIL. WHEN PRESSED MR TRUDEAU SAID QUITE SPECIFICALLY THAT HE WAS NOT PREPARED TO MEET THE PREMIERS BEFORE THE RESOLUTION HAD EMERGED FROM PARLIAMENT. HIS GROUNDS WERE THAT FIRST HE DID NOT BELIEVE THAT THE PREMIERS HAD REACHED AGREEMENT AMONGST THEMSELVES AND SECONDLY THAT THERE WAS PROVISION IN THE RESOLUTION FOR THE IMMEDIATE DISCUSSION WITH THE PROVINCES OF AMENDING FORMULAE AND OTHER CONSTITUTIONAL MATTERS.

3. OVER THE WEEKEND BOTH MR TRUDEAU AND MR CHRETIEN HAD BEEN VERY DISMISSIVE OF THE PROVINCIAL PREMIERS' ALLEGED AGREEMENT AND THEIR INVITATION TO MR TRUDEAU TO MEET THEM ON 16 APRIL. THE PREMIERS HAVE DECLINED SO FAR TO REVEAL THE DETAILS OF THEIR AGREEMENT (APPARENTLY AT MR LEVESQUE'S INSISTENCE) AND MR TRUDEAU HAS BEEN QUICK TO ADDUCE THIS AS EVIDENCE THAT THERE IS, IN FACT, NO AGREEMENT. MR RYAN IN QUEBEC HAS SAID THAT IN ANY CASE, SHOULD HE WIN THE PROVINCIAL ELECTION ON 13 APRIL, HE WOULD NOT BE READY BY 16 APRIL TO MEET WITH OTHER PREMIERS TO DISCUSS CONSTITUTIONAL PROPOSALS WHICH HE HAS SO FAR HAD NO HAND IN FORMULATING.

4. MR TRUDEAU'S TV INTERVIEW ON SUNDAY EVENING WAS IN THE EVENT LITTLE MORE THAN A BRIEF INTRODUCTION TO A RE-BROADCAST OF THE ENGLISH LANGUAGE PORTIONS OF HIS SPEECH IN THE HOUSE ON 23 MARCH.

CONFIDENTIAL

/s.

CONFIDENTIAL

5. WE HAVE BEEN TOLD IN CONFIDENCE THAT THE FEDERAL GOVERNMENT WILL APPEAL THE NEWFOUNDLAND DECISION AND WILL ATTEMPT TO PERSUADE THE SUPREME COURT TO HEAR THIS AND THE MANITOBA APPEAL TOGETHER ON 28 APRIL - OR AS SOON THEREAFTER AS POSSIBLE. THE FEDERAL GOVERNMENT CONFIDENTLY EXPECT THE QUEBEC PROVINCIAL COURT RULING BY THE END OF NEXT WEEK, BEFORE EASTER. OUR SOURCES DISCOUNT THE INFORMATION WE HAVE HAD FROM QUEBEC THAT THE PROVINCIAL COURT WOULD PROBABLY WISH TO DELAY ITS RULING UNTIL AFTER THE SUPREME COURT HAD RULED.

FORD

CANADIAN CONSTITUTION LIMITED
NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

LORD MORAN C/O HDS OF MISSION POD
PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]

2

CONFIDENTIAL



BK
cc 720

Canada

10 DOWNING STREET

THE PRIME MINISTER

14 April 1981

Dear David,

I am writing in response to your recent telephone call following your letter of 12 February about the possibility of transmitting BBC External Service programmes in French to Canada.

Ideally it is desirable that French speaking Canadians should be able to hear BBC broadcasts relating to the Constitutional Question in French. But if a French Service to Canada were to be started at this time, however balanced and well intentioned, there is a very real risk that the Federal Government might see it as smacking of interference in Canada's internal affairs.

In addition, it takes time to build up listenership to a new service, as you will know from your experience with the BBC. By the time a worthwhile French speaking audience had been achieved in Canada, it is to be hoped that the current problem over the Constitution would have been resolved. In these circumstances, and given the pressure on the resources of the BBC External Services in the present economic situation, we shall have to rely on the World Service in English to make our case.

Yours sincerely

David Ginsburg, Esq., M.P.

JS



✓ Press

Canada

Foreign and Commonwealth Office

London SW1A 2AH

14 April 1981

Dear David,

✓ MP

CANADA

Many thanks for your letter of 7 April. Things have subsequently become rather clearer in Canada, in that there is to be further debate from 21 to 23 April prior to the Supreme Court beginning their proceedings on 28 April, followed by two more days of debate after the Supreme Court have produced a verdict. Meanwhile, in preparing our reply to the FAC, we want to take into account the Quebec verdict which is expected any day now.

Against this background, we hope to be able to circulate to you and others interested our revised draft soon after Easter. The actual date of publication thereafter will clearly need to be carefully discussed at the time.

I am copying this letter to Nick Sanders (No 10), Henry Steel (Attorney General's Office), Wilfred Hyde (Cabinet Office), Murdo Maclean and David Wright.

*Yours,
Alan*

A K C Wood

PS/Lord Privy Seal

D C R Heyhoe Esq
PS/Chancellor of the Duchy of Lancaster
Privy Council Office
Whitehall
LONDON
SW1A 2AT



Foreign and Commonwealth Office

London SW1A 2AH

13 April 1981

Dear Michael,

Broadcasts in French to Canada

Thank you for your letter of 30 March asking for a short draft reply for the Prime Minister to send to David Ginsburg MP's letter of 12 February about the possibility of transmitting certain BBC programmes in French to Canada. I attach a draft. It differs slightly from the line in George Walden's letter to you of 2 March in response to your original enquiry in that it omits mention of possible cuts in the vernacular services and bases its main argument on the political case.

yours ever
Roderic Lyne

(R M J Lyne)
Private Secretary

M O'D B Alexander Esq
10 Downing Street

DRAFT: minute/letter/teleletter/despach/note

TYPE: Draft/Final 1+

FROM:

Reference

Prime Minister

DEPARTMENT:

TEL. NO:

SECURITY CLASSIFICATION

- Top Secret
- Secret
- Confidential
- Restricted
- Unclassified

TO:

Your Reference

David Ginsburg Esq MP
House of Commons

Copies to:

PRIVACY MARKING

.....In Confidence

CAVEAT.....

SUBJECT: BROADCASTS IN FRENCH TO CANADA

1. I am writing in response to your recent telephone call following your letter of 12 February about the possibility of transmitting BBC External Service programmes in French to Canada.
2. Ideally it is desirable that French speaking Canadians should be able to hear BBC broadcasts relating to the Constitutional Question in French. But if a French Service to Canada were to be started at this time, however balanced and well intentioned, there is a very real risk that the Federal Government might see it as smacking of interference in Canada's internal affairs.
3. In addition, it takes time to build up listenership to a new service, as you will know from your experience with the BBC. By the time a worthwhile French speaking audience had been achieved in Canada, it is to be hoped that the current problem over the Constitution ~~will~~^{would} have been resolved. In these circumstances, and given the pressure on the resources of the BBC External Services in the present economic situation, we shall have to rely on the World Service in English to make our case.

Enclosures—flag(s).....

Canada

PROOF—FOR OFFICIAL USE ONLY



**First Report from the Foreign Affairs
Committee**

Session 1980–81

**British North America Acts:
The Role of Parliament**

Observations by the Government

*Presented to Parliament
by the Secretary of State for Foreign and Commonwealth Affairs
by Command of Her Majesty
1981*

**LONDON
HER MAJESTY'S STATIONERY OFFICE**

p net

Cmnd.

Introduction

1. The British North America Act 1867 is the basic Canadian constitutional instrument. That Act was an Act of the United Kingdom Parliament. It can in certain important respects be amended only by Act of the United Kingdom Parliament. It has been so amended some 14 times. This anomalous situation whereby particular provisions of the constitution of one sovereign nation can be amended only by the legislature of another sovereign nation is preserved by section 7(1) of the Statute of Westminster 1931, under which Canada's complete independence was otherwise confirmed. The historical background is touched on in the Memorandum by the Foreign and Commonwealth Office to the Foreign Affairs Committee (147/79-80/FM; 362-xxii, p. 2) and generally in the Report of the Foreign Affairs Committee itself.

2. It is expected that the Canadian Federal Parliament will soon request that a Bill be laid before the United Kingdom Parliament which would essentially do two things. It would amend the Canadian Constitution in a number of respects, notably by providing for a Canadian Charter of Rights and Freedoms. Further, it would terminate the remaining responsibility of the United Kingdom Parliament in connection with amendment of the Canadian Constitution and confer the relevant powers of amendment on Canadian institutions, thereby (to use the term which has gained a wide currency) "patriating" the Canadian Constitution.

3. These Canadian proposals have provoked extensive public discussion in Canada and the United Kingdom. The Government welcome the Report of the Foreign Affairs Committee as making a significant contribution to this debate.

4. The Government note that in accordance with the mandate which the Foreign Affairs Committee gave itself, the Report of the Committee understandably concentrates on the role of Parliament in relation to the British North America Acts and accordingly deals from the Parliamentary angle with the constitutional history, with precedent and with legal propriety. It contains valuable material bearing on those aspects; and it clearly shows that there is room for debate among legal and constitutional experts about some of them. While recognising the importance of these aspects, the Government in the Observations that follow will draw attention to certain broader considerations. In their view these are crucial to an overall examination of the issue.

The Committee's Conclusions

5. These Observations are directed primarily to the Committee's Conclusions as presented at pages xi to xiii of its Report. The Government find no difficulty in principle with Conclusions 1 to 3, while not necessarily accepting in detail the reasoning on which they are based. The Government fully accept Conclusions 7 and 11 (i) to (v). But for reasons which will be developed in these Observations, they are unable similarly to endorse the remaining Conclusions.

Conclusions 11 and 7

6. The Government are in complete agreement with what they regard as the central conclusions of the Committee, namely Conclusions 11 (ii), (iii) and (iv). The Government endorse Conclusion 11 (iii) that it would

not be in accord with the established constitutional position to patriate the Canadian Constitution unilaterally, and Ministers have so stated in the House. Unilateral patriation could hardly be reconciled with the convention by which the United Kingdom Parliament acts only at the request and with the consent of Canada. Moreover, such patriation without provision of a formula for Canadian amendment of the British North America Acts would, as the Committee points out, deprive the Canadian people of any lawfully established means of amending their own Constitution and would accordingly leave the Canadian Parliament in an impossible situation: in the Committee's words, it would "amount to a gross interference in the internal affairs of Canada and a grave breach of relations between the United Kingdom and Canada" (paragraph 120 of the Report). Conclusion 11(iv) that it would be similarly improper to enact a requested constitutional package with amendments not consented to by the Canadian Government and Parliament is founded on the same basis as Conclusion 11(iii) and the Government likewise agree with it: as the Report says (paragraph 122), "A partial package is a new package". The Government are in no doubt that unilateral action would be deeply resented in Canada.

7. The Government also endorse Conclusion 11(ii) that it would not be in accord with the established constitutional position for the United Kingdom Parliament to undertake any deliberation about the suitability for the peoples of Canada of a requested constitutional package.

8. The Government likewise accept Conclusion 7, that there is no rule, principle or convention that the United Kingdom Parliament, when requested to enact constitutional amendments directly affecting Canadian Federal-Provincial relations, should accede to that request only if it is concurred in by all the Provinces directly affected.

9. On the separate but obviously related issue of whether there exists in Canada a corresponding constitutional rule, principle or convention requiring Provincial concurrence, the Court of Appeal for Manitoba has come to a similar view recently in a case relating to the draft Canadian request. The decision of the Court (whence an appeal lies to the Supreme Court of Canada; see paragraph 28 below) is contained in a judgment of 3 February, which the Committee therefore did not have the advantage of seeing before it reported. In response to questions whether there was a constitutional convention as to prior Provincial agreement to a Canadian request for constitutional amendments affecting Federal-Provincial relationships, or a legal requirement for Provincial agreement to such amendments, the Court, by differing majorities of its five Judges, held that there was no such convention and no such legal requirement.

10. Dealing with the question of constitutional convention in his leading majority judgment, Chief Justice Freedman of Manitoba said, after a careful analysis of all the previous cases of amendment by the United Kingdom Parliament and of the relevant parts of the Federal Government's 1965 White Paper:

"As recently as December 21 1979 the Supreme Court of Canada in the Senate Reference could write thus:

'The practice, since 1968, has been to seek amendment of the Act by a joint address of both Houses of Parliament. Consultation with one or more of the Provinces has occurred in some instances.'

This is not language appropriate to the existence of a convention full-blown, vigorous and operative. A convention should be certain and consistent; what we have here is uncertain and variable."

Dealing with the question of legal requirement, Freedman CJM was able to dispose of the matter very shortly:

"No convention, no rule of law. The matter is as simple as that."

11. A further point which the Government consider significant is the finding (not in the Conclusions of the Report of the Committee but in paragraph 99) that the objective of section 7(1) of the Statute of Westminster "... was simply to maintain the status quo in relation to constitutional amendments. We cannot see in that status quo . . . any evidence of a requirement . . . of unanimous consent [of the Provinces]".

12. In the case already referred to the Manitoba Court of Appeal came to the same conclusion. Matas J.A. examined in detail the history of section 7(1) and its effect, which he described as being neutral. He concluded:

"... neither the preceding Imperial Conferences nor the Statute [of Westminster] pretended to grant the provinces a legal right they did not have prior to the Statute with respect to amendments to the British North America Act."

13. The Government regard the combined effect of Conclusions 7 and 11 as being that the United Kingdom Parliament will not examine the suitability for Canada of constitutional amendments requested by the Federal Parliament and that there is no legal requirement for agreement to such amendments by all the Provinces directly affected. Certainly it has not been the practice of the United Kingdom Government or Parliament before or after the Statute of Westminster to concern themselves either with the fact or with the degree of Provincial consent.

Conclusions 4 to 6

14. These Conclusions refer to the need to take account of the federal character of Canada's constitutional system (Conclusion 4); assert that the United Kingdom Parliament is left free to decide whether a request is so out of line with the established constitutional position that it can rightly be rejected (Conclusion 5); and assert also that it would not be in accord with the established constitutional position to accept unconditionally the constitutional propriety of every request from the Canadian Parliament (Conclusion 6).

15. These Conclusions set the scene for Conclusions 8 to 10, of which more will be said below. They appear to proceed on the basis that such precedent as there is admits of measuring constitutional propriety against some objective indicator as to the nature of Canada's constitution. They also appear to involve reliance on a view that there exists some fixed and immutable form of Canadian federalism to be upheld by the United Kingdom Parliament. The Report (paragraph 103) cites a witness as arguing that the United Kingdom Parliament has "political responsibility for upholding the Federal Constitution of Canada". To suggest that it is the United Kingdom Parliament that has the political responsibility for upholding the Federal Constitution of Canada is to overlook the extent to which constitutional change has been effected in Canada itself over the years and has remained

the constant preoccupation of Canadian institutions, as demonstrated by the long series of constitutional conferences designed to reach agreement on an amending formula.

16. The approach adopted in these Conclusions also seems to give insufficient weight to the fact that, whatever may have been the circumstances in which the various requests for amendments have been made throughout the years, there has been no instance where the United Kingdom has declined to act on the basis of a Canadian request or has purported to examine whether Provincial consent existed or was required. The repeated statements by Ministers of successive Governments that it would be in accordance with precedent for the Government to introduce, and for Parliament to enact, legislation on the basis of a Canadian request have been statements of plain fact: in every one of the numerous cases where there has been a request from the Federal Parliament for amendment, the Government of the day have introduced, and Parliament has enacted, legislation in accordance with it.

17. In view not only of the consistent line taken by Ministers since 1940, if not earlier, but also of what has happened in practice on the occasion of previous requests, the Government regard as too dismissive the evidence, quoted at length in paragraph 80 of the Report, to the effect that "the series of Ministerial statements in the British Parliament . . . cannot therefore properly be regarded as providing a clear convention for action in the present case". While the Government accept that there is in the nature of things never an exact precedent for a particular constitutional amendment, the consistent practice has been to act in accordance with the request and consent of the Federal Parliament. The force of this consistent practice cannot be ignored. This does not mean the United Kingdom Parliament is under some legal obligation automatically to enact whatever Canadian proposals are put before it; but it does point overwhelmingly in the direction of acceding to a Canadian request for patriation. Certainly for the United Kingdom Government and Parliament not to act on such a request would be entirely unprecedented.

Conclusions 8 to 10

18. It follows that the Government do not agree with the Committee's Conclusions 8 to 10 which conclude, broadly, that it would be proper for the United Kingdom Parliament to decide that the request did not convey the clearly expressed wishes of Canada as a federally structured whole because it did not enjoy a sufficient level and distribution of Provincial concurrence. Indeed the Government do not find these conclusions readily reconcilable with the Committee's own Conclusion 11. A number of points arise here.

19. In the first place, the Committee's view seems to be based on an assumption that section 7(1) of the Statute of Westminster in some way conferred a positive role: that is, a role as in some sense custodian for the wishes of Canada as a federally structured whole though not (see paragraph 104 of the Report) a guardian or trustee for the Provinces themselves. Yet the Committee itself concludes that section 7(1) merely preserved the status quo. The Government have already concurred in the Committee's conclusion

that there is no legal requirement to obtain the agreement of all the Provinces directly affected to requested amendments of the Constitution. This point has been mentioned in paragraphs 11 to 13 above.

20. Secondly, the Committee expresses the opinion that the United Kingdom Parliament has "a duty or responsibility to the Canadian people or community as a federally structured community" (paragraph 103) or, in the words of Conclusion 10, "to Canada as a federally structured whole".

21. Thirdly, the Committee concludes, also in Conclusion 10, that it would be proper to test the level and distribution of Provincial concurrence against the "least demanding of the formulae which have been put forward by the Canadian authorities for a post-patriation amendment".

22. The Government consider that these Conclusions fail to take sufficiently into account more than fifty years of constitutional and political development and the realities of present day international relations.

23. Canada has been a sovereign and fully independent nation at least since the enactment of the Statute of Westminster. The Balfour Declaration, contained in the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926, said of relations between the United Kingdom and the Dominions that:

"They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or internal affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations" (Cmd. 2768 p. 14).

24. Relations with Canada are conducted at the diplomatic level exclusively with the Federal Government. Access by the Provinces to the Crown is exclusively through Her Majesty's Ministers in Canada. For very many years, all Canadian requests for constitutional amendments have been acted on by the United Kingdom exclusively at the behest of the Federal Parliament. The Government are not persuaded that any of the earlier cases show that Provincial objections must be heeded. To refuse now to give effect to a request from the Federal Parliament would cause grave offence. Canada is a key member of the Commonwealth and there are further close links between Canada and the United Kingdom in the form of common membership of the NATO Alliance, of the OECD group of industrialised countries and of many other international organisations. Canada is a valued member of the international community with special influence in the Third World. Much is therefore at stake; the repercussions of a rift over the constitutional issue between the United Kingdom and Canada could well spread beyond the bilateral relations between the two countries.

25. Apart from international relations, there is, however, another and probably more fundamental reason why the United Kingdom should not purport to put in question a request from the Federal Parliament for constitutional amendment. Canada is a parliamentary democracy which has common roots with our own. The Federal Parliament is not a body isolated from and unrepresentative of the Provinces and the Canadian peoples. It represents Canada as a whole and the peoples of Canada just as the United Kingdom Parliament represents the United Kingdom as a whole and the peoples of the United Kingdom. The Ministers of the Canadian Government

are elected members of the Federal Parliament. It is to that Parliament and to that Parliament alone that they are answerable. The members of that Parliament are sensitive to Canadian sentiments and Canadian opinion. If the members of the Federal Parliament were to misread the wishes of the Canadian people, it is they who would be answerable to the Canadian electorate.

26. The United Kingdom Parliament has no constituency in Canada. It is answerable to no electorate there. In the view of the Government, the Federal Parliament is the best judge of what is right for Canada. The United Kingdom Parliament would be unwise to take on itself a responsibility which belongs properly to the duly elected representatives of Canada, by whom the issues have been exhaustively considered, particularly when such a role would involve judgments of a kind that, in 1981, it is not in a position to make.

27. As to the suggestion in Conclusion 10 that the United Kingdom Parliament should concern itself with the sufficiency of the level and distribution of Provincial concurrence, if there is, as Conclusion 7 suggests, no requirement of concurrence by all the Provinces directly affected, this would mean that a line is to be drawn somewhere short of full concurrence. The Government consider that there is no defensible basis for the drawing of such a line by the United Kingdom. There is certainly no precedent for it doing so: and certainly no precedent for any particular degree of Provincial opposition being critical. The Committee, also in Conclusion 10, proposes as the test the least demanding of the formulae which have been put forward by the Canadian authorities for post-patriation amendment. For the United Kingdom to select and apply for this purpose a particular post-patriation amendment formula would however involve a substantial incursion into Canadian prerogatives. It is true that the formula suggested has at one time or another been broadly accepted by all the Provinces, but this acceptance was conditional upon agreement on a wider package (and what may be acceptable as a formula for post-patriation amendment is, in any event, not necessarily appropriate as a criterion for patriation itself). In fact, it has seemed to the Canadian authorities that complete agreement has always been just beyond reach. Discussions have continued on and off for many years. Each time the issues have widened. The Canadian Parliament seems now to be on the point of deciding that after so many abortive attempts to find an agreed solution the constitutional issues must be finally resolved. With this prize at last within their grasp, the repercussions of the United Kingdom Parliament obstructing the considered request of the Canadian Government and Parliament by interposing a criterion of its own selection would be all the more serious. Any attempt by members of the United Kingdom Parliament to question the right of their Canadian opposite numbers to ask for and obtain patriation on terms decided in Canada would be regarded as gross interference in Canadian affairs.

Conclusion 12

28. The Government acknowledge the force of the view expressed by the Committee that the question how far the United Kingdom's response to a request ought to be affected by the existence of substantial litigation in the Canadian courts is best left to be considered in the light of all the circumstances at the time when such a request is received in London. Reference has already been made in these Observations to the judgment

the Manitoba Court of Appeal delivered on 3 February (paragraphs 9, 10 and 12 above). Other proceedings, raising issues similar to those argued before the Manitoba Court of Appeal, have been commenced in Newfoundland and, more recently, in Quebec. There is every likelihood that the judgment of the Manitoba Court of Appeal will be appealed to the Supreme Court of Canada, but there is no certainty as to when the Supreme Court of Canada will rule on any such appeal. However the Government feel bound to point out that the current litigation in Canada turns primarily on the propriety of the request to be made by the Federal Parliament in terms of Canadian constitutional practice and convention rather than on the propriety of the United Kingdom Parliament's response to such a request. There is no technical bar (eg under the *sub judice* rule) to the United Kingdom Parliament's proceeding with legislation to give effect to the request while litigation is still pending before the Canadian Courts.

Conclusions of the Government

29. Technically and as a matter of strict law, the powers of the United Kingdom Parliament are undoubtedly unfettered. But the realities of convention and of fifty years and more of post-Colonial development have to be recognised. The exercise of such powers as still remain in the hands of the United Kingdom Parliament under the Statute of Westminster depend on the request and consent of Canada, the necessary request and consent being that of the Federal Parliament and not of the Provincial governments or legislatures.

30. The Government therefore concur fully in the conclusion of the Committee that the United Kingdom Parliament should not unilaterally modify a Canadian request for constitutional amendment. But it is necessary to go further. It is the Federal Parliament which is empowered to act for Canada as a whole and, in the view of the Government, is the legislature which is the proper and sole guardian of the interests of the Canadian people as a whole. The Government would not think it right to reject a request for constitutional amendment which on its face reflects the will of the duly elected representatives of that legislature. Rejection of such a request would imply that in some respects the United Kingdom still exercises constitutional control over Canada. This would not be compatible with the full sovereignty and equal status of the two nations recognised by the Balfour Declaration and with the relationships between the two countries as they have developed since then.

The Committee's Recommendation

31. The Committee recommended (paragraph 15) that the Government should draw to the attention of the Government of Canada their view that the considerations set out in Chapters V to VIII of their Report supported the Committee's Conclusions; also that that view, together with the other considerations and conclusions in the Report, had been reported to the House. This recommendation was carried out at the Foreign and Commonwealth Office at a meeting between the Canadian High Commissioner and an Under-Secretary at the Foreign and Commonwealth Office on the date of publication of the Report, ie 30 January 1981.

JS
1 April 1981

I am writing on behalf of the Prime Minister to thank you for your letter of 31 March enclosing a background paper on "The Role of the United Kingdom in the Amendment of the Canadian Constitution". I shall be drawing your letter and its enclosure to the Prime Minister's early attention.

MA

Her Excellency Mrs. Jean Casselman Wadds
S

GRS 400

mb

UNCLASSIFIED

FM OTTAWA 012225Z APRIL 81

TO IMMEDIATE FCO

TELEGRAM NUMBER 155 OF 1 APRIL

CANADIAN CONSTITUTION

1. IN THE HOUSE YESTERDAY EVENING, THE PRIME MINISTER MADE IT CLEAR THAT HE WANTED THE HOUSE TO PASS THE RESOLUTION SO THAT THE SUPREME COURT COULD CONSIDER A CONCRETE RATHER THAN A HYPOTHETICAL CASE. UNDER PRESSURE, HE SAID "IF THE SUPREME COURT DECIDES AGAINST US, THEN OBVIOUSLY THE RESOLUTION WILL NOT BE SENT TO GREAT BRITAIN", THUS MAKING IT CLEAR THAT HE WAS PREPARED NOT TO PUT THE ADDRESS TO WESTMINSTER UNTIL THE SUPREME COURT HAD RULED.

2. WHEN THE HOUSE RESUMED TODAY IT BECAME CLEAR THAT MR CLARK STILL WANTED TO HAVE THE SUPREME COURT'S RULING BEFORE THE HOUSE COMPLETED ITS DELIBERATIONS. HE PROPOSED THAT THE DEBATE ON THE CONSTITUTION BE ADJOURNED SO THAT THE SUPREME COURT COULD DECIDE IF WHAT PARLIAMENT IS BEING ASKED TO DO WAS, IN FACT, LEGAL. AS FOR THE AMENDMENTS HE PROPOSED THAT THE HOUSE SHOULD AGREE ON WHAT AMENDMENTS IT WANTED SO THAT THE SUPREME COURT WOULD HAVE A CLEAR PICTURE OF WHAT THE RESOLUTION WOULD LOOK LIKE AT THE END OF THE PROCESS. TRUDEAU OPPOSED THIS. HE SAID THAT THE ONLY WAY THE SUPREME COURT WOULD KNOW WHAT PARLIAMENT WANTED WAS IF PARLIAMENT PRESENTED IT WITH A RESOLUTION IT HAD PASSED.

3. MR BROADBENT SUGGESTED A COMPROMISE. THE HOUSE SHOULD REACH AN AGREEMENT ON THE AMENDMENTS TO BE INCLUDED IN THE RESOLUTION DEBATE THEM BRIEFLY AND VOTE ON THEM. THE RESOLUTION AS AMENDED SHOULD THEN BE REFERRED TO THE SUPREME COURT BEFORE THE FINAL READING IN PARLIAMENT. IT SHOULD BE AGREED BEFOREHAND THAT THEREAFTER NO NEW AMENDMENTS, EXCEPT THOSE NEEDED TO TAKE INTO ACCOUNT THE RULING OF THE SUPREME COURT, SHOULD BE INTRODUCED AT THE FINAL READING.

/ 4. THE

4. THE THREE HOUSE LEADERS AGREED TO MEET AND DISCUSS THIS,
BUT BY EARLY EVENING FURTHER PROGRESS WAS STILL BEING DELAYED
BY THE PC CONTINUING TO RAISE POINTS OF PRIVILEGE.

FORD

CANADIAN CONSTITUTION LIMITED

NAD
CCD
P & CD
PCCU
PARLIAMENTARY UNIT
NEWS D
INFORMATION D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX
CABINET OFFICE

COPIES TO:

SIR I SINCLAIR }
MR FREELAND } LEGAL ADVS.
DR PARRY }

LORD MORAN C/O HDS OF MISSION POD
PS/CHANCELLOR OF THE DUCHY OF
LANCASTER

PS/LORD CHANCELLOR

PS/LORD PRESIDENT

MR H STEEL, LAW OFFICERS' DEPT

[COPIES SENT TO NO 10 DOWNING ST]



With the compliments of
NORTH AMERICA DEPARTMENT

Foreign and Commonwealth Office
London, S.W.1.

GRS 210

UNCLASSIFIED
FM OTTAWA 312055Z MAR 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 152 OF 31 MARCH

ha
Ant

CANADIAN CONSTITUTION

1. THE NEWFOUNDLAND COURT ANNOUNCED ITS DECISION TODAY. IT FOUND 3-0 AGAINST (REPEAT AGAINST) THE FEDERAL GOVERNMENT. THOUGH DISSAPPOINTING TO THE GOVERNMENT, THIS WAS NOT TOTALLY UNEXPECTED.
2. AT QUESTION TIME THE OPPOSITION PRESSED THE PRIME MINISTER IN THE LIGHT OF THIS DECISION TO POSTPONE FURTHER DISCUSSION OF THE DRAFT RESOLUTION PENDING THE FINAL DECISION OF THE SUPREME COURT. TRUDEAU AT FIRST INDICATED THAT THE GOVERNMENT WAS DETERMINED TO PRESS ON WITH THE FINALISATION OF THE RESOLUTION AND ITS DESPATCH TO WESTMINSTER BUT WOULD NOT PRESS HMG TO GET IT THROUGH PARLIAMENT PENDING THE SUPREME COURT DECISION HERE. WHEN FURTHER PRESSED HE MODIFIED THIS AND SEEMED TO SUGGEST THAT HE WAS PREPARED TO HOLD UP THE DESPATCH OF THE RESOLUTION TO WESTMINSTER PENDING A DECISION OF THE SUPREME COURT BUT STOOD FIRM ON THE NEED TO COMPLETE PRELIMINARY PROCESSING OF THE RESOLUTION SO THAT THE DEBATE WOULD NOT HAVE TO START ALL OVER AGAIN. HE SUGGESTED TO THE OPPOSITION THAT DISCUSSIONS SHOULD TAKE PLACE BETWEEN THE HOUSE LEADERS WITH A VIEW TO REACHING AGREEMENT ON COMPLETING THE DEBATE ON THE RESOLUTION IN TIME FOR IT TO BE AVAILABLE TO THE SUPREME COURT BEFORE IT STARTED ITS HEARINGS.
3. QUESTIONS OF PRIVILEGE ARE STILL BEING DISCUSSED AND IT IS NOT YET CLEAR WHEN THE HOUSE LEADERS WILL HAVE THEIR MEETING OR WHAT WILL BE DECIDED.

FORD

LIMITED
NAD
CCD
NEWS D
PS
PS/LPS
PS/MR RIDLEY
PS/MR BLAKER
PS/MR HURD
PS/PUS
SIR E YOUDE
MR DAY
MR URE
LORD N G LENNOX

COPIES TO:

MR FREELAND }
MR PARRY } LEGAL ADVISERS

Sir I. Sinclair

*Copies to: No. 10 Downing St
Ps/Chancellor of the Duchy of
Lancaster
Ps/Lord Chancellor
Lord Moran
Mr H. Steel, Law Officers' Dept
Cabinet Office
Lord President
Sir P. Mook, Buckingham Palace*

PCB
PCCU
Parliamentary Unit
Information Dept

Canadian High Commission



Haut Commissariat du Canada

ds. Ann

London,
March 31st, 1981

MS

The Rt Hon Margaret Thatcher MP
Prime Minister
House of Commons
London SW1A 0AA

Pemie Minister

*The Federal Govt are becoming
more active here. I have acc'd.*

My Dear Prime Minister

Ann 1/4

Not attached

Further to my recent letter, I am enclosing a background paper entitled "The Role of the United Kingdom in the Amendment of the Canadian Constitution".

This paper, prepared for the information of members of the Parliament of Canada, and for Canadians generally, includes a commentary upon the report of the U.K. Select Committee on Foreign Affairs entitled "British North America Acts: The Role of Parliament". The more general conclusions of the paper appear on Pages 3 and 4, while the conclusions relating to the Select Committee's Report are outlined on Page 37.

I am confident that when all aspects are carefully considered, British Parliamentarians will treat the resolution from their Canadian parliamentary colleagues with the same degree of understanding and co-operation that has been the hallmark of Anglo-Canadian relations.

Yours sincerely

Jean Casselman Wadds

Jean Casselman Wadds
High Commissioner

The Canadian Constitution 1981

*of proposed constitutional resolutions tabled by the
Minister of Justice in the House of Commons on February 11, 1981
with the amendments approved by the House of Commons April
23, 1981 and by the Senate on April 24, 1981*

**A resolution as finally
amended by the
Parliament of Canada,
April 1981**

Canada 



Section	Pages
1. PURPOSE AND SCOPE	1-2
2. SHORT TITLE	3
3. INTERPRETATION	4-5
4. COMMENCEMENT	6
5. TRANSITION	7
6. REVOCATION	8
7. AMENDMENTS	9-10
8. ENACTING CLAUSE	11

Consolidation of proposed constitutional resolution tabled by the Minister of Justice in the House of Commons on February 13, 1981 with the amendments approved by the House of Commons on April 23, 1981 and by the Senate on April 24, 1981

9. PART I - THE CONSTITUTION	12-16
10. PART II - THE LEGISLATIVE PROCESS	17-21
11. PART III - THE JUDICIAL PROCESS	22-25
12. PART IV - THE EXECUTIVE PROCESS	26-28
13. PART V - THE FINANCIAL PROVISIONS	29-31
14. PART VI - THE ELECTORAL SYSTEM	32-34
15. PART VII - THE OFFICIAL LANGUAGES	35-37
16. PART VIII - THE PEACE, ORDER AND GOOD GOVERNMENT CLAUSE	38-40
17. PART IX - THE AMENDMENT PROCEDURE	41-45
18. PART X - THE FINAL PROVISIONS	46-48

Consolidation of proposed constitutional resolution tabled by the
Minister of Justice in the House of Commons on February 13, 1981
with the amendments approved by the House of Commons on April
23, 1981 and by the Senate on April 24, 1981

For further information, please contact:

The Canadian High Commission
1 Grosvenor Square
London, W1X 0A8
Tel. 629-9492 Ext. 363 or 370

TABLE OF CONTENTS	Sections	Pages
ADDRESS TO HER MAJESTY	1
CONSTITUTION ACT, 1981	1-66	3-25
I CANADIAN CHARTER OF RIGHTS AND FREEDOMS .	1-33	3-10
Guarantee of Rights and Freedoms	1	3
Fundamental Freedoms	2	3
Democratic Rights	3-5	3-4
Mobility Rights	6	4
Legal Rights	7-14	4-6
Equality Rights	15	6
Official Languages of Canada .	16-22	6-8
Minority Language Educational Rights	23	8-9
Enforcement	24	9
General	25-31	9-10
Application of Charter	32	10
Citation	33	10
II RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA	34	11
III EQUALIZATION AND REGIONAL DISPARITIES	35	11
IV CONSTITUTIONAL CONFERENCES	36	12
V INTERIM AMENDMENT PRO- CEDURE AND RULES FOR ITS REPLACEMENT	37-45	12-16
VI PROCEDURE FOR AMENDING CONSTITUTION OF CANADA .	46-56	16-21
VII AMENDMENT TO THE CONSTITUTION ACT, 1867	57-58	21-23
VIII GENERAL	59-66	23-25
SCHEDULE I	26-31

TABLE OF CONTENTS

Page	Section	
1		ADDRESS TO HER MAJESTY
3-5	1-60	CONSTITUTION ACT, 1981
7-10	1-33	I CANADIAN CHARTER OF RIGHTS AND FREEDOMS
		Guarantees of Rights and Freedoms
1	1	Freedom of Religion
1	2	Freedom of Thought, Belief, Opinion and Expression
3-4	3-5	Democratic Rights
4	6	Equality Rights
4-5	7-14	Legal Rights
5	15	Language Rights
6-8	16-22	Official Languages of Canada
		Minority Language Educational Rights
8-9	23	Right to Life
9	24	Enforcement
9-10	25-31	General
10	32	Application of Charter
10	33	Transition
		II RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA
11	34	
		III LOCALIZATION AND REGIONAL DISPARITIES
11	35	
		IV CONSTITUTIONAL CONVENTIONS
15	36	
		V INTERIM AMENDMENT PROCEDURE AND RULES FOR ITS REPLACEMENT
13-14	37-45	
		VI PROCEDURE FOR AMENDING CONSTITUTION OF CANADA
15-16	46-55	
		VII AMENDMENT TO THE CONSTITUTION
17-18	56-58	
17-18	59-66	VIII GENERAL
18-21	67-71	SCHEDULE

THAT, WHEREAS in the past certain amendments to the Constitution of Canada have been made by the Parliament of the United Kingdom at the request and with the consent of Canada;

AND WHEREAS it is in accord with the status of Canada as an independent state that Canadians be able to amend their Constitution in Canada in all respects;

AND WHEREAS it is also desirable to provide in the Constitution of Canada for the recognition of certain fundamental rights and freedoms and to make other amendments to that Constitution;

A respectful address be presented to Her Majesty the Queen in the following words:

**To the Queen's Most
Excellent Majesty:
Most Gracious Sovereign:**

We, Your Majesty's loyal subjects, the House of Commons of Canada in Parliament assembled, respectfully approach Your Majesty, requesting that you may graciously be pleased to cause to be laid before the Parliament of the United Kingdom a measure containing the recitals and clauses hereinafter set forth:

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Constitution Act, 1981
enacted

1. The *Constitution Act, 1981* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

Termination of power to legislate for Canada

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1981* comes into force shall extend to Canada as part of its law.

French version

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

Short title

4. This Act may be cited as the *Canada Act*.

CONSTITUTION ACT, 1981

PART I

SCHEDULE B

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and
freedoms in
Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental
freedoms

2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

Democratic Rights

Democratic
rights of
citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum
duration of
legislative
bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention
(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right
(a) to be informed without unreasonable delay of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(e) not to be denied reasonable bail without just cause;
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimina-
tion

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before
and under law
and equal
protection and
benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative
action
programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

Official
languages of
Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official
languages of
New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement
of status and
use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is suffi-

cient to warrant the provision to them out of public funds of minority language instruction; and
(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Application to territories and territorial authorities

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32. (1) This Charter applies
(a) to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislature and government of each province and to all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this Act, except Part VI, comes into force.

Citation

Citation

33. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of
aboriginal and
treaty rights

34. (1) The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of
"aboriginal
peoples of
Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

PART III

EQUALIZATION AND REGIONAL DISPARITIES

Commitment to
promote equal
opportunities

35. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

Commitment
respecting
public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

PART IV

CONSTITUTIONAL CONFERENCES

Constitutional
conferences

36. (1) Until Part VI comes into force, a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once in every year.

Participation of
aboriginal
peoples

(2) A conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

Participation of
territories

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

PART V

INTERIM AMENDMENT PROCEDURE AND RULES FOR ITS REPLACEMENT

Interim
procedure for
amending
Constitution of
Canada

37. Until Part VI comes into force, an amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and by the legislative assembly or government of each province.

amendment of provisions relating to some but not all provinces

38. Until Part VI comes into force, an amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and by the legislative assembly or government of each province to which the amendment applies.

amendments respecting certain language rights

39. (1) Notwithstanding section 41, an amendment to the Constitution of Canada

(a) adding a province as a province named in subsection 16(2), 17(2), 18(2), 19(2) or 20(2), or

(b) otherwise providing for any or all of the rights guaranteed or obligations imposed by any of those subsections to have application in a province to the extent and under the conditions stated in the amendment,

may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and the legislative assembly of the province to which the amendment applies.

initiation of amendment procedure

(2) The procedure for amendment prescribed by subsection (1) may be initiated only by the legislative assembly of the province to which the amendment applies.

initiation of amendment procedures

40. (1) The procedures for amendment prescribed by sections 37 and 38 may be initiated either by the Senate or House of Commons or by the legislative assembly or government of a province.

Revocation of authorization

(2) A resolution made or other authorization given for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Limitation on use of interim amendment procedure

41. Sections 37 and 38 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedure prescribed by section 37 shall be used to amend the *Canadian Charter of Rights and*

Freedoms and any provision for amending the Constitution, including this section.

Coming into
force of Part VI

42. Part VI shall come into force

(a) with or without amendment, on such day as may be fixed by proclamation issued pursuant to the procedure prescribed by section 37, or

(b) on the day that is two years after the day this Act, except Part VI, comes into force,

whichever is the earlier day but, if a referendum is required to be held under subsection 43(3), Part VI shall come into force as provided in section 44.

Provincial
alternative
procedure

43. (1) The legislative assemblies of seven or more provinces that have, according to the then latest general census, combined populations of at least eighty per cent of the population of all the provinces may make a single proposal to substitute for paragraph 46(1)(b) such alternative as they consider appropriate.

Procedure for
perfecting
alternative

(2) One copy of an alternative proposed under subsection (1) may be deposited with the Chief Electoral Officer of Canada by each proposing province within two years after this Act, except Part VI, comes into force but, prior to the expiration of that period, any province that has deposited a copy may withdraw that copy.

Referendum

(3) Where copies of an alternative have been deposited as provided by subsection (2) and, on the day that is two years after this Act, except Part VI, comes into force, at least seven copies remain deposited by provinces that have, according to the then latest general census, combined populations of at least eighty per cent of the population of all the provinces, the government of Canada shall cause a referendum to be held within two years after that day to determine whether

(a) paragraph 46(1)(b) or any alternative thereto approved by resolutions of the Senate and House of Commons and deposited with the Chief Electoral Officer at least ninety days prior to the day on which the referendum is held, or

(b) the alternative proposed by the provinces, shall be adopted.

Coming into
force of Part VI
where
referendum
held

44. Where a referendum is held under subsection 43(3), a proclamation under the Great Seal of Canada shall be issued within six months after the date of the referendum bringing Part VI into force with such modifications, if any, as are necessary to incorporate the proposal approved by a majority of the persons voting at the referendum and with such other changes as are reasonably consequential on the incorporation of that proposal.

Right to vote

45. (1) Every citizen of Canada has, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, the right to vote in a referendum held under subsection 43(3).

Establishment
of Referendum
Rules
Commission

(2) If a referendum is required to be held under subsection 43(3), a Referendum Rules Commission shall forthwith be established by commission issued under the Great Seal of Canada consisting of

(a) the Chief Electoral Officer of Canada, who shall be chairman of the Commission;

(b) a person appointed by the Governor General in Council; and

(c) a person appointed by the Governor General in Council

(i) on the recommendation of the governments of a majority of the provinces, or

(ii) if the governments of a majority of the provinces do not recommend a candidate within thirty days after the Chief Electoral Officer of Canada requests such a recommendation, on the recommendation of the Chief Justice of Canada from among persons recommended by the governments of the provinces within thirty days after the expiration of the first mentioned thirty day period or, if none are so recommended, from among such persons as the Chief Justice considers qualified.

Duty of
Commission

(3) A Referendum Rules Commission shall cause rules for the holding of a referendum under subsection 43(3) approved by a majority of the Commission to be laid before Parliament within sixty days after the Commission is established or, if Parliament is not then sitting, on any of the first ten days next thereafter that Parliament is sitting.

Rules for referendum

(4) Subject to subsection (1) and taking into consideration any rules approved by a Referendum Rules Commission in accordance with subsection (3), Parliament may enact laws respecting the rules applicable to the holding of a referendum under subsection 43(3).

Proclamation

(5) If Parliament does not enact laws under subsection (4) respecting the rules applicable to the holding of a referendum within sixty days after receipt of a recommendation from a Referendum Rules Commission, the rules recommended by the Commission shall forthwith be brought into force by proclamation issued by the Governor General under the Great Seal of Canada.

Computation of period

(6) Any period when Parliament is prorogued or dissolved shall not be counted in computing the sixty day period referred to in subsection (5).

Rules to have force of law

(7) Subject to subsection (1), rules made under this section have the force of law and prevail over other laws made under the Constitution of Canada to the extent of any inconsistency.

PART VI

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

General procedure for amending Constitution of Canada

46. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least a majority of the provinces that includes

(i) every province that at any time before the issue of the proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada,

(ii) two or more of the Atlantic provinces, and

(iii) two or more of the Western provinces.

Definitions	(2) In this section,
“Atlantic provinces”	“Atlantic provinces” means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;
“Western provinces”	“Western provinces” means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta.
Amendment authorized by referendum	<p>47. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by a referendum held throughout Canada under subsection (2) at which</p> <ul style="list-style-type: none"> (a) a majority of persons voting thereat, and (b) a majority of persons voting thereat in each of the provinces, resolutions of the legislative assemblies of which would be sufficient, together with resolutions of the Senate and House of Commons, to authorize the issue of a proclamation under subsection 46(1), <p>have approved the making of the amendment.</p>
Authorization of referendum	<p>(2) A referendum referred to in subsection (1) shall be held where directed by proclamation issued by the Governor General under the Great Seal of Canada, which proclamation may be issued where</p> <ul style="list-style-type: none"> (a) an amendment to the Constitution of Canada has been authorized under paragraph 46(1)(a) by resolutions of the Senate and House of Commons; (b) the requirements of paragraph 46(1)(b) in respect of the proposed amendment have not been satisfied within twelve months after the passage of the resolutions of the Senate and House of Commons; and (c) the issue of the proclamation has been authorized by the Governor General in Council.
Time limit for referendum	(3) A proclamation issued under subsection (2) in respect of a referendum shall provide for the referendum to be held within two years after the expiration of the twelve month period referred to in paragraph (b) of that subsection.

Amendment of provisions relating to some but not all provinces

48. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Amendments respecting certain language rights

49. (1) Notwithstanding section 55, an amendment to the Constitution of Canada

- (a) adding a province as a province named in subsection 16(2), 17(2), 18(2), 19(2) or 20(2), or
- (b) otherwise providing for any or all of the rights guaranteed or obligations imposed by any of those subsections to have application in a province to the extent and under the conditions stated in the amendment,

may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and the legislative assembly of the province to which the amendment applies.

Initiation of amendment procedure

(2) The procedure for amendment prescribed by subsection (1) may be initiated only by the legislative assembly of the province to which the amendment applies.

Initiation of amendment procedures

50. (1) The procedures for amendment prescribed by subsection 46(1) and section 48 may be initiated either by the Senate or House of Commons or by the legislative assembly of a province.

Revocation of authorization

(2) A resolution made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Right to vote

51. (1) Every citizen of Canada has, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, the right to vote in a referendum held under section 47.

(2) Where a referendum is to be held under section 47, a Referendum Rules Commission shall forthwith be established by commission issued under the Great Seal of Canada consisting of

(a) the Chief Electoral Officer of Canada, who shall be chairman of the Commission;

(b) a person appointed by the Governor General in Council; and

(c) a person appointed by the Governor General in Council

(i) on the recommendation of the governments of a majority of the provinces, or

(ii) if the governments of a majority of the provinces do not recommend a candidate within thirty days after the Chief Electoral Officer of Canada requests such a recommendation, on the recommendation of the Chief Justice of Canada from among persons recommended by the governments of the provinces within thirty days after the expiration of the first mentioned thirty day period or, if none are so recommended, from among such persons as the Chief Justice considers qualified.

(3) A Referendum Rules Commission shall cause rules for the holding of a referendum under section 47 approved by a majority of the Commission to be laid before Parliament within sixty days after the Commission is established or, if Parliament is not then sitting, on any of the first ten days next thereafter that Parliament is sitting.

(4) Subject to subsection (1) and taking into consideration any rules approved by a Referendum Rules Commission in accordance with subsection (3), Parliament may enact laws respecting the rules applicable to the holding of a referendum under section 47.

(5) If Parliament does not enact laws under subsection (4) respecting the rules applicable to the holding of a referendum within sixty days after receipt of a recommendation from a Referendum Rules Commission, the rules recommended by the Commission shall forthwith be brought into force by proclamation issued by the Governor General under the Great Seal of Canada.

Computation of period	(6) Any period when Parliament is prorogued or dissolved shall not be counted in computing the sixty day period referred to in subsection (5).
Rules to have force of law	(7) Subject to subsection (1), rules made under this section have the force of law and prevail over other laws made under the Constitution of Canada to the extent of any inconsistency.
Limitation on use of general amendment procedure	52. (1) The procedures prescribed by section 46, 47 or 48 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedures prescribed by section 46 or 47 shall, nevertheless, be used to amend any provision for amending the Constitution, including this section.
Idem	(2) The procedures prescribed by section 46 or 47 do not apply in respect of an amendment referred to in section 48.
Amendments by Parliament	53. Subject to section 55, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate or House of Commons.
Amendments by provincial legislatures	54. Subject to section 55, the legislature of each province may exclusively make laws amending the constitution of the province.
Matters requiring amendment under general amendment procedure	55. An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with a procedure prescribed by section 46 or 47: <ul style="list-style-type: none"> (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province; (b) the <i>Canadian Charter of Rights and Freedoms</i>; (c) the rights of the aboriginal peoples of Canada set out in Part II; (d) the commitments relating to equalization and regional disparities set out in section 35; (e) the powers of the Senate; (f) the number of members by which a province is entitled to be represented in the Senate;

- (g) the method of selecting Senators and the residence qualifications of Senators;
- (h) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province; and
- (i) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada.

Consequential amendments

56. (1) Class 1 of section 91 and class 1 of section 92 of the *Constitution Act, 1867* (formerly named the *British North America Act, 1867*), the *British North America (No. 2) Act, 1949*, referred to in item 22 of Schedule I to this Act and Parts IV and V of this Act are repealed.

Idem

(2) When Parts IV and V of this Act are repealed, this section may be repealed and this Act may be renumbered, consequential upon the repeal of those Parts and this section, by proclamation issued by the Governor General under the Great Seal of Canada.

PART VII

AMENDMENT TO THE CONSTITUTION ACT, 1867

Amendment to
Constitution Act, 1867

57. The *Constitution Act, 1867* (formerly named the *British North America Act, 1867*) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:

“Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

- (a) exploration for non-renewable natural resources in the province;
- (b) development, conservation and management of non-renewable natural resources and forestry

resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

“Primary production”

(5) The expression “primary production” has the meaning assigned by the Sixth Schedule.

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or govern-

ment of a province had immediately before the coming into force of this section.”

Idem

58. The said Act is further amended by adding thereto the following Schedule:

“THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,
 - (a) production from a non-renewable natural resource is primary production therefrom if
 - (i) it is in the form in which it exists upon its recovery or severance from its natural state, or
 - (ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and
 - (b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.”

PART VIII

GENERAL

Primacy of
Constitution of
Canada

59. (1) 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.

Constitution of
Canada

(2) The Constitution of Canada includes

- (a) the *Canada Act*;
- (b) the Acts and orders referred to in Schedule I; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

Amendments to
Constitution of
Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Repeals and
new names

60. (1) The enactments referred to in Column I of Schedule I are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential
amendments

(2) Every enactment, except the *Canada Act*, that refers to an enactment referred to in Schedule I by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in Schedule I may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

French version
of Constitution
of Canada

61. A French version of the portions of the Constitution of Canada referred to in Schedule I shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

English and
French versions
of certain
constitutional
texts

62. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 61, the English and French versions of that portion of the Constitution are equally authoritative.

English and
French versions
of this Act

63. The English and French versions of this Act are equally authoritative.

Commence-
ment

64. Subject to section 65, this Act shall come into force on a day to be fixed by proclamation issued by the Governor General under the Great Seal of Canada.

Exception

65. Part VI shall come into force as provided in Part V.

Short title and
citations

66. This Schedule may be cited as the *Constitution Act, 1981*, and the Constitution Acts 1867 to 1975 (No. 2) and this Act may be cited together as the *Constitution Acts, 1867 to 1981*.

SCHEDULE I

to the

CONSTITUTION ACT, 1981

MODERNIZATION OF THE CONSTITUTION

Item	Column I Act Affected	Column II Amendment	Column III New Name
1.	British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)	(1) Section 1 is repealed and the following substituted therefor: “1. This Act may be cited as the <i>Constitution Act, 1867</i> .” (2) Section 20 is repealed.	Constitution Act, 1867
2.	An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.)	(1) The long title is repealed and the following substituted therefor: “ <i>Manitoba Act, 1870</i> .” (2) Section 20 is repealed.	Manitoba Act, 1870
3.	Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June, 1870.		Rupert's Land and North-Western Territory Order

- Union, dated the 16th day of May, 1871.
5. British North America Act, 1871, 34-35 Vict., c. 28 (U.K.)
 Section 1 is repealed and the following substituted therefor:
 "1. This Act may be cited as the *Constitution Act, 1871*."
 Constitution Act, 1871
 6. Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated the 26th day of June, 1873.
 Prince Edward Island Terms of Union
 7. Parliament of Canada Act, 1875, 38-39 Vict., c. 38 (U.K.)
 Parliament of Canada Act, 1875
 8. Order of Her Majesty in Council admitting all British possessions and Territories in North America and islands adjacent thereto into the Union, dated the 31st day of July, 1880.
 Adjacent Territories Order
 9. British North America Act, 1886, 49-50 Vict., c. 35 (U.K.)
 Section 3 is repealed and the following substituted therefor:
 "3. This Act may be cited as the *Constitution Act, 1886*."
 Constitution Act, 1886
 10. Canada (Ontario Boundary) Act, 1889, 52-53 Vict., c. 28 (U.K.)
 Canada (Ontario Boundary) Act, 1889

SCHEDULE I—Continued

Item	Column I Act Affected	Column II Amendment	Column III New Name
11.	Canadian Speaker (Appointment of Deputy) Act, 1895, 2nd Sess., 59 Vict., c. 3 (U.K.)	The Act is repealed.	
12.	The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.)		Alberta Act
13.	The Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42 (Can.)		Saskatchewan Act
14.	British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.)	Section 2 is repealed and the following substituted therefor: “2. This Act may be cited as the <i>Constitution Act, 1907</i> .”	Constitution Act, 1907
15.	British North America Act, 1915, 5-6 Geo. V, c. 45 (U.K.)	Section 3 is repealed and the following substituted therefor: “3. This Act may be cited as the <i>Constitution Act, 1915</i> .”	Constitution Act, 1915
16.	British North America Act, 1930, 20-21 Geo. V, c. 26 (U.K.)	Section 3 is repealed and the following substituted therefor: “3. This Act may be cited as	Constitution Act, 1930

17. Statute of Westminster, 1931, 22 Statute of Westminster, 1931
 Geo. V, c. 4 (U.K.) In so far as they apply to Canada,
 (a) section 4 is repealed; and
 (b) subsection 7(1) is repealed.
18. British North America Act, 1940, Constitution Act, 1940
 3-4 Geo. VI, c. 36 (U.K.) Section 2 is repealed and the following substituted therefor:
 "2. This Act may be cited as the *Constitution Act, 1940*."
19. British North America Act, 1943, The Act is repealed.
20. British North America Act, 1946, The Act is repealed.
 9-10 Geo. VI, c. 63 (U.K.)
21. British North America Act, 1949, Newfoundland Act
 12-13 Geo. VI, c. 22 (U.K.) Section 3 is repealed and the following substituted therefor:
 "3. This Act may be cited as the *Newfoundland Act*."
22. British North America (No. 2) Act, The Act is repealed.
 1949, 13 Geo. VI, c. 81 (U.K.) (effective when section 56 of the *Constitution Act, 1981* comes into force)

SCHEDULE I—Concluded

Item	Column I Act Affected	Column II Amendment	Column III New Name
23.	British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.)	The Act is repealed.	
24.	British North America Act, 1952, 1 Eliz. II, c. 15 (Can.)	The Act is repealed.	
25.	British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.)	Section 2 is repealed and the following substituted therefor: “2. This Act may be cited as the <i>Constitution Act, 1960.</i> ”	Constitution Act, 1960
26.	British North America Act, 1964, 12-13 Eliz. II, c. 73 (U.K.)	Section 2 is repealed and the following substituted therefor: “2. This Act may be cited as the <i>Constitution Act, 1964.</i> ”	Constitution Act, 1964
27.	British North America Act, 1965, 14 Eliz. II, c. 4, Part I (Can.)	Section 2 is repealed and the following substituted therefor: “2. This Part may be cited as the <i>Constitution Act, 1965.</i> ”	Constitution Act, 1965

28. British North America Act, 1974,
23 Eliz. II, c. 13, Part I (Can.)

Section 3, as amended by
25-26 Eliz. II, c. 28, s. 38(1)
(Can.) is repealed and the follow-
ing substituted therefor:

“3. This Part may be cited as
the *Constitution Act, 1974.*”

29. British North America Act, 1975,
23-24 Eliz. II, c. 28, Part I (Can.)

Section 3, as amended by
25-26 Eliz. II, c. 28, s. 31 (Can.)
is repealed and the following sub-
stituted therefor:

“3. This Part may be cited as
the *Constitution Act (No. 1),*
1975.”

30. British North America Act (No. 2),
1975, 23-24 Eliz. II, c. 53 (Can.)

Section 3 is repealed and the
following substituted therefor:

“3. This Act may be cited as
the *Constitution Act (No. 2),*
1975.”

Constitution Act, 1974

Constitution Act (No. 1), 1975

Constitution Act (No. 2), 1975



**The Role of
The United Kingdom
in the Amendment
of the Canadian Constitution**

Canada

PREFACE

As discussion continues in Canada of the request for enactment by the United Kingdom Parliament of the proposed *Canada Act* and its Schedule, the *Constitution Act, 1981*, there is growing interest in the Parliament of Canada and among Canadians concerning the role of the United Kingdom in relation to our constitution. The recent publication of the Report of the Foreign Affairs Committee of the U.K. House of Commons entitled "British North America: The Role of the United Kingdom in the Process of Constitutional Change in Canada,"

The Role of The United Kingdom

I have therefore had this background paper prepared for the information of members of the House and in the Commons of Canada, and for Canadian organizations, so that they may better appreciate the respective responsibilities of the Parliaments and Governments of

in the

Amendment of the Canadian Constitution

Honourable Jean Chrétien
Minister of Justice of Canada
March 1981

Background Paper
Published by the Government of Canada

Honourable Jean Chrétien
Minister of Justice of Canada
March 1981

PREFACE

As discussion continues in Canada of the request for enactment by the United Kingdom Parliament of the proposed *Canada Act* and its Schedule, the *Constitution Act, 1981*, there is growing interest in the Parliament of Canada and among Canadians concerning the role of the United Kingdom in relation to our constitution. The recent publication of the Report of the Foreign Affairs Committee of the U.K. House of Commons entitled "British North America Acts: The Role of Parliament", commonly referred to as the "Kershaw Report", has also attracted considerable attention in Canada.

I have therefore had this background paper prepared for the information of members of the Senate and House of Commons of Canada, and for Canadians generally, that they may better appreciate the respective responsibilities in this important process of the Parliaments and Governments of these two sovereign Commonwealth countries.

Honourable Jean Chrétien
Minister of Justice of Canada
March 1981

PRELIMINARY

As discussion continues in Canada of the request for enactment by the United Kingdom Parliament of the proposed Canada Act and its Schedule, the Constitution Act, 1981, there is growing interest in the Parliament of Canada and among Canadians concerning the role of the United Kingdom in relation to our constitution. The recent publication of the Report of the Foreign Affairs Committee of the U.K. House of Commons entitled "British North America Act: The Role of Parliament", commonly referred to as the

This is the English version of a document printed in Canada in English and French. The bilingual version is available on request from:

The Canadian High Commission
1 Grosvenor Square
London, W1X 0AB

Honorable Jean Chrétien
Minister of Justice of Canada
March 1981

Table of Contents

PARAGRAPH:

Introduction

Patriation and Amendment of Canadian Constitution	1-2
Role of the United Kingdom	3-8
Summary of Conclusions	9

Canada's Position

Canadian Independence	10
Legal Link with United Kingdom	11-12
United Kingdom Role Governed by Convention	17
Convention Applies Solely to Federal Requests	18
Statute of Westminster Preserved Constitutional Status Quo	19-22
The Amendments: Convention Consistently Followed	23-29
The Reason for the Convention—Principle of Responsible Government	30
The Search for an Amending Formula—54 Years of Dead- lock	31
The Need for a Solution	32-35
The Proposed Patriation Package	36-45
Provincial Opposition Judicially Rejected	46-48

Kershaw Report

General	49-50
Inadequacy of Evidence	51-54
The Kershaw Position:	55-56
A. Role of British Authorities	57-62
B. Constitutionality of Canadian Proposal	63-71
C. Circumstances Justifying British Compliance	72-76
D. Interference with Canadian Independence	77-80
Conclusions	81-82

Table of Contents

Page

1-2	Introduction
3-8	Partition and Amendment of Canadian Constitution
9	Role of the United Kingdom
10	Summary of Conclusions
11	Canada's Position
12	Canadian Independence
13-14	Legal Link with United Kingdom
15-16	United Kingdom Role Governed by Convention
17	Convention Aims for Federal Requests
18-19	Status of Westminster Reserved Constitutional Status Quo
20-21	The Amendment Convention Constantly Follows
22	The Reason for the Convention—Principle of Responsibility
23	Conclusion
24	The Search for an Anchoring Formula—of Legal or Moral
25	Look
26-27	The Need for a Solution
28-29	The Proposed Revision Package
30-31	Provisional Opposition Initially Rejected
32-33	Keir Report
34-35	General
36-37	Independence of Evidence
38-39	The Keir Report
40-41	A. Role of British Authorities
42-43	B. Responsibility of Canadian Report
44-45	C. Circumstances Justifying British Complaint
46-47	D. Interference with Canadian Independence
48-49	Conclusion

Appendices

PARAGRAPH:

Appendix A—Constitutional Amendments Affecting Provincial Interests

1871	1-2
1886	3
1907	4
1915	5-7
1930	8-10
1931	11-13
1940	14-16
1943	17-19
1946	20
1949 #1	21-24
1949 #2	25-26
1951	27
1960	28
1964	29

Appendix B—The Unsuccessful Search for an Amending Formula

Appendix C—Substantive Constitutional Reforms Discussed 1967-1980

Appendix A

The following table lists the amendments to the Constitution of the State of New York which have been adopted since 1892.

Appendix B—Constitutional Amendments Affecting Provincial Interests

1-5	1892
6	1894
7	1901
8	1912
9-10	1930
11-12	1931
13-16	1940
17-19	1943
20	1946
21-24	1949-51
25-28	1949-52
29	1951
30	1960
31	1964

Appendix B—The Unsuccessful Search for an Amendment

Appendix C—Substantive Constitutional Provisions (1967-1980)

Introduction

Patriation And Amendment of the Canadian Constitution

1. Canada, now an independent nation, is composed of what were once British colonial territories. Because of these colonial origins, the basic documents of the Constitution of Canada are British statutes, which cannot at present be amended in certain important respects without the co-operation of the Parliament of the United Kingdom. This anachronistic situation is inappropriate to the status of a wholly autonomous member of the world community. It is also inconvenient for the British authorities who are called upon from time to time to provide the legal sanction for Canadian constitutional amendments.

2. For the past 54 years, the Government of Canada and the various provincial governments have attempted unsuccessfully to reach agreement on a legal device that would end this unsatisfactory state of affairs by "patriating" the Constitution, and establishing an all-Canadian procedure for its future amendment. In view of this prolonged failure, and of the impediment it poses to desired substantive reforms of the Canadian Constitution, the Government of Canada has proposed to the Parliament of Canada a measure to break the deadlock.¹ Consisting of a patriation provision and an amending formula, together with certain other reforms that have long been under discussion, the proposed amendment will finally put an end to the need for future British involvement in Canada's constitutional amendment process. To accomplish this goal, however, the co-operation of the United Kingdom Parliament will be required one last time.

The Role of the United Kingdom

3. The role of United Kingdom authorities in these matters is governed by a very important two-part convention:

- (a) It is only the Government and Parliament of Canada which may request the Parliament of the United Kingdom to exercise its legal power to amend the Constitution of Canada; and
- (b) Whenever such a request is received, it is always complied with.

This is a long-established and invariably honoured convention of British-Canadian relations.

4. Some opponents of the current patriation proposal have asserted that British authorities possess not just legal powers with respect to the amend-

¹ See: *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, Ottawa, Feb. 13, 1981.

ment of the Canadian Constitution, but also the political discretion to decide how and in what circumstances that power should be exercised. Unfortunately, this mistaken notion has also been adopted recently by the Foreign Affairs Committee of the United Kingdom House of Commons (Kershaw Committee), in advice offered by the Committee to the United Kingdom Parliament concerning the patriation proposal.²

5. The Kershaw Committee has advised the United Kingdom Parliament that:

- (a) "The UK Parliament's fundamental role in these matters is to decide whether or not a request conveys the clearly expressed wishes of Canada as a whole, bearing in mind the federal character of the Canadian constitutional system."³
- (b) "Where a requested amendment or patriation would directly affect the federal structure of Canada, and the opposition of Provincial governments and legislatures is officially represented to the UK Government or Parliament, the UK Parliament is bound to exercise its best judgment in deciding whether the request, in all the circumstances, conveys the clearly expressed wishes of Canada as a federally structured whole."⁴
- (c) An appropriate level of provincial concurrence that would be required to achieve this would be one which is "commensurate with that required by the least demanding of the formulae for a post-patriation amendment (similarly affecting that federal structure) which have been put forward by the Canadian authorities"⁵.
- (d) Alternatively, "it might well be proper for the UK Parliament to accede" without the concurrence of the provinces to a patriation/amendment request if it were substantially altered from the concurrent proposal in certain respects specified by the Committee.⁶

6. This advice ignores the convention that United Kingdom authorities do not exercise political discretion with respect to requests from the Government and Parliament of Canada for amendment of the Constitution of Canada. It suggests, moreover, that discretion may be exercised in ways that would require British involvement of a very detailed nature in Canadian constitutional and political affairs—matters with respect to which only Canadian authorities have a governmental mandate from the Canadian electorate. Such an approach would be wholly without precedent in British-Canadian relations.

² *The British North America Acts: The Role of Parliament*, House of Commons, First Report of Foreign Affairs Committee, 1980-81, Jan. 30, 1981 (hereinafter called the *Kershaw Report*).

³ Para. 14(8), based on paras. 107 and 111.

⁴ Para. 14(9), based on para. 114.

⁵ Para. 14(10), based on para. 114.

⁶ Para. 115.

Should the advice of the Kershaw Committee be followed, the consequences would be grave. A Canadian constitutional impasse of already excessive duration would be prolonged indefinitely, Canada's cordial relations with the United Kingdom would be severely strained, and the future course of Commonwealth relationships could be seriously affected.

8. In view of the seriousness of these and other ramifications that could flow from the advice of the Kershaw Committee, it is important that the Government of Canada record its position on these matters, indicate in what respects it believes the *Kershaw Report* to be in error, and explain the severe problems to which reliance on the advice contained in that report could lead.

Summary of Conclusions

9. It may be useful to outline in summary form at this point the major conclusions that are reached in the ensuing commentary:

- (a) The Constitution of Canada needs to be patriated, and an all-Canadian procedure established for future constitutional amendments. (Paras. 31-35.)
- (b) The patriation/amendment package should include certain substantive constitutional improvements, such as a Charter of Rights and Freedoms, the extension of provincial jurisdiction over natural resources, and a commitment to the equalization of economic opportunities throughout Canada. (Paras. 32-44.)
- (c) These constitutional reforms, which are the subject of a current proposal by the Government of Canada, have been the subject of extremely lengthy study, consultation and discussion by and among the federal and provincial orders of government in Canada, as well as by many other segments of Canadian society. (Paras. 31 and 40-41.)
- (d) Nothing in these proposed amendments would transfer any provincial right or power to the federal order of government. The only way in which they would affect the federal structure of Canada or federal-provincial relationships would be by *expanding* provincial powers with respect to natural resources, and giving the provinces a legal role in the amendment process for the first time. (Paras. 43-44.)
- (e) Because of the peculiar nature of the Canadian Constitution, these proposed amendments require the legal sanction of the Parliament of the United Kingdom. Once enacted, they will put an end to this anachronistic procedure for all future amendments. (Paras. 11-12 and 36.)
- (f) There is no constitutional requirement, whether based on convention, the nature of federalism, or any other circumstance, that the

concurrence of Canadian provinces must be obtained before the Government and Parliament of Canada seek amendments of the type proposed. (Paras. 63-71.)

- (g) There is a long-standing convention to the effect that the legal power of the United Kingdom Parliament to amend the Canadian Constitution is exercised in accordance with the wishes of the Government and Parliament of Canada. This convention has *always* been honoured by United Kingdom authorities. The convention ensures that Canadians have, in reality, full control of their Constitution. British authorities retain no political responsibility for the Constitution of Canada because they are not answerable to the Canadian electorate. (Paras. 13-17 and 57-62.)
- (h) There is nothing in the proposed patriation package that would justify deviation from the convention on this occasion. (Para. 45.)
- (i) Failure to respect the convention would place severe strains on British-Canadian and Commonwealth relations. (Paras. 50 and 81-82.)

Canada's Position

Canadian Independence

10. Canada is a totally independent nation in reality, though not in law. It is comprised of former British colonies and territories, of course, and the *British North America Act, 1867*,⁷ which brought the new nation into being, did not entirely end its colonial status. Canada's independence developed rapidly thereafter, however, and was complete, as a matter of practical reality, by the end of the First World War. That fact was formally announced to the world by the *Balfour Declaration* of 1926, in which representatives of the Government of the United Kingdom joined with those of several Dominion Governments to proclaim that the United Kingdom and the Dominions were "autonomous" and "equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united in a common allegiance to the Crown".⁸

Legal Link With United Kingdom

11. Canadians take pride in the fact that our Constitution, unlike those of many nations, is entirely lawful in both its origins and its subsequent development. The Constitution of Canada was not the product of armed revolution, as in the case of the United States. It was created instead by legal devolution from the Parliament of the United Kingdom. Since then, every stage in the growth of the Canadian Constitution has been marked by scrupulous adherence to the rule of law. An unbroken chain of legality extends from the time Canada was a British colony to its present status as a fully autonomous member of the world community.

12. At the time of the *Balfour Declaration* in 1926, the Parliament and Government of the United Kingdom retained, as a vestige of Canada's former colonial status, very sweeping legal powers over Canada and its Constitution. The *Declaration* did not change that legal situation; it was a political document that simply gave explicit recognition to the independence the Dominions had already attained in reality, though not in law. To change the legal situation a statute of the United Kingdom Parliament would be required.

United Kingdom Role Governed by Convention

13. The apparent paradox of independence in reality, but dependence in law, was resolved by a constitutional device that has been developed to a high degree of refinement under the British constitutional tradition: the

⁷ 30 and 31 Victoria, c. 3 (United Kingdom).

⁸ *Report of Inter-Imperial Relations Committee of Imperial Conference, 1926.*

restraint of legal power by political usage or convention. Under British and Commonwealth constitutional practice, it is common for an individual or agency of government in whom some legal power has been vested to exercise that power in accordance with the wishes of some other agency that possesses no legal authority in the matter, but enjoys a democratic mandate from the voters affected. Thus, for example, the Queen in the United Kingdom and the Governor-General in Canada have, legally, a final veto power over all proposed legislation of the respective national Parliaments of those countries. This arises from their legal right to grant or refuse Royal Assent. In reality, however, this legal power is exercised on the advice of the Prime Minister and Cabinet of the day. This separation and balancing of legal and democratic authority is the key to the success with which constitutions shaped in the British mold have been able to accommodate the shifting needs of changing times. It is one of the most characteristic and useful features of the British constitutional approach.

14. From the earliest years of Canada's independence, this familiar constitutional technique has been applied consistently in the realm of British-Canadian relations to overcome the apparent contradiction involved where one autonomous nation continues to hold important legal powers over another. A convention developed under which British authorities exercised their remaining legal powers over Canada and Canadian affairs in accordance with the wishes of the Canadian authorities who have the real democratic responsibility for such Canadian affairs: the Government and Parliament of Canada.

15. That this convention was fully applicable to the amendment of the Constitution of Canada long before the *Balfour Declaration* is well illustrated by the procedures followed in connection with the enactment of the *British North America Act, 1915*⁹. This statute amended the *B.N.A. Act* with respect to the number and distribution of Senators, and established a minimum provincial representation in the House of Commons. These matters were of considerable importance to the provinces, and had been the subject of an inconclusive meeting of provincial Premiers. The Government of Canada did not consult the provinces before presenting a resolution proposing the amendment to the Senate and House of Commons. An alteration suggested by the Government of British Columbia was incorporated into the resolution, but an objection by the Government of Prince Edward Island was rejected. The Resolution for a Joint Address to the Crown requesting the amendment was passed by the Senate and House of Commons, despite suggestions in both Houses that the provinces should first be consulted. In the Senate, a motion to that effect was rejected on

⁹ 5 and 6 George V, c. 45 (United Kingdom). (See Appendix A for fuller description.)

division.¹⁰ The Parliament of the United Kingdom, paying no heed to the controversy surrounding the request, enacted the amendment in the precise form set out in the draft bill embodied in the Canadian Joint Address.

16. The 1915 amendment has been cited because, being the last disputed amendment before the *Balfour Declaration*, it demonstrates that well before Britain's formal acknowledgment of Dominion independence, United Kingdom parliamentarians had adopted an attitude of non-involvement in Canadian political and constitutional affairs, even in a situation in which an amendment requested by federal authorities significantly affected provincial interests, there was public provincial opposition, and some Canadian parliamentarians were calling for provincial consultation. This is by no means an isolated example. The 1907 amendment, which will be discussed later,¹¹ offers even earlier evidence of the convention.

17. Indeed, while the convention of British non-intervention in the real governance of *other* Canadian affairs has not always been as absolute as it was by the time of the *Balfour Declaration*, it had been evident from the beginning where important *constitutional* issues were concerned. As early as 1868, a unanimous Address to the Queen from the Nova Scotia House of Assembly, requesting the removal of that province from Confederation, was rejected by British authorities. A petition to the same effect, signed by 36 of the 38 House of Assembly members and 16 of 19 Nova Scotia members of the Canadian House of Commons, resulted in a motion in the United Kingdom Parliament to send an investigatory commission to Nova Scotia, but the motion was defeated by a large majority in both British Houses.¹² The reason for the "determined attitude" of British authorities not to entertain Nova Scotia's request for a change in its constitutional status was what one scholar has described as the view of the British Colonial Secretary "that the province should look to Ottawa for the redressing of her grievances".¹³ The Under-Secretary for the Colonies told Parliament that British authorities have "no business to inquire into the local arrangements of the North American Provinces".¹⁴ Every subsequent provincial attempt to secure constitutional amendment from British authorities has met with a similar response.¹⁵

Convention Applies Solely to Federal Requests

18. It will be noted that it is the federal order of government—the Government and Parliament of Canada—to whose requests the convention

¹⁰ See Appendix A.

¹¹ See below, para. 59, ff.

¹² P. Gerin-Lajoie, *Constitutional Amendment in Canada*, pp. 139-40.

¹³ *Ibid.*, p. 139.

¹⁴ *Ibid.*, p. 140.

¹⁵ *Ibid.*, p. 140, ff.

applies. Requests and submissions from provincial authorities concerning constitutional amendments have been consistently declined. The reason for this is clear: in relations with the rest of the world, Canada's sole official representative is its national government. As the Government of Prince Edward Island acknowledged in its brief to the Kershaw Committee:

"The federal government is the paramount of the two levels of government of Canada and, to a large extent, the embodiment of the nation, particularly beyond the boundaries of Canada."¹⁶

Statute of Westminster Preserved Constitutional Status Quo

19. Although acceptance of this convention avoided the worst disadvantages of continuing British legal authority over an independent Canada, it was nevertheless thought desirable to make the law correspond to the reality as soon as possible. A series of conferences was accordingly held for this purpose. The result was the *Statute of Westminster, 1931*,¹⁷ which gave legal expression to the independence of the Dominions recognized by the *Balfour Declaration* by enacting, among other things, that the United Kingdom Parliament would make no future laws extending to a Dominion without the request and consent of that Dominion.¹⁸

20. In Canada's case, however, it proved impossible to terminate British legal authority over Canada altogether at that time. Unlike the other Dominions, Canada did not possess an internal procedure for the amendment of its own Constitution. The only way in which most aspects of the *British North America Acts* could be amended was by statute of the United Kingdom Parliament. Although discussions had been held between federal and provincial governments in 1927 with a view to devising a satisfactory Canadian amending formula, no agreement had yet been reached. All parties to these discussions had acknowledged that any permanent amending formula should involve some element of provincial consultation and/or consent, but they could not agree as to the appropriate degree of provincial involvement. Provincial spokesmen were concerned that, if the *Statute of Westminster* transferred all legal powers to Canada in constitutional matters before agreement was reached on an amending formula with a suitable provincial role, the past practice of unilateral amendment requests by the federal order of government might be converted from a convention to a legally binding statutory stipulation. This, they feared, might foreclose the possibility of developing a future amending formula that included a satisfactory element of provincial consultation and consent. As a result, section 7

¹⁶ *Representation of the Government of Prince Edward Island to the Foreign Affairs Committee . . . Regarding the British North America Acts*, Nov. 28, 1980, p. 3.

¹⁷ 22 George V, c. 4 (United Kingdom).

¹⁸ S. 4.

was drafted to exempt the amendment of the *B.N.A. Acts* from the ambit of the *Statute of Westminster* for the time being.¹⁹ This exemption left unaltered the convention of unilateral federal requests for amendments and of British compliance with such requests. As the *Kershaw Report* has said, its effect was "simply to maintain the status quo in relation to constitutional amendments".²⁰

21. As explained above, the "status quo" concerning constitutional amendments that section 7(1) of the *Statute of Westminster* preserved was a situation in which British authorities did not exercise any political responsibility, but merely employed the legal powers entrusted to them in the manner requested by the Government and Parliament of Canada, without enquiring into the circumstances leading to the request. Viscount Bennett, who was Prime Minister of Canada when the *Statute of Westminster* was passed, and who later served in the House of Lords, told that House in 1946 (in connection with an amendment that Quebec opposed) that the practice was so well established as to bestow, in reality, the amending power on the federal order of government:

"They cannot amend it directly, but they do it indirectly, because we have agreed that we will consent to pass any legislation that they may petition to have passed by this Parliament."²¹

22. Insofar as provincial involvement in the amendment process was concerned, the status quo was one in which provinces were sometimes consulted about amendments and sometimes not. The final decision as to whether a request for amendment should be made remained in federal hands, and requests were sometimes made in spite of provincial objections.

The Amendments: Convention Consistently Followed

23. That the status quo before 1931 was as it has been described above, and that it remained unaltered thereafter, is thoroughly documented by the history of Canadian constitutional amendments since 1867. The Parliament of the United Kingdom has enacted legislation amending or affecting the *B.N.A. Acts* on 21 occasions. Twelve of these amendments were passed up to (and including) the *Statute of Westminster, 1931*, and nine have been enacted since then. In every case the request has come from the federal order of government, always (with two early and inconsequential exceptions)²² in the form of a Joint Address to the Crown from the Senate and House of Commons. Every request has been granted (apart from occasional technically-based alterations in drafting) in the form requested.

¹⁹ S. 7(1).

²⁰ Para. 99.

²¹ United Kingdom, *House of Lords Debates*, 1946, pp. 698-99.

²² Gerin-Lajoie, note 12 above, pp. 145-6.

Several of these amendments have affected provincial interests significantly, and some such amendments have been requested without provincial consultation or consent. Indeed, on a few notable occasions such requests have been made in the face of public opposition by one or more provinces. Yet the Government and Parliament of the United Kingdom have never concerned themselves about the existence or extent of provincial consultation or consent.

24. The practice of British non-involvement in the merits of Canadian constitutional amendments has been frequently and uniformly confirmed in public statements by British Ministers of the Crown and senior parliamentarians over a period of many years. Some examples include the following:

—July 10, 1940—United Kingdom, *House of Commons Debates*, pp. 1177-81 (Re *B.N.A. Act, 1940*):

“*The Solicitor-General (Sir William Jowitt)* I beg to move, ‘That the Bill be now read a Second time.’

This House will remember that the Statute of Westminster, which gave legal recognition to the fact that the Dominion of Canada had already obtained full sovereignty in its own affairs, expressly preserved the powers of the British North America Act. Therefore, as a matter of mere legal machinery, it is still necessary, until some better method is evolved for amendment of the British North America Act, for the extension of the Canadian powers to be passed by this Parliament. But our Parliament, in passing such legislation, is merely carrying out the wishes of the Dominion Parliament, and in that way the legal position is made to square with the constitutional position. Hence Members will see that the Preamble to this Bill recites the fact that:

‘the Senate and Commons of Canada in Parliament assembled have submitted an Address to His Majesty praying that His Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom.’

In accordance with these provisions we are therefore carrying out the wishes of the Canadian Parliament in passing this piece of legislation. Nothing further need be said, I think, by way of explanation

My justification to the House for this Bill—and it is important to observe this—is not on the merits of the proposal, which is a matter for the Canadian Parliament; if we were to embark upon that, we might trespass on what I conceive to be their constitution-

al position. The sole justification for this enactment is that we are doing in this way what the Parliament of Canada desires to do. . . .

I do not know what the view of the Provincial Parliaments is. I know, however, that when the matter was before the Privy Council some of the Provincial Parliaments supported the Dominion Parliament. It is sufficient justification for the Bill that we are morally bound to act on the ground that we have here the request of the Dominion Parliament and that we must operate the old machinery which has been left over at their request in accordance with their wishes.”

—July 22, 1943—United Kingdom, *House of Commons Debates*, pp. 1100-1102 (Re *B.N.A. Act, 1943*):

“*The Secretary of State for Dominion Affairs (Mr. Attlee)*: I beg to move, ‘That the Bill be now read a Second time.’

(T)he procedure ... for amending the British North America Act remains as it was before the Statute of Westminster. This procedure has for many years been followed on the basis of an Address presented to the King by both Houses of the Canadian Parliament, and that is what has been done on this occasion. I understand that the address was carried in both Houses by very large majorities. The Clauses of the Bill follow substantially the terms of the Address passed in the Canadian Parliament, and the Recital corresponds closely with that adopted on the last occasion on which similar legislation was passed here

I have no information as to any Province objecting, but, in any case, the matter is brought before us by an Address voted by both Houses of Parliament, and it is difficult for us to look behind that fact.”

—July 22, 1946—United Kingdom, *House of Lords Debates*, p. 698 (Re *B.N.A. Act, 1946*):

“*Viscount Bennett*: There has been a good deal of discussion about an amendment of the Constitution being a political measure. Canada is the only one of the Dominions in which a Party majority can amend the Constitution. They cannot amend it, directly, but they do it indirectly, because we have agreed that we will consent to pass any legislation that they may petition to have passed by this Parliament.”

—December 2, 1949—United Kingdom, *House of Commons Debates*, pp. 1458-1459 (Re *B.N.A. Act, 1949 No. 2*):

“*The Secretary of State for Commonwealth Relations (Mr. Philip Noel-Baker)*: I beg to move, ‘That the Bill be now read a Second time.’

The Bill is cast in the terms of the Address adopted by the Federal Parliament of Canada, and, of course, we are all ready to do what they desire. In moving his Resolution about the Address to His Majesty, the Canadian Prime Minister said that it dealt with the attributes of Canada as an adult sovereign State among the States of the world.”

—May 30, 1951—United Kingdom, *House of Commons Debates*, p. 225 (Re *B.N.A. Act, 1951*):

“*The Secretary of State for Commonwealth Relations (Mr. Gordon-Walker)*: I beg to move, ‘That the Bill be now read a Second time.’

This is really a Canadian Bill, or rather a Canadian Act, because it has been passed by both Houses of the Canadian Parliament, and it comes before us as a matter of constitutional convenience. It would therefore be quite improper for me to go into the merits of the Bill on either side”

—November 11, 1960—United Kingdom, *House of Commons Debates*, pp. 1369-1370 (Re *B.N.A. Act, 1960*):

“*The Minister of State for Commonwealth Relations (Mr. C. J. M. Alport)*: I beg to move, ‘That the Bill be now read a Second time.’

We are therefore to all intents and purposes acting in what is a formal capacity for the Canadian Parliament in a matter which is solely its concern. In accordance with long established precedent, we refrain from discussing the merits of a Bill submitted to us amending the British North America Acts when this has been introduced in consequence of Addresses to Her Majesty adopted by both Houses of the Canadian Parliament.”

—July 25, 1979—United Kingdom, *House of Lords Debates*, p. 2007:

“*Lord Trefgarne (Government Whip)*:

The Statute of Westminster reserves to the United Kingdom Parliament a purely technical role in relation to the British North America Act.

I must, therefore, emphasise again to the House that the United Kingdom Parliament's power over the Canadian Constitution is strictly limited. If Parliament were, in spite of constitutional precedent, to decline to act on a request from the Canadian Government, we would lay ourselves open to charges of interference in Canadian domestic politics. Even to query whether there was internal support in Canada for a request to patriate the constitution would be tantamount to questioning the authority of the Canadian Parliament or Government to make it. Further, for the United Kingdom Parliament to purport to legislate otherwise than at the request and with the consent of the Canadian Government would conflict with the agreements reached with the Dominions at the Imperial Conference of 1930 and the Statute of Westminster of 1931, to which I have already referred. The Federal Government is the sole representative of Canada in international relations. We cannot be the arbiters of the correct balance of the case presented to us: this must be the sole responsibility of the Canadian Government."

25. The frequency and consistency of such public statements by representatives of the British Government (always without dissent from any quarter) prompted one witness before the Kershaw Committee to admit that, although he disagreed with the view they express, it has become "an article of faith".²³

26. Appendix A contains a summary of the fourteen most important amendments to the Canadian Constitution that have been enacted since 1867, indicating the extent to which they have affected provincial interests and the extent, if any, of provincial consultation, consent or disagreement. (None of the other seven amendments had any significant effect on provincial interests.) It is submitted that the survey in Appendix A fully confirms the observations made above. All fourteen amendments described had significant effects on the rights, powers or interests of the provinces. While some of these were of relatively minor importance, others had, or were perceived to have, serious impact on provincial interests, or on federal-provincial relationships. Of the fourteen amendments, nine were requested and enacted without provincial consent, and a tenth (1960) had only partial consent. Only four were fully agreed to by the provinces. Even more significant is the fact that six amendments (1907, 1915, 1943, 1946, 1949 No. 1, 1949 No. 2) were requested and enacted in the face of opposition by one or more provinces. Most important of all, the United Kingdom Parliament did not hesitate on any of these occasions, even when strong provincial

²³ Submission of Dr. Geoffrey Marshall, p. 3.

opposition was known, to pass the amendment requested by the Government or Parliament of Canada.

27. Insofar as both the actual or apprehended impact on provincial interests and the extent of provincial opposition are concerned, the most striking of the amendments were probably the two enacted in 1949. These will be discussed next.

28. *The B.N.A. Act, 1949, No. 1*²⁴ added Canada's tenth province, Newfoundland, to Confederation. This significantly affected the interests of the other nine provinces in a variety of ways, such as by reducing their proportionate representation in the Senate and the House of Commons, and by increasing claims on federal subsidies and services. Quebec was especially affected, in that its disputed boundary with Labrador was confirmed by the Act.²⁵ Yet neither Quebec nor any of the other existing provinces was consulted about the matter. The Premiers of two provinces, Quebec and Nova Scotia, stated publicly that the provinces should have been consulted.²⁶ But the United Kingdom Parliament passed the amendment without regard to the absence of provincial involvement in the process.

29. *The B.N.A. Act, 1949, No. 2*²⁷ bestowed on the Parliament of Canada the power to amend the "Constitution of Canada" in certain respects.²⁸ While the ambit of this amendment has subsequently been held to extend only to matters of exclusive concern to the federal order of government,²⁹ the governments of several provinces were very concerned at the time that the new federal power might permit the Parliament of Canada to encroach on matters of provincial competence. Correspondence between the Prime Minister and the provincial Premiers, tabled in the Canadian House of Commons, gave public notice of substantial provincial dissent to a unilateral federal amendment request on the matter. Quebec and Alberta "outspokenly" demanded provincial consultation.³⁰ Ontario doubted "the advisability of dealing with the matter piecemeal without first attempting general agreement", and Nova Scotia expressed the same view.³¹ Manitoba declined to agree without a more careful examination of the implications for the "provincial position".³² In light of this widespread provincial dissent, the Opposition introduced a motion in the Canadian House of Commons to delay the amendment request until after a federal-provincial conference on constitutional amendment, but the motion was defeated, and the proposed

²⁴ 12 and 13 George VI, c. 22 (United Kingdom).

²⁵ *Terms of Union*, s. 2.

²⁶ Gerin-Lajoie, note 12 above, p. 129.

²⁷ 13 George VI, c. 81 (United Kingdom).

²⁸ S. 91(1).

²⁹ *Senate Reference* (1980) 102 D.L.R. (3rd) 2 (S.C.C.).

³⁰ Gerin-Lajoie, note 12 above, at p. xvii. The word "outspokenly" is that of Dr. Gerin-Lajoie.

³¹ *Ibid.*

³² *Ibid.*, p. xviii.

Joint Address was passed and dispatched to Westminster. The requested amendment was enacted by the United Kingdom Parliament promptly and without question.³³

The Reason for the Convention: Principle of Responsible Government

30. It is important to understand that this history of invariable respect for the convention of British non-involvement in Canadian constitutional affairs is no mere question of protocol. The convention is rooted in one of the most fundamental notions of the British constitutional heritage: the principle of responsible government. Democratic systems like those of the United Kingdom and Canada place political decision-making in the hands of those who are responsible through the ballot box to the persons who will ultimately be affected by the decisions in question. The governmental authorities of the United Kingdom have no Canadian electorate to answer to; the Government and Parliament of Canada do. The Parliament of Canada represents every region of Canada, and is fully responsible for its actions to those with whom the ultimate political judgment must always rest in democracies: the voters of the nation.

The reason that British authorities have always respected the wishes of the Government and Parliament of Canada with regard to the amendment of the Constitution of Canada is that to do otherwise would be to deny the principle of responsible government.

The Search for an Amending Formula—54 Years of Deadlock

31. Since 1927, discussions have been held intermittently between federal and provincial authorities in Canada with a view to agreeing upon an all-Canadian amending formula that would permit this last vestige of British legal authority over Canadian affairs to be terminated. These discussions continued until the summer of 1980. Patriation and an amending formula have been the subject of ten major federal-provincial processes of consultation—in 1927, 1931, 1935-36, 1950, 1960-61, 1964, 1967-71, 1975-76, 1978-79 and 1980. These subjects have been discussed by federal and provincial governments in thirteen first ministers' conferences, seventeen ministerial conferences, and countless meetings of officials. These efforts span the ministries of six Canadian Prime Ministers (two Conservative and four Liberal), and some dozens of provincial first ministers. There appeared to be agreement to the "Fulton-Favreau Formula" in 1965, but the Quebec Government changed its mind at the last moment. There was unanimous tentative agreement in 1971 to what has become known as the "Victoria Formula", but final acceptance was frustrated by failure to reach agreement

³³ There were some minor and purely technical drafting modifications: *ibid.*, p. xxii.

on other aspects of the constitutional amendment "package" of which it formed a part. Appendix B describes this unsuccessful search more fully.

The Need for a Solution

32. The failure of the Victoria Conference in 1971 frustrated more than the search for a satisfactory future amending formula. It also brought to an unsuccessful conclusion several years' efforts to reach agreement on the reform of various substantive aspects of the Canadian Constitution. Lengthy discussions had been underway, for example, concerning the enactment of a constitutionally entrenched Charter of Rights and Freedoms. Methods were being sought to express the commitment of all governments to the goal of reducing regional disparities and promoting equality of opportunity for all Canadians. Proposals had also been under study for a number of possible changes in the distribution of legislative powers between the federal and provincial orders of government. All these negotiations came to an end. Although several attempts to reach agreement on these and other matters have subsequently been made, none has succeeded. Items as important and diverse as ownership and management of natural resources, jurisdiction over electronic communications, and responsibility for family law, have been added to the list of constitutional issues that have been discussed and require resolution. And the list continues to grow. Appendix C contains a description of the substantive constitutional reforms discussed between 1967 and 1980.

33. It is also striking, in reviewing the past attempts to find agreement on an amending formula or on substantive changes, that no combination of items or ordering of priorities has brought success. In the first six attempts at constitutional reform described in Appendix B, covering the years 1927 to 1966, agreement was unsuccessfully sought on patriation and an amending process alone. Substantially the same option was proposed by the Prime Minister of Canada in 1976 in the eighth attempt, and the Premiers of the provinces concluded that this would not be acceptable without other changes being adopted at the same time. On the other hand, the seventh (1967-71), ninth (1978-79) and tenth (1980) attempts involved discussion of far-reaching substantive changes, and this approach also failed to bring about agreement.

34. This prolonged failure to achieve even minor constitutional reforms by the consultative process has played into the hands of those who seek much more radical constitutional changes. This was dramatically illustrated in 1976 by the decision of Quebec voters to elect a provincial government dedicated to removing Quebec from Confederation. While it is true that those same voters rejected the "sovereignty-association" option in 1980, it is probable that their decision was based, in part, on assurances made by

federalist speakers (including most provincial premiers) during the referendum campaign. Those assurances were to the effect that substantive reforms to the present Canadian Constitution, which would ensure that Confederation remains an attractive permanent option for the people of Quebec, are attainable. Yet the September 1980 First Ministers' Conference on Constitutional Reform, convened after the referendum and after a summer of intensive federal-provincial consultation, ended, once more, in failure.

35. The efforts to reach agreement at the September 1980 conference were genuine and energetic on all sides. All eleven First Ministers had agreed to a list of twelve items for negotiation. Some had been proposed by the federal government and others by various provincial governments. In the negotiations that ensued, some Premiers accepted some of the Prime Minister's proposals, the Prime Minister accepted some of the Premiers' proposals, some Premiers accepted some proposals of other Premiers, some Premiers rejected the proposals of other Premiers, and some Premiers rejected some proposals of the Prime Minister. When a summary of the positions of all First Ministers on each of the twelve items was made, it became clear that there was not unanimous consent on any of the twelve items, but the reasons for this lack of consensus were many and varied, and blame for the failure to reach consensus cannot be assigned to anyone. The fault lay with the process; the meeting demonstrated once more that progress on substantive constitutional reform cannot be expected until an all-Canadian amendment procedure is in place.

The Proposed Patriation Package

36. Following the failure of the 1980 constitutional conference the Government of Canada proposed a measure to break the impasse. The Parliament of the United Kingdom would be requested to exercise its legal power of amendment one final time, by terminating its authority over the Constitution of Canada, establishing an all-Canadian amendment formula, and providing for two substantive matters on which there is wide agreement among Canadians: the entrenchment of a Charter of Rights and Freedoms, and the recognition of a commitment to reduce regional disparities and equalize opportunities for all Canadians.

37. The amending formula proposed was based, with modifications, on the Victoria Formula (on which there was unanimous provincial consent in 1971), together with a procedure for substituting a more satisfactory formula if one can be devised. The chief modification made to the Victoria Formula was to add the possibility of amending the Constitution on the authority of a referendum to the voters, as well as on the authority of the Parliament of Canada and legislatures of the provinces.³⁴ There was nothing

³⁴ S. 46.

radical in that feature; the Constitution of Australia is also amendable by referendum.³⁵ Nor was there anything about it that was oppressive to provincial interests; it required the same extent and distribution of provincial concurrence as the Victoria Formula, which is considerably more demanding than the requirements of the Australian Constitution.

38. It should not be overlooked that the proposal provided for an alternative amending procedure to be substituted for this modified Victoria Formula if agreement could be reached on a suitable alternative within two years of patriation. For the first two years after patriation, unanimous federal and provincial consent would be required for constitutional amendments,³⁶ and during that period the Prime Minister of Canada would be required to convene constitutional conferences at least annually.³⁷ During this period agreement might be reached among all governments on a formula that would be preferred to the modified Victoria Formula that would otherwise come into effect at the end of the interim period. Even if unanimous agreement is not possible, but if an alternative amending formula should be agreed upon during that time by seven or more provinces representing at least 80% of the population, that alternative could be put to the people in a subsequent referendum, and if approved it would replace the modified Victoria Formula now proposed.³⁸

39. The equalization statement and Charter of Rights and Freedoms were matters on which there had been extensive federal-provincial consultation over many years. There is no significant opposition in Canada to the goals of equalizing opportunities and reducing regional economic disparities. The initiative for a Canadian Charter of Rights and Freedoms is not new nor is it confined to the present Government of Canada. Earlier statutory Bills of Rights in Canada included that of Saskatchewan, first adopted in 1947, and the *Canadian Bill of Rights*, adopted by Parliament in 1960. Also, as early as 1950, the entrenchment of a constitutional bill or charter was proposed by Saskatchewan at a federal-provincial constitutional conference. Since 1968 it has been a regular topic of federal-provincial discussion. Entrenchment of a limited list of rights was agreed upon at the Constitutional Conference in Victoria in 1971 (the adoption of the "Victoria Charter" subsequently failed, as noted above, for other reasons). The principle of entrenchment of a charter, and many of the specifics of the proposed Charter, were endorsed by a Joint Parliamentary Committee in 1972 and in 1978, by the Canadian Bar Association in 1977, by its Constitutional Committee in more detail in 1978, and by the Task Force on Canadian

³⁵ Constitution of Australia, s. 128.

³⁶ S. 36.

³⁷ S. 35.

³⁸ S. 42.

Unity in 1979. It is clear that there is general public support for such a measure. As a spokesman for the Official Opposition, the Honourable J. Epp, indicated to the Special Joint Committee on the Constitution on January 20, 1981:

“... in presenting our proposed amendments to the government’s resolution, we do so in the knowledge that it is the popular will of Canadians that our constitution rest in this country. It is also the popular will that we have a Charter of Rights and Freedoms for the Canadian people embedded in the constitution.”³⁹

40. The patriation proposal was introduced in the Canadian House of Commons in October 1980, by way of a Resolution for an Address to Her Majesty. After debate in the House, a Special Joint Committee of the Senate and House of Commons was established. That Committee held very lengthy public meetings on the matter, receiving a multitude of written and verbal presentations from an extremely wide range of Canadian organizations and individuals. A total of 962 written communications were received as of December 31, 1980.⁴⁰ Of these, 639 were from individuals, and 323 were from groups representing many thousands of other Canadians. While some of the communications were simple requests for information, or for an opportunity to appear before the Joint Committee, there were 572 submissions addressing the substance of the proposal, 409 from individuals, and 163 from organizations.⁴¹ Of that number, 10 individuals and 94 organizations presented their submissions in person at meetings of the Joint Committee, and made themselves available for questioning by members of the Committee.⁴² The Committee held 106 meetings on 56 sitting days for a total of 267 sitting hours. The Minister of Justice appeared as a witness 39 times and the Acting Minister of Justice appeared on his behalf nine times. Clause-by-clause consideration occupied 90.5 hours.⁴³ The meetings of the Committee were extensively covered by the news media and were, from an early stage, broadcast regularly on radio and television.

41. As a result of these hearings, the Special Joint Committee recommended numerous alterations to the proposal, including modification of the amending formula, a strengthening of the Charter of Rights and Freedoms, the recognition and affirmation of aboriginal and treaty rights of the aboriginal peoples, and the inclusion of a detailed elaboration and extension of the powers of the provinces with respect to natural resources. The Committee’s *Report*⁴⁴ is now undergoing careful study and debate by the

³⁹ *Minutes of Proceedings and Evidence*, Issue No. 41, p. 93.

⁴⁰ By Feb. 2, 1981, the total number of written communications had reached 1,208: *op. cit.* note 1 above, s. 3.

⁴¹ *Ibid.*, Appendix D.

⁴² *Ibid.*, Appendix B.

⁴³ *Ibid.*, s. 2.

⁴⁴ Note 1, above.

Parliament of Canada. By the time a request is made to the Parliament of the United Kingdom for enactment of the patriation package of amendments, extensive consultation will have taken place within the Canadian social and political structure, and Canada's political process will have provided a decisive democratic mandate for the proposal.

42. While the patriation proposal does not cover many of the substantive matters that must eventually be dealt with in the constitutional reform process, it is a vital first step in that direction. It will essentially complete the devolution of legal authority over the Canadian Constitution from British to Canadian hands, and will permit Canadians to get on with the important task of re-shaping their Constitution to better serve the needs of every Canadian.

43. There has been some misunderstanding of the effect the proposal will have on the federal nature of the Canadian Constitution. Important though it is, the measure will not alter or affect Canada's federal structure, in any way that would be detrimental to provincial interests. Nor will it directly affect federal-provincial relationships or transfer any provincial powers to the federal order of government. It requires only brief consideration of its major components to establish that the proposal poses absolutely no threat to federalism in Canada:

- (a) *Patriation* will have a neutral effect, favouring neither the federal nor the provincial order.
- (b) *The Amending Procedures* proposed are entirely appropriate to a federally structured constitution, allocating important roles in the amendment process to both orders of government. While it is true that the Government of Canada would be in a position to initiate amendment referenda in certain circumstances, the Constitution of Australia, which entrusts a similar function to the federal Government of that country,⁴⁵ has always been regarded as thoroughly "federal", despite that fact. Indeed, the governments and legislatures of the Australian states have utterly no role to play in the amendment process.⁴⁶ The present proposal contemplates a much more significant role for provincial authorities in Canada than their Australian counterparts enjoy.
- (c) *The statement on equalization* will not affect the federal-provincial balance, since it is expressly stated to operate "without altering the legislative authority of Parliament or of the provincial legislatures"⁴⁷.

⁴⁵ *Constitution of Australia*, s. 128.

⁴⁶ Except to amend state constitutions and to agree under s. 51 (xxxvii) to a delegation of jurisdiction.

⁴⁷ Note 1 above, s. 34(1).

- (d) The *Charter of Rights and Freedoms* will not involve any transfer of powers between federal and provincial authorities, either. It will place certain limitations on *both* federal and provincial orders of government in the interests of protecting certain fundamental rights and freedoms of the individual.
- (e) Similarly, the *recognition and affirmation of treaty and aboriginal rights* will not transfer any powers. It will place limits on both federal and provincial orders of government in the interests of better protecting the rights of Canada's aboriginal peoples.

44. The only way in which the proposal will alter the federal-provincial equilibrium will be to *increase provincial powers*. This will occur in two respects:

- (a) The present power of the Government and Parliament of Canada to secure amendments to the Constitution of Canada by request to the United Kingdom Parliament without provincial consent will be ended and replaced by an amending formula under which a large measure of provincial consent will be legally required; and
- (b) Provincial powers in the field of natural resources will be expanded.

45. It has been suggested by some opponents of the proposal that it is so unprecedented in its impact on provincial powers and interests, federal-provincial relations, and the structure of Canadian federalism, that the convention of British non-involvement in the merits of amendments should not be regarded as applicable. It is submitted that an objective observer, analysing the various components of the measure carefully, and comparing them with past amendments, must conclude that there is nothing unprecedented in the proposal. It differs in content from previous amendments, of course, but so did every other amendment. It is unquestionably important, but so too were many of the past amendments. As to its impact on Canadian federalism, the only conclusions to which an objective examination of the proposal and its predecessors can lead are the following:

- (a) *Nothing* is being proposed that would alter provincial rights or powers, federal-provincial relations, the federal-provincial equilibrium, or the federal structure of Canada in any way that would be detrimental to provincial interests; and
- (b) The provinces had much more to fear in this regard from some of the previous amendments—the 1949 ones, for example—than from the present proposal.

Accordingly, it is mistaken to suggest that anything in the proposal differs so markedly from previous amendment requests as to justify deviation from the invariable practices of the past.

Provincial Opposition Judicially Rejected

46. The governments of several Canadian provinces have taken issue with the proposed amendment request. They allege that such a request should not be made to the United Kingdom Parliament unless concurred in by every province. The Government of Canada is of the view that although it is desirable to consult, and to obtain the consent of, the provinces where feasible, there is no constitutional requirement for doing so, and where, as in the present circumstances, prolonged consultation has proved fruitless, there is ample justification for proceeding without further consultation.

47. The dissenting provinces launched constitutional references in the courts of three provinces. On February 3, 1981, the Manitoba Court of Appeal, which was the first court to hear and determine a reference, rejected this challenge by a majority decision. The Court denied the contention that there is any constitutional requirement of provincial consent for amendment requests, and upheld the position of the Government of Canada that the Senate and House of Commons of Canada are legally and constitutionally entitled to present the proposed patriation package to the United Kingdom Parliament without further provincial consultation.⁴⁸

48. The decision of the Manitoba Court of Appeal came only a few days after the publication of the *Kershaw Report* in the United Kingdom. This *Report* will be considered next.

⁴⁸ *Patriation Reference*, Man. C.A., Feb. 3, 1981.

Kershaw Report

General

49. The *Report* of the Kershaw Committee to the United Kingdom House of Commons, dated January 30, 1981, is a lengthy document that attests to both the seriousness and the assiduousness with which the members of the Committee approached the task they had set for themselves. Many of the *Report's* conclusions are in full accord with the position of the Government of Canada, as explained above. For example, the *Report* acknowledges:

- (a) "Canada's full independence as a sovereign state in the international legal and political order."⁴⁹
- (b) "It would be quite improper for the UK Parliament to deliberate about the suitability of requested amendments or methods of patriation, or about the effects of those amendments on the welfare of Canada or any of its communities or peoples."⁵⁰
- (c) A decision by the United Kingdom Parliament to terminate its legal power to legislate for Canada without creating a post-patriation amending formula, or to undertake no further amendments to the Canadian Constitution would "amount to a gross interference in the internal affairs of Canada and a grave breach of relations between the UK and Canada"⁵¹.
- (d) "(I)t would be unconstitutional for the UK Parliament, if requested to patriate the B.N.A. Acts along with a new Charter of Rights to enact only part of the requested package (eg by enacting it without the whole or part of the requested Charter of Rights). Such a course of action would amount to legislating for Canada without its request and consent."⁵²
- (e) "There is no rule, principle or convention that the UK Parliament, when requested to enact constitutional amendments directly affecting Canadian Federal-Provincial relations, should accede to that request only if it is concurred in by all the Provinces directly affected."⁵³
- (f) "There can be no doubt that if a request by the Canadian Government and Parliament is a proper request, it is the responsibility of the UK Government and Parliament to secure the enactment of the request with all the urgency or priority which the Canadian Government may reasonably desire."⁵⁴

⁴⁹ Para. 85.

⁵⁰ Paras. 113 and 118.

⁵¹ Para. 120.

⁵² Para. 122.

⁵³ Para. 14(7).

⁵⁴ Para. 57.

50. Unfortunately, in several other respects the opinions expressed by the Kershaw Committee seriously misconstrue both Canada's internal constitutional situation and the fundamental nature of Canada's relationship to the United Kingdom. These misunderstandings have led the Committee to offer advice to the United Kingdom Parliament which, if followed, would prolong Canada's constitutional impasse indefinitely, and would seriously jeopardize relations between the two countries. The source of these regrettable misunderstandings will be examined in the paragraphs that follow.

Inadequacy of Evidence

51. It might contribute to an understanding of the errors that were made to point out, at the outset, that the task which the Committee undertook involved a detailed inquiry into complex issues of Canadian law, history and constitutional practice—subjects that understandably fell outside the personal experience of its members. To make up for this crucial shortcoming, the Committee was forced to rely on submissions made to it, and unfortunately those submissions did not present, in total, a balanced view of the question.

52. The Committee received briefs from the governments of several provinces which oppose the amendment proposal, and from three British legal scholars, two of whom indicated that, though expressing personal views, they had been consulted by provincial governments, and none of whom claimed expert knowledge about the Canadian Constitution. Perhaps because they appeared in person before the Committee, the opinions of these three British academics received considerable attention from the news media, and seem to have had great influence on the views of the Committee.

53. The Government of Canada did not make a presentation to the Committee because it was considered inappropriate for the executive government of one nation to offer advice to a committee of the Parliament of another nation. The Committee did receive a purely factual background memorandum from the Foreign and Commonwealth Office which took no position on contentious issues, and it had access to the factums filed in the Manitoba Court of Appeal, as well as to a background paper prepared for other purposes by the Canadian Department of External Affairs. However, the availability of these documents did not offset the predominantly provincialist nature of the evidence presented to the Committee, especially by the British academic witnesses who appeared in person. This is regrettable, because many of the submissions suffered from illogicality and errors of fact.

54. When asked by Canadian journalists about the absence of impartial evidence from Canadian experts, the Chairman of the Committee is reported to have replied:

"The Committee was already being accused of meddling in Canadian affairs and would have been open to more such charges if Canadian witnesses had been invited to appear."⁵⁵

This statement illuminates the dilemma that the Kershaw Committee faced in undertaking to investigate the patriation proposal: to conduct a thorough inquiry into matters of Canadian law and practice would risk being accused of "meddling"; yet to make recommendations that might profoundly influence Canada's constitutional future without such an inquiry, as the Committee has chosen to do, involves even greater perils.

The Kershaw Position

55. The position taken by the Kershaw Committee may be summarized as follows:

- A. *British authorities continue to hold not only legal, but real political responsibility for the Canadian Constitution, permitting them to decline a constitutional amendment requested by the Parliament of Canada if in their judgment the request contravenes some fundamental principle ("established constitutional position") of the Canadian Constitution.*⁵⁶
- B. *It would contravene a fundamental principle ("established constitutional position") of the Canadian Constitution for the Parliament of Canada to request British enactment of the proposed patriation package if "it did not enjoy a sufficient level and distribution of Provincial concurrence" to "convey the clearly expressed wishes of Canada as a federally structured whole".*⁵⁷
- C. *The United Kingdom Parliament would be justified in enacting a patriation measure requested by the Parliament of Canada if it either:*
 - (i) *had the concurrence of the governments, legislatures, or voters of Quebec, Ontario, and provinces containing 50% of the Western and 50% of the Atlantic populations;*⁵⁸ or
 - (ii) *were substantially altered from the current proposal in certain specified respects.*⁵⁹
- D. *Such a refusal by the United Kingdom Parliament would not "constitute an 'interference' in Canadian internal affairs".*⁶⁰

⁵⁵ Toronto *Globe and Mail*, National Edition, Feb. 6, 1981, p. 1.

⁵⁶ Paras. 14(5) and 84.

⁵⁷ Para. 14(10).

⁵⁸ Paras. 14(10) and 114.

⁵⁹ Para. 115.

⁶⁰ Para. 96.

56. Arguments, like chains, are no stronger than their weakest links. If any step in the argument can be shown to be fallacious, the conclusion collapses. The reasoning of the *Kershaw Report* suffers from several such fatal flaws. In fact, most of the steps in its argument are demonstrably erroneous. The following paragraphs deal with the argument in order of the steps outlined above.

A. Role of British Authorities

57. The line of reasoning upon which the opinion that British authorities retain a real supervisory power over the Canadian Constitution was based appears to be as follows:

- (a) The intent and effect of section 7(1) of the *Statute of Westminster, 1931*, was to preserve the “status quo” with respect to the amendment of the Canadian Constitution.
- (b) The status quo permitted British discretion to be exercised in order to protect fundamental principles (“the established constitutional position”) of the Canadian Constitution.
- (c) Nothing that has happened since 1931—neither the disputed amendments of 1943, 1946 and 1949, nor the frequent and consistent public statements of non-involvement in Canadian affairs by representatives of the British Government over the years—has altered that situation.

58. The premise of this argument is correct: section 7(1) of the *Statute of Westminster* was designed to preserve the status quo with respect to constitutional amendments. It is a mistake, however, to suggest that the status quo contemplated British political involvement in the substance of Canadian constitutional amendments.⁶¹

59. The principal evidence offered by the Kershaw Committee to support the view that British authorities continued to exercise political discretion in such matters is the manner in which the 1907 amendment was enacted. This amendment concerned the amount of subsidies paid by the Government of Canada to the provinces. The Government of British Columbia disagreed with the amendment proposed by the Parliament of Canada on the basis that the subsidy for it was inadequate and made strong representations to Westminster (federal authorities having consented to the dispatch of the provincial delegation to the United Kingdom for that purpose). A small and different drafting change, to remove the words “final and unalterable”, was eventually made (and accepted by the Government of Canada). This is sometimes represented as having been based on British Columbia’s objections. In reality, however, the amendment as originally requested by the

⁶¹ See above, para. 23, ff.

federal authorities was enacted in substance by the United Kingdom Parliament in spite of British Columbia's objections, and the drafting change was made thereto, as the *Kershaw Report* admits, because of "a parliamentary draftsman's view that it was technically inappropriate" to use certain words in the legislation.⁶² The 1907 experience ought to have led the Committee to a very different conclusion than the one it reached: that at least as early as 1907, even though Canada had not yet reached the state of full *de facto* independence in all matters that it was to attain during World War I, it was already independent enough in constitutional matters that British authorities did not concern themselves with the merits of Canadian constitutional disputes.

60. Even if the 1907 experience had involved a substantive British supervisory role over the Canadian Constitution, its significance would have been erased by two subsequent events of great importance:

—The 1915 amendment (described earlier),⁶³ which was the first occasion on which the Canadian Address to the Crown contained a draft of the requested amendment, and which was passed without modification despite provincial opposition. The Kershaw Committee seems to have overlooked this important precedent.

—The *Balfour Declaration*, 1926, which put an end to any possible remaining doubts as to Canada's absolute autonomy and total responsibility for its own destiny. An indication that the Kershaw Committee did not give sufficient weight to the *Balfour Declaration* is the Committee's statement that in 1931 "Canada was becoming a sovereign and independent state".⁶⁴

61. Even less plausible than the argument that British authorities retained a residue of substantive responsibility for the Canadian Constitution in 1931 is the Committee's contention that there was nothing in subsequent events or in subsequent statements by representatives of the British Government that would be incompatible with such a residue. To the events of 1943, 1946 and 1949, when the United Kingdom Parliament passed amendments which significantly affected (or were feared to affect) provincial interests, on federal request, without provincial consultation or consent, and in the face of substantial provincial objections, the *Report* replies only that the objec-

⁶² Para. 58. It is true that Mr. Winston Churchill stated in Parliament at the time that the alteration had been made "in deference to the representation of British Columbia", and that British authorities would not "always be prepared to accept the Federal point of view as against the provincial" (para. 38). He appears to have been mistaken in his view of the origin of the technical amendment, however, and he acknowledged that British authorities would not "pretend to go into the merits of the difference on a constitutional question between British Columbia and the Federal Government" (para. 38).

⁶³ See above, para. 15.

⁶⁴ Para. 85. Emphasis added.

tions were not “officially” made known to the British Government.⁶⁵ The fact is, however, that the controversies were matters of public notoriety, and that whenever members of the British Government were questioned on the subject their uniform public response was to the effect that they ought not to be concerned about the events leading up to Canadian requests for amendment. While it may be true, as the Committee suggests,⁶⁶ that these statements did not constitute “undertakings” to Canada, they did constitute, together with the invariable practice of British deference to the constitutional wishes of the Government and Parliament of Canada, overwhelming evidence of a *convention* upon which Canada was and is entitled to rely.

62. The fact that British authorities themselves harboured no private reservations when making such public statements is well illustrated by an incident to which the *Kershaw Report* itself refers. In 1946, the United Kingdom High Commissioner in Canada wrote to the Permanent Under-Secretary, Dominions Office, reporting a conversation between the British Secretary of State for the Dominions and the Premier of Quebec, in which the latter complained about the recent passage of the 1946 amendment without provincial consultation.⁶⁷ The letter continues:

“The Secretary of State replied that there were only three possible courses of action for the UK Government on the receipt of the Canadian Government request. One was to pass the Act as requested, the second to refuse to do so and the third to amend it; if we had refused to pass the legislation there would have been an outcry from one end of Canada to the other; the Secretary of State was advised that we had no power to amend the legislation; therefore, he had no alternative to passing the Act and he took this in hand as quickly as possible.”

At another point in the letter the High Commissioner acknowledges that: “...the Dominion Parliament has power in itself to propose amendments without consulting the Provinces”; and that “...the United Kingdom *action is and must be purely automatic*”.⁶⁸

B. Constitutionality of Canadian Proposal

63. It is essential to the thesis advanced in the *Kershaw Report* to establish that it would offend a fundamental principle (“established constitutional position”) of the Canadian Constitution for the Canadian Parliament to seek British enactment of the proposed patriation package without further

⁶⁵ Para. 76. It might be noted in passing that para. 110 states that “informal” conveyance of provincial *approval* would be sufficient.

⁶⁶ Para. 77.

⁶⁷ Para. 72, note 2.

⁶⁸ Emphasis added.

provincial consultation or consent. It was on this question that the Kershaw Committee was probably at its greatest disadvantage. As pointed out earlier, the Committee relied primarily on submissions by parties to one side of the dispute in Canada or by British academics who did not claim first-hand knowledge of the Canadian scene.

64. The reasoning by which the Kershaw Committee arrived at the conclusion that the proposed patriation package would be unconstitutional was as follows:

- (a) No amendment "significantly affecting the federal structure of Canada"⁶⁹ may properly be proposed to the United Kingdom Parliament without "the clearly expressed wish of Canada as a whole, bearing in mind the federal nature of that community's constitutional system".⁷⁰
- (b) The proposed patriation package would "directly affect the federal structure of Canada".⁷¹

It was mistaken on both counts.

65. The Committee relied on three sources for its view that no amendment "significantly affecting the federal structure of Canada"⁷² may properly be requested by federal authorities without provincial consultation and consent:

- (a) statements of the Supreme Court of Canada in the *Senate Reference*;⁷³
- (b) statements contained in a 1965 publication of the Government of Canada: *The Amendment of the Constitution of Canada*;⁷⁴ and
- (c) an implication arising from the federal nature of Canada.

66. The *Senate Reference*⁷⁵ may be disposed of quickly. It was a ruling by the Supreme Court of Canada as to whether the Parliament of Canada has the legislative power under section 91(1) of the *B.N.A. Act* to enact on its own authority certain amendments affecting the Canadian Senate. The case had nothing to do with the capacity of the Parliament of Canada to make amendment requests to the Parliament of the United Kingdom.

67. Reliance on the Government of Canada's 1965 publication, *The Amendment of the Constitution of Canada*,⁷⁶ to support a constitutional requirement of provincial consent is puzzling, because in fact the publication establishes the contrary proposition. It is true that it refers to a general

⁶⁹ Para. 114.

⁷⁰ Para. 111.

⁷¹ Paras. 14(9) and 111.

⁷² Para. 114.

⁷³ Note 29 above. *Kershaw Report*, para. 33, ff.

⁷⁴ Para. 48, ff.

⁷⁵ Note 29 above.

⁷⁶ Note 74 above.

principle concerning a degree of provincial consultation and agreement with respect to requests for amendment “directly affecting federal-provincial relationships”, but it points out the uncertainty surrounding the appropriate nature and degree of provincial participation,⁷⁷ and, moreover, expressly states that the principle in question is “not constitutionally binding in any strict sense”.⁷⁸ Inasmuch as the publication received the tacit approval of all provincial governments before it was released, it offers compelling authority for the proposition that provincial consultation and consent is *not* a constitutionally binding requirement of the existing amendment process.

68. It is interesting to note that in the decision of the Manitoba Court of Appeal upholding the constitutionality of the proposed patriation package, even the dissenting judges were unable to find clear historical evidence of a convention requiring provincial consultation and consent for such an amendment request.⁷⁹

69. The Kershaw Committee seemed to sense the weakness of the argument that a convention exists relating to provincial consent. It was perhaps for that reason that it tried to derive the constitutional principle it asserted primarily by implication from the federal nature of the Canadian Constitution rather than from past experience.

70. It is true that the Constitution of Canada is, generally speaking, federal in nature. It can also be conceded that in a theoretically ideal model of federalism it would be desirable that both the central and the regional orders of government should play significant roles in the constitutional amendment process. It does not follow from these premises, however, that an amendment request which would significantly affect the federal structure of Canada requires provincial consultation and consent. There are several reasons why this does not follow:

- (a) Solutions to real political and constitutional problems must be based on actual existing constitutions rather than on theoretical ideals.
- (b) In actuality, no existing “federal” constitution conforms exactly to the ideal model. Historical, social and political realities prevailing in each “federal” nation permit only an approximation of the ideal. The Canadian Constitution deviates from perfect federalism in a number of important respects. For example, the *B.N.A. Act* bestows on the federal order of government the power to affect the rights and interests of the provinces unilaterally in such significant ways as appointing and instructing provincial Lieutenants-Gover-

⁷⁷ P. 15.

⁷⁸ P. 11.

⁷⁹ Note 48 above, *per* O’Sullivan J. A., p. 26, and *per* Huband J. A., p. 9.

nor,⁸⁰ disallowing provincial legislation,⁸¹ declaring provincial works to the "works for the general advantage of Canada,"⁸² and influencing matters within provincial jurisdiction through the "spending power".⁸³ No purpose would be served by an exhaustive elaboration of these powers and their ramifications. It should be observed, however, that some of them have exerted profound influence on the shape of Canadian federalism, and continue to do so. Provincial works as diverse and important as railways, grain elevators, and uranium mines are subject to federal jurisdiction by reason of the federal declaratory power, for example, and programmes as vast and socially significant as public medical insurance owe their existence to the federal spending power. It is also worthy of note that under Canadian federalism the residue of unallocated governmental power lies, not with the provinces as in Australia and the United States, but with the federal order of government.⁸⁴

- (c) In the present context the most significant deviation from perfect federalism in the actual Canadian Constitution is the fact that until an all-Canadian amendment procedure is devised, the federal order of government has been left with the responsibility of requesting British amendments to the Constitution of Canada. This has been a feature of Canada's particular brand of federalism since the country's birth.
- (d) The proposal under current discussion will move the Canadian Constitution considerably closer to ideal federalism in this regard by giving the provinces a legal role in the amendment process which they have never had before. The role that the provinces will thereafter be able to play in the process will be very important—much more important, for example, than that which their counterparts play under the "federal" Constitution of Australia.

71. Even if the Kershaw Committee were correct in its mistaken belief that the Constitution of Canada requires a measure of provincial concurrence before the Parliament of Canada can properly approach the United Kingdom Parliament to request a constitutional amendment "significantly affecting the federal structure of Canada", the requirement would not apply to the proposal currently under discussion, because, as has been explained earlier,⁸⁵ that proposal, when implemented, will not affect the "federal

⁸⁰ *B.N.A. Act*, note 7 above, s. 58, ff.

⁸¹ S. 90.

⁸² S. 92(10)(c).

⁸³ See: *Government of Canada, Federal-Provincial Grants and the Spending Power of Parliament*, June 1969.

⁸⁴ *B.N.A. Act*, s. 91, introductory words (the "Peace, order and good government" clause).

⁸⁵ See para. 43 above.

structure” of Canada in any way that would be detrimental to the interests of the provinces.

C. Circumstances Justifying British Compliance With Canadian Request

72. The Kershaw Committee has expressed the opinion that the United Kingdom Parliament would be justified in granting an amendment request from the Government and Parliament of Canada if a certain specified degree of provincial concurrence were manifested,⁸⁶ or, alternatively, if the proposal were substantially modified in certain specified respects.⁸⁷ Another possible alternative, which the *Report* discusses inconclusively, would be to await the final outcome of litigation on the subject.⁸⁸ Finally, the Committee has raised the possibility that “the UK Parliament might reasonably consider setting a term of years” beyond which it would no longer be willing to abide by certain constraints which it now recognizes on its legal powers over the Canadian Constitution.⁸⁹ Each of these suggested conditions to British co-operation will be examined.

73. Having decided that the Constitution of Canada requires a measure of provincial concurrence before an amendment request can properly be made to the United Kingdom Parliament by the Government and Parliament of Canada, the Committee was then obliged to determine the extent and distribution of such concurrence that would, in its opinion, justify British compliance. All the provincial briefs to the Committee had urged the need for unanimous provincial consent. This approach was rejected⁹⁰ in favour of a standard based on the amending formula set out in the Government of Canada’s original proposal (since modified somewhat in this respect): consent of the governments, legislatures, or voters of Quebec, Ontario, and of provinces representing at least 50% of the population west of Ontario and 50% of that east of Quebec.⁹¹ While the test chosen is certainly a suitable measure of required provincial concurrence to future amendments to the Constitution of Canada, the suggestion that it be applied in the present context prompts the following observations:

- (a) It is very difficult to understand how this criterion could be said to be somehow inherent in the nature of federalism, when the constitutions of the two other major federal systems in the world, the United States and Australia, have markedly different provisions for regional involvement in the amendment process. In both those countries, the amending procedures require less regional support

⁸⁶ Para. 114.

⁸⁷ Para. 115.

⁸⁸ Paras. 123 and 127.

⁸⁹ Para. 14(11).

⁹⁰ Para. 14(7).

⁹¹ Para. 114.

for constitutional amendments than the modified Victoria Formula adopted by the present proposal would provide. The United States Constitution calls for the ratification by the legislatures of 75% of the states, regardless of their population or geographic distribution.⁹² The Australian Constitution requires the support, by referendum, of only a majority of voters in a majority of states, again without regard to which states are involved.⁹³

- (b) The Committee suggests that the criterion be applied only where the "federal structure" would be "significantly" or "directly" affected by an amendment.⁹⁴ As shown above,⁹⁵ the proposed patriation package would not affect the federal structure in any way that would be detrimental to provincial interests. Therefore, by the Committee's own standards there would be no need for provincial concurrence in this case.
- (c) Even if one accepted the Committee's view that a request of the type proposed must be shown to meet "the clearly expressed wishes of Canada as a whole, bearing in mind the federal character of the Canadian constitutional system",⁹⁶ it is the Parliament of Canada, with a membership drawn from all parts of the country, and the constitutional responsibility for Canada's relations with the rest of the world, which is best suited to convey to the United Kingdom "the clearly expressed wishes of Canada as a whole".

74. An alternative suggestion is made in paragraph 115 of the *Kershaw Report*—that it would be acceptable for the United Kingdom Parliament to enact, without *provincial concurrence*:

"a request for patriation/amendment involving *only* (i) termination of the UK's legislative powers and (ii) a post-patriation amendment formula providing for amendment only with at least such a degree of provincial support as is required to initiate an amendment"⁹⁷ under Part V of the proposal.

This would involve the elimination of the Charter of Rights and Freedoms from the proposal, and the adoption as a permanent amending procedure of a special formula that the proposal provides for interim purposes only. It would require an extensive alteration of the proposal now being considered. The Committee's explanation of why it would be justifiable for the United Kingdom Parliament to enact this modified proposal without provincial consent is not easy to follow. It is stated that such an enactment "would not

⁹² Constitution of United States, Article V.

⁹³ Constitution of Australia, s. 128.

⁹⁴ Paras. 111 and 114.

⁹⁵ See para. 43 above.

⁹⁶ Para. 14(8).

⁹⁷ Para. 115.

substantially affect the federal character of Canada's constitutional system"⁹⁸, but, as has been explained above,⁹⁹ the proposal now being considered would not do so either. The Kershaw Committee's "alternative" suggestion looks very much like an attempt to do that which the Committee itself has said would not be appropriate for British authorities: to determine "the suitability for the peoples of Canada of a requested constitutional package".¹⁰⁰

75. The section of the *Kershaw Report* which discusses pending litigation¹⁰¹ does not make any positive recommendations on the subject to the United Kingdom Parliament. It does serve a useful purpose, however: to remind everyone concerned that there is no need for the dissenting provinces to seek a forum for their complaints outside Canada. The courts of Canada, before whom the provincial challenges have been placed, are better able than any other body to determine issues of Canadian constitutional law. To the extent that the challenges involve political issues, Canadian politicians and the Canadian electorate are better able to judge their merits than are the politicians of another country. The first of the courts consulted by the dissenting provinces has already ruled that there is no constitutional impediment to the proposal of the Government of Canada. Whatever the decision of the other courts, and ultimately of the people of Canada, may be, there can be no doubt that Canadian legal and political institutions are completely competent to deal with this Canadian problem. In short, those who disagree with the current proposal have no need for an external forum; their objections can be adjudicated—knowledgeably, impartially and effectively—at home.

76. The "Conclusions" section of the *Kershaw Report* suggests that "the UK Parliament might reasonably consider setting a term of years beyond which this constitutional position could not be expected to continue"¹⁰². There does not appear to be anything in the body of the *Report* that supports such a conclusion; the question seems to have arisen for the first time at the conclusion stage. It is possible that if the Committee had had more time to reflect on the unfortunate consequences that could result from the combination of rejecting the proposed request and imposing a time limit on British co-operation in the Canadian amendment process, it might have thought better of the idea. Yet the suggestion does offer another useful reminder—that Canadians should not expect to rely indefinitely on the good will and patience of our British friends when amendments to the Canadian Constitution are required. The time has arrived for Canada to be constitu-

⁹⁸ *Ibid.*

⁹⁹ See para. 43 above.

¹⁰⁰ Para. 14(11).

¹⁰¹ Paras. 123, ff.

¹⁰² Para. 14(11).

tionally independent, legally as well as politically. The proposed patriation package will achieve that goal, and will eliminate all future need to inconvenience the Government and Parliament of the United Kingdom with Canadian amendment requests. No time limit is necessary.

D. Interference with Canadian Independence and Internal Affairs

77. The *Kershaw Report* describes Canada, quite properly, as “an independent and sovereign state”,¹⁰³ and asserts that: “The primary desire of the UK Government and Parliament is to maintain and enhance the warm and friendly relations with Canada which have subsisted over many decades and through two World Wars”.¹⁰⁴

78. Unhappily, many of the *Report's* conclusions advise the Government and Parliament of the United Kingdom to respond to the proposed Canadian request for amendment of the Canadian Constitution in ways that would constitute intolerable interference with the internal affairs of “an independent and sovereign state”. To appreciate the extent of intervention in Canadian affairs that would occur if the Committee's advice were heeded, one has only to consider a few of the responsibilities that the United Kingdom Parliament would be called upon to undertake:

- (a) *Guardian of Canadian Federalism*. It would owe, without any electoral mandate, a “duty or responsibility to the Canadian people or community”¹⁰⁵ to decide, contrary to the decision of Canada's democratically elected national Parliament if necessary, “whether or not a request for amendment or patriation of the B.N.A. Acts conveys the clearly expressed wish of Canada as a whole, bearing in mind the federal nature of that community's constitutional system”.¹⁰⁶
- (b) *Interpreter of the Canadian Constitution*. To perform the role of guardian of Canadian federalism, it would have to decide whether the Kershaw Committee has correctly interpreted Canadian constitutional requirements, or whether other authorities have more accurately construed Canadian law, history and constitutional practice.
- (c) *Determiner of Precise Amendment Requirements*. In order to carry out the role that the Kershaw Committee calls for it to play, the United Kingdom Parliament would also be required to determine the appropriateness of the detailed conditions for acceptance of an amendment request that the Committee has postulated. This would mean deciding:

¹⁰³ Para. 7.

¹⁰⁴ Para. 14.

¹⁰⁵ Para. 103.

¹⁰⁶ Para. 111.

- (i) whether "Victoria Formula" type criteria should be applied to determine the extent and distribution of provincial concurrence;¹⁰⁷ and
- (ii) whether, in the alternative, the Parliament of Canada should be required to make substantial alterations to the proposed amending formula, and abandon altogether the proposed Charter of Rights and Freedoms.

If it undertook these responsibilities, the United Kingdom Parliament would find itself very deeply immersed in Canadian affairs.

79. In light of that fact, it is surprising to read in the *Kershaw Report* statements that: "Nothing in our Report casts any doubt on Canada's full independence as a sovereign state"¹⁰⁸, and that adopting its recommendations would not "constitute an 'interference' in Canadian internal affairs".¹⁰⁹

The key to this inconsistency may lie in the following statement:

"The Canadian Parliament is not 'absolutely sovereign', but is (by the will of the Canadian community confirmed in 1931) subject to the constraints of a *federal* constitution".¹¹⁰

Implicit in this statement are two fallacies:

- (a) The belief that the status quo that was "confirmed" in 1931 involved a British supervisory power over the Canadian Constitution which still persists. As has been explained,¹¹¹ this is a mistaken belief.
- (b) The notion that the internal division of governmental responsibilities between central and regional governments in a federal system somehow restricts the national sovereignty of a federal nation like Canada in its relations with the outside world. The truth is that while the Canadian Parliament and provincial legislatures each have certain assigned law-making powers within Canada, Canada's national sovereignty is unlimited, and is exercised on behalf of the entire nation by the democratically elected Government and Parliament of Canada.

These twin fallacies appear to have been primarily to blame for leading the Kershaw Committee to several of its most unfortunate conclusions.

80. If the United Kingdom Parliament were to accept these mistaken assumptions and the suggestions of the Committee that flow from them, it would be casting aside one of the Commonwealth's most fundamental

¹⁰⁷ See para. 73 above.

¹⁰⁸ Para. 85.

¹⁰⁹ Para. 96.

¹¹⁰ *Ibid.*

¹¹¹ See para. 14, ff., above.

precepts. That association was proclaimed by the *Balfour Declaration* to be one of "autonomous communities ... equal in status, in no way subordinate one to another".¹¹² The principle of equality has always included the equality of the national Parliaments of the communities making up the Commonwealth. It is surely not the time to abandon a concept which has been the strength of this unique association.

Conclusions

81. It was pointed out earlier that any flaw in the Kershaw Committee's chain of reasoning would invalidate its conclusions. It is submitted that many such flaws have been demonstrated by the preceding paragraphs. Indeed, every major component of the Committee's position can be shown to be mistaken:

- (a) British authorities do *not* retain political responsibility for the amendment of the Canadian Constitution because:
 - (i) British authorities had divested themselves of political discretion with respect to the Constitution of Canada long before the *Statute of Westminster, 1931*;
 - (ii) the *Statute of Westminster* preserved the constitutional status quo in this regard; and
 - (iii) subsequent statements by representatives of the United Kingdom Government and actions by the United Kingdom Parliament have consistently and emphatically confirmed this position.
- (b) The Constitution of Canada does *not* require provincial concurrence to an amendment request such as has been proposed because:
 - (i) there is no support in Canadian constitutional law or practice for the Kershaw Committee's belief that provincial consent is required for amendments "significantly affecting the federal structure of Canada"¹¹³; and
 - (ii) in any event, the amendments proposed would not affect the federal structure of Canada in any way detrimental to provincial interests.
- (c) The detailed conditions suggested by the *Kershaw Report* as to the extent of provincial concurrence required, or, alternatively, the type of changes in the proposal required, to justify British acceptance of an amendment request, *offend the Committee's own advice* that "it would be quite improper for the UK Parliament to deliberate about the suitability of requested amendments or methods of patriation".¹¹⁴

¹¹² Note 8 above.

¹¹³ Para. 114.

¹¹⁴ Para. 113.

- (d) If the Parliament of the United Kingdom followed the advice of the Kershaw Committee on these matters, it *would* “constitute an ‘interference’ in Canadian internal affairs”¹¹⁵.

82. Canadians have reason to be very grateful to the Government and Parliament of the United Kingdom for the patience, understanding and co-operation they have consistently displayed throughout Canada's prolonged constitutional amendment stalemate. Deeply steeped in democratic traditions, British authorities have always known that political judgments concerning the amendment of the Constitution of Canada can only be exercised by those who hold a political mandate from the people of Canada. They have, therefore, always respected the wishes of the Government and Parliament of Canada when amendment requests have been made. Canadians are confident that when this final request for British constitutional assistance arrives at Westminster, it will be treated in the same understanding and co-operative manner that has always marked the relations of these two cordial associates in the Commonwealth of Nations.

¹¹⁵ Para. 96.

Appendix A

Constitutional Amendments Affecting Provincial Interests

(Source: Factum of Attorney General of Canada in *Manitoba et al v. Canada*, Manitoba Court of Appeal, November 1980.)

1. The *British North America Act, 1871* affected federal-provincial relationships and the powers and rights of provincial governments. It empowered Parliament alone to create new provinces without the consent of the existing provinces and thereby alter significantly the balance between province and province and between province and the federal government. It allowed Parliament alone to add new Senate seats for such provinces. It prescribed an amending formula for making changes to provincial borders. No provincial consent was sought or given.

2. The question of provincial consent was raised in a series of resolutions in the Canadian House of Commons by the Honourable Mr. Mills. They were not accepted. The last of these resolutions was as follows:

“That the respective Legislatures of the Provinces now embraced within the Union having agreed to the same on a Federal basis, which has been sanctioned by the Imperial Parliament, this House is of opinion that any alteration by the Imperial Legislation of the principle of Representation in the House of Commons recognized and fixed by the 51st and 52nd Sections of the *British North America Act, 1867*, without the consent of the several Provinces that were parties to the compact, would be a violation of a fundamental principle in our constitution, and destructive of the independence and security of the Provincial Governments and Legislatures.”

(Canada, *House of Commons Journals*, 1871, pp. 253-54.)

3. The *British North America Act, 1886* affected federal-provincial relationships and the powers and rights of provincial governments. It empowered Parliament *alone* to provide for territorial representation in Parliament, including the Senate. Any additional Senate members would, of course, affect the relative voice of the other Senators. No provincial consent was sought or given.

4. The *British North America Act, 1907* affected federal-provincial relationships and the rights of provincial governments. It increased the amount of subsidies paid to the provincial governments under the original terms of the *B.N.A. Act, 1867*. It was sought by Parliament and granted by the United Kingdom Parliament despite the objection of British Columbia. The

other provinces agreed. British Columbia claimed it was entitled to additional subsidies because of its peculiar needs arising out of a mountainous terrain, scattered population and geographical isolation. On March 25, 1907, the Legislative Assembly of British Columbia passed a resolution protesting against the federal proposal. British Columbia submitted a memorandum to the British Colonial Office protesting the inadequacy of the amount. British Columbia's objection did not prevent the passage of the Act although the British Government did accept one drafting change. They deleted the words "final and unalterable" from the Act, apparently on the advice of the parliamentary draftsman that such words were not appropriate in a statutory enactment. The substance of the amendment was enacted in spite of the provincial objection.

5. The *British North America Act, 1915* affected federal-provincial relationships and altered provincial rights. It increased the number of Senators and altered the senatorial divisions. It also added what is the present section 51A which guarantees that provinces would never have fewer members in the House of Commons than they have in the Senate. There was no consultation with the provinces, although the Province of British Columbia had requested a change in representation and this was embodied in the resolution. The Premier and Attorney General of Prince Edward Island appeared before the committee of the House of Commons considering the resolution. Their representation for change was not accepted. This amendment affected all provinces by affecting the provincial allocation of Senators and by establishing a floor for House of Commons representation.

6. The question of provincial consent was raised by Mr. O. Turgeon (Gloucester):

"... I am perfectly willing to accept this proposal as a very moderate one, but, in order to secure its acceptance by the Imperial Parliament, would it not be better first to submit it to an interprovincial conference: for it is scarcely two years ago that a conference of the provinces denied this right to the maritime provinces. I believe that if the Prime Minister referred this proposal to the judgment of the Provincial Legislatures and secured their assent or, at least, their favourable comment, the proposal would be sanctioned by the Imperial Parliament. I join with my hon. friend from Prince Edward Island in suggesting that this proposal be separated from the other, in order that it may be submitted to the Provincial Legislatures for their assent... ."

(Canada, *House of Commons Debates*, 1915, vol. II, pp. 1465-66.)

The address, however, was accepted without any further reference to the provinces.

7. In the Senate, it was noted that the subject of the amendment had been discussed at a provincial Premiers' meeting but that the Premiers had reached no decision on the matter.

(Canada, *Senate Debates*, 1914, p. 880.)

An amendment was moved in the Senate that the section providing for a minimum representation of each province in the House of Commons should not take effect until the consent of the legislatures of the provinces had been obtained. This proposal was rejected on division.

(Canada, *Senate Debates*, 1914, p. 902. See also Canada, *Senate Debates*, 1914, pp. 885-86; 888-92; 896-97.)

8. The *British North America Act, 1930* affected federal-provincial relationships and altered provincial rights. By that amendment the federal government transferred ownership of lands and resources to the four Western provinces (less extensively to British Columbia than to the other three provinces, since only the Railway Belt lands were transferred in that province). All four provinces agreed. The consent of the other provinces was not sought although the subject had been discussed at a Federal-Provincial Conference in 1927 where Ontario and Quebec, at least, had indicated agreement in principle.

9. In the debates in the House of Commons it was argued by Mr. MacLaren:

"... amendments to the British North America Act, especially those of the importance of the one we have before us, should be submitted not in an informal but in a very official way to all the provinces in order to obtain their concurrence therein, or to give them an opportunity of expressing objections. The procedure now suggested is contrary to both Confederation and the British North America Act. It is not following out the spirit in which that Act was framed; it is not giving to the provinces the opportunity of expressing objection or acquiescence. I do not see how it can be considered that the simple passage by this House of this petition represents the will of the provinces. Therefore, Mr. Speaker, I enter my protest that a petition of this character should be forwarded without consulting all the provinces of the Dominion with a view of obtaining their assent thereto or their objections."

(Canada, *House of Commons Debates*, 1930, p. 2628. The issue was also raised in the *Senate Debates*, 1930, pp. 335-39, 348-9.)

10. The government members took the view that the amendment affected only the four Western provinces and, therefore, the consent of all provinces

was not necessary. Also, it was pointed out that no province was in objection, although the proposed amendment was common knowledge.

11. The *Statute of Westminster, 1931* substantially increased both federal and provincial rights and powers. It provided that Parliament and all provincial legislatures could legislate free of the limitations previously imposed by the *Colonial Laws Validity Act*. Section 7(1) retained full United Kingdom legislative authority over the *British North America Acts*, and section 7(3) provided that neither Parliament nor the provincial legislatures were authorized by virtue of the powers conferred to legislate on matters other than those within their legislative competence.

12. Although provincial governments were consulted on this amendment and their consent given, it is clear from the surrounding circumstances that this was not intended to acknowledge or create a convention that the provinces must consent to constitutional amendments before they would be enacted by Westminster.

(a) The Imperial Conference of 1930 considered the provinces as being given only the right to consultation. In the *Summary Proceedings* of that Conference, at p. 3717, the following is found:

“... it appeared that representations had been received from certain of the Provinces of Canada subsequent to the passing of the Resolution, protesting against action on the Report *until an opportunity had been given to the Provinces to determine whether their rights would be adversely affected by such action*. Accordingly, it appeared necessary to provide for two things. In the first place *it was necessary to provide an opportunity for His Majesty's Government in Canada to take such action as might be appropriate to enable the provinces to present their views*. In the second place, it was necessary to provide for the extension of the sections of the proposed Statute to Canada, or for the exclusion of Canada from their operation after the Provinces had *been consulted*.” (Emphasis added.)

(b) *The Minutes of the Federal-Provincial Conference of 1931* (at p. 10) states:

“Two provinces had felt (he [Mr. Bennett] did not consider wrongly) that they should be *consulted* in this particular matter of the Statute of Westminster, as they were directly affected by it. *The Conference therefore had been called for that particular purpose*.” (Emphasis added.)

(c) In response to provincial concerns that the present section 4 and the preamble of the *Statute of Westminster* would add to federal powers it was proposed by Mr. Geoffrion that a section be added

to exempt the *British North America Acts* from the application of the Statute. This proposal became the present section 7(1). This proposal is described in the *Minutes* as follows at p. 16:

“Mr. Geoffrion then explained that his suggestion was an effort to meet the difficulty of the implied recognition in the Statute of the Dominions’ power to request amendments. *He merely wished to insure that the position of the Provinces would not be any weaker after the Statute than it had been before.* His suggestion would, he thought, reserve the provincial position until the whole question of amendment could be discussed in the future ” (Emphasis added.)

After Mr. Geoffrion’s proposal had been put into a formal textual form, the following discussion took place, described at p. 20:

“Mr. Guthrie followed Mr. Bennett by stating that it was the purpose behind the new draft to make absolutely clear that the statute made no change in the British North America Act and gave the Dominion no new power to alter it. *It was definitely designed to maintain the status quo....*”

Mr. Cahan then emphasized that the sole purpose of the committee last night in suggesting alterations to Section 7 *was to preserve absolutely the status quo as to relations inter se.*” (Emphasis added.)

- (d) The practice followed after the passage of the *Statute of Westminster* was not invariably one of requiring consultation with or the consent of the provinces before a constitutional amendment would be enacted by Westminster. For example, that in 1949 admitting Newfoundland into Confederation, statutorily confirmed Quebec’s border with Labrador, without Quebec’s consent. The 1949(2) amendment conferred on Parliament powers to amend the Constitution in certain respects.

13. Despite the contrary conclusion of Gérim-Lajoie in his text, *Constitutional Amendment in Canada*, pp. 196-97, the wording of the 1930 Imperial Conference Report does not indicate an intention that thereafter amendments to the Constitution of Canada, even including amendments which affect federal-provincial relationships or alter provincial rights and powers, would be made only with the consent of provincial legislatures or provincial governments. It is clear the wording was intended to be neutral. The argument of Mr. Ralston in debate on the resolution requesting Westminster to pass the Statute of Westminster, following the Federal-Provincial Conference of 1931, illustrates this point:

“...the report of the conference of 1930 is very careful not to provide for the consent of the provinces but only to give the provinces an opportunity to present their views. At page 18 the following appears:

‘Accordingly, it appeared necessary to provide for two things. In the first place it was necessary to provide an opportunity for His Majesty’s government in Canada to take such action as might be appropriate to enable the provinces to present their views. In the second place it was necessary to provide for the extension of the sections of the proposed statute to Canada or for the exclusion of Canada from their operation after the provinces had been consulted.’

But while this is the preamble—so to speak—when we come to the legal conditions which are to be complied with we find that the consent of the provinces is not mentioned nor are they necessarily to be consulted but that it is to be sufficient if the formalities required for amendments to the British North America Act are carried out. Note how the report proceeds:

‘To this end it seemed desirable to place on record the view that the sections of the statute relating to the Colonial Laws Validity Act should be so drafted as not to extend to Canada unless the statute was enacted in response to such requests as are appropriate to an amendment of the British North America Act. It also seemed desirable to place on record the view that the sections should not subsequently be extended to Canada except by an act of the parliament of the United Kingdom enacted in response to such requests as are appropriate to an amendment of the British North America Act.’

Any idea which the provinces might have had, that their consent might be required, vanishes when we read the last sentence to the effect that the only procedure required to be followed is such procedure as is necessary and appropriate to an amendment of the British North America Act. And that procedure provides only for an address by both houses of parliament, without reference at all to the provinces.”

(Canada, *House of Commons Debates*, 1931, p. 3208.)

14. The *British North America Act, 1940* affected federal-provincial relationships and altered provincial rights and powers. It transferred authority to legislate on unemployment insurance from provincial to federal

jurisdiction. The consent of all provinces was sought and obtained. (Correspondence with the provinces is printed as an appendix to *Votes and Proceedings of the House of Commons*, June 25, 1940.)

15. In speaking to the resolution the Prime Minister stated:

“... not having received the consent of all nine provinces until this year, we could not possibly before this particular session have introduced in a manner which would avoid all questions a measure for the amendment of the British North America Act.”

(Canada, *House of Commons Debates*, 1940, p. 1118.)

16. It is clear, however, from the exchange recorded on page 1122 that consent of the provinces was considered *desirable* but *not necessary*:

“*Mr. Thorson*: ... But I would not wish this debate to conclude with an acceptance, either direct or implied, of the doctrine that it is necessary to obtain the consent of the provinces before an application is made to amend the British North America Act. Fortunately, this is an academic question at this time.

Mr. Lapointe: May I tell my hon. friend that neither the Prime Minister nor I have said that it is necessary, but it may be desirable.

Mr. Thorson: The Prime Minister has made it perfectly clear that the question does not enter into this discussion, in view of the fact that all the provinces have signified their willingness that this amendment should be requested.”

(Canada, *House of Commons Debates*, 1940, p. 1122.)

17. The *British North America Act, 1943* affected federal-provincial relationships and arguably provincial rights. It postponed until after the war the redistribution of the representation of the provinces in the House of Commons, required after the 1941 decennial census by virtue of section 51 of the *British North America Act, 1867*. No provincial consent was sought or obtained. The Legislative Assembly of Quebec requested the federal government to modify its proposal. Mr. Adélar Godbout forwarded to the Prime Minister an official note along these lines. (Canada, *House of Commons Debates*, 1943, p. 4353-54.) Quebec's objections were ignored.

18. During debate the resolution was opposed on the ground that provincial consents had not been obtained. (Canada, *House of Commons Debates*, 1943, pp. 4356, 4364.) The Minister of Justice, Mr. St. Laurent, argued that the amendment did not alter the allocation of federal and provincial powers. At the same time he stated that if such allocation were to be changed it would not be proper to do so without the consent of the legislative body that was given

the constitutional powers in question. (Canada, *House of Commons Debates*, 1943, pp. 4365-66.)

Mr. St. Laurent did not say that such amendments could not be passed by Parliament alone but merely that it would be proper, that is, appropriate, to have provincial consent. In the same debate, Mr. Coldwell stated:

“I know, of course, that at present the real power of amendment of our constitution, which is in the British North America Act, is in reality in the hands of this parliament. As I have just indicated, anything we may ask regarding amendment will be granted by the imperial parliament at Westminster.”

(Canada, *House of Commons Debates*, 1943, p. 4345.)

19. There was also discussion in the Senate regretting the lack of provincial consent. (Canada, *Senate Debates*, 1943, pp. 288-9.)

20. The *British North America Act, 1946* affected federal-provincial relationships and altered provincial rights. This amendment replaced the original section 51 of the *British North America Act, 1867* with a new one providing for the representation of the provinces on a strictly proportional basis. Provincial consents were neither sought nor obtained. Quebec objected (letter of May 30, 1946 from Duplessis to St. Laurent). Opposition members said provincial consent should have been obtained (Canada, *House of Commons Debates*, 1946, pp. 2228-35), and Mr. Diefenbaker moved an amendment to the effect that the Government be required to consult the provinces. This was defeated. (Canada, *House of Commons Journals*, 1946, vol. 87, pp. 373-374.) The government took the position that the amendment did not deal with provincial powers. Mr. St. Laurent indicated that *in his view*, matters given to the provincial legislatures and governments could not be dealt with without provincial consent (pp. 1936-37). Other members indicated such matters could not be dealt with without provincial *consultation* (pp. 2255-56, 2461, 2601, 2626). Mr. St. Laurent stated, however, that in his view Parliament alone could request changes respecting minority language rights under section 133 (p. 2621).

21. The *British North America Act, 1949* affected federal-provincial relationships and altered the rights of the provinces. It added Newfoundland to Confederation. The addition of a province alters significantly the balance between province and province, and province and the federal government. This amendment confirmed by statute the boundary between Quebec and Labrador—without Quebec's consent. Provincial consents were neither sought nor obtained. There was opposition to the bill in the House of Commons on the ground that the provinces should have been consulted. During the debate on the resolution the same point was made. (Canada,

House of Commons Debates, 1949, p. 345; and Canada, *Senate Debates*, 1949, pp. 71, 79.)

22. The Leader of the Opposition moved an amendment that the resolution be amended in the following terms:

“And whereas it is desirable that the government of Canada should consult with the governments of the several provinces in respect to the said matter; ‘Now therefore be it resolved, that the Government of Canada be required to consult at once the governments of the several provinces and that upon a satisfactory conclusion of such consultations a humble address be presented to His Majesty in the following words’ ”

(Canada, *House of Commons Journals*, 1949, p. 69; and Canada, *House of Commons Debates*, 1949, pp. 498-501.)

The amendment was defeated.

(Canada, *House of Commons Journals*, 1949, pp. 73-75.)

23. The Premiers of Quebec and Nova Scotia stated publicly that consultation should have taken place (Gérin-Lajoie, p. 129).

24. Since Confederation the original four provinces have been increased to ten by action of the federal Parliament (and, on occasion, the United Kingdom Parliament or government) without any consultation with or consent by the original four provinces. It is, therefore, obvious that the contention that there is a convention that provincial consent is required for amendments to the Constitution of Canada affecting federal-provincial relationships or provincial rights and powers is untenable.

25. *The British North America Act, 1949(2)* at the time was thought by the provinces to have affected significantly federal-provincial relations and the rights of the provinces. This amendment added section 91(1) to the *British North America Act* giving Parliament authority to amend “the Constitution of Canada” except with respect to five listed categories. There was no provincial consent sought or obtained. The government took the position that the amendment dealt with matters entirely under federal jurisdiction.

26. The Opposition moved an amendment to the resolution that would have required the convoking of a federal-provincial conference to “devise a method of amending within Canada the Constitution of Canada, and of safeguarding minority rights”. The method so devised would then become the subject of the resolution. (Canada, *House of Commons Debates*, 1949, p. 841.) The amendment was defeated.

27. The *British North America Act, 1951* affected federal-provincial relationships and altered provincial rights. It transferred to Parliament jurisdiction over pensions. Provincial legislatures retained concurrent authority. The consent of all provinces was obtained.

28. The *British North America Act, 1960* affected federal-provincial relationships and affected provincial rights. It imposed a compulsory retirement age of 75 on Superior Court judges. The amendment would have ramifications for provincial governments because of their jurisdiction over the administration of justice derived from section 92(14) of the *British North America Act*. Initial consent from all provinces was obtained for an amendment which would have applied to District and County Court judges, as well as to Superior Court judges. (Correspondence exchanged with provincial governments is printed as an Appendix to the *Votes and Proceedings* of February 16th, 1960.) In addition to establishing in the constitution the retirement age for County and District Court judges, the amendment would have extended the existing section 99 of the *British North America Act* to them so that their security of tenure would thereafter have been constitutionally entrenched as is the case for Superior Court judges. The Senate, however, objected to this amendment and deleted the reference to District and County Court judges. The resolution changed in this significant way was adopted by Parliament and thus the final text of the amendment was not that originally approved by the provinces. (Canada, *House of Commons Debates*, 1960, pp. 7199-201; Canada, *Senate Debates*, 1960, p. 997; Canada, *House of Commons Journals*, 1960, pp. 854-56.)

29. The *British North America Act, 1964* affected federal-provincial relationships and altered provincial rights. It extended Parliament's concurrent jurisdiction over pensions to include supplementary benefits thereto. All provinces consented to the amendment. (Canada, *Sessional Papers* No. 202-J, June 10, 1964.)

Appendix B

The Unsuccessful Search for an Amending Formula

(Source: Factum of Attorney General of Canada in *Manitoba et al v. Canada*, Manitoba Court of Appeal, November 1980.)

The following is the history of federal-provincial attempts to find an amending formula for those parts of the Constitution not amendable in Canada:

- (a) The first attempt was made at the Dominion-Provincial Conference of 1927 called in response to the *Balfour Declaration* of 1926. That report recognized that Canada, and the other Dominions, were independent countries and not subordinate to the United Kingdom. For Canada to achieve such a status legally, however, it was recognized that an amending formula for the Constitution would have to be found to enable full legal power to be transferred from the United Kingdom to Canada. The attempt to find such a formula was unsuccessful.
- (b) The question of an amending formula was again raised at the Dominion-Provincial Conference of 1931 in anticipation of the passage of the *Statute of Westminster*. Agreement was not reached on an amending formula.
- (c) A third attempt was commenced in 1935. The House of Commons established a Special Committee to study the best method by which the *B.N.A. Act* could be amended. This Special Committee held eleven sessions between February 18 and June 19, 1935. It did not result in adoption of an amending formula. However, this led to the holding of a Dominion-Provincial Conference in December 1935. The Conference resulted in the establishment of a Continuing Committee on Constitutional Questions to be comprised of federal and provincial representatives who were to draft an amending procedure. No agreement was reached.
- (d) A fourth attempt was commenced in 1950 with the Dominion-Provincial Conference of that year. Agreement could not be reached.
- (e) A fifth attempt was commenced at a Federal-Provincial Conference in July 1960 at which the then Prime Minister announced his intention to recommence discussions with the provinces on an amending formula and patriation. A conference of Attorneys General was initiated which met four times. These ministerial conferences drafted an amending formula (the Fulton Formula) that received the support of nearly all participants. The ensuing draft bill, however, did not receive unanimous approval and by 1962 this initiative was spent.

- (f) A sixth attempt was initiated in 1964 at a First Ministers' Conference. The new draft (the Fulton-Favreau Formula) was unanimously recommended by the Attorneys General for acceptance by First Ministers at their meeting of October 14, 1964. The formula was later approved by the legislatures of nine provinces, but in January 1966 the Quebec government stated that it would not seek approval by its legislature.
- (g) A seventh attempt was commenced in 1967 which led to what has been called the Constitutional Review Process of 1967-1971. This led to six first ministers' meetings, 26 meetings of ministers, and innumerable meetings of federal and provincial officials. It was decided that progress might be made by undertaking a full-scale review of the Constitution rather than concentrating only on the amending formula. This process led to the "Canadian Constitutional Charter, 1971" (generally referred to as the "Victoria Charter"). The Government of Canada and eight provincial governments accepted the Charter but, Quebec indicated it would not. In Saskatchewan, after the election of a new government, no opinion was expressed on the matter since Quebec's position made the question academic.
- (h) An eighth attempt was initiated in 1975, at a Federal-Provincial Conference, by the Prime Minister suggesting that a more limited approach than that taken during the 1967-71 process be tried. It was suggested that an attempt be made to reach agreement primarily on an amending formula with certain additional guarantees respecting language rights. The Premiers held two meetings at which they discussed the proposal and then informed the federal government on October 14, 1976 that they could not agree to patriation without wider ranging constitutional reform, involving transfers of federal authority to the provinces.
- (i) A ninth attempt was initiated at a Federal-Provincial Conference of First Ministers in October 1978. This followed the introduction in the Parliament of Canada of a draft "Constitutional Amendment Bill" (Bill C-60 of 1977-78). A continuing Committee of Ministers was established by the First Ministers which met three times and reported back to the First Ministers in February 1979. There was no agreement.
- (j) A tenth attempt was initiated in June of 1980. The Continuing Committee of Ministers on the Constitution was instructed by First Ministers to attempt to reach consensus on twelve items of constitutional reform including patriation and an amending formula. However, again no consensus was reached.

Appendix C

Substantive Constitutional Reforms Discussed 1967-1980

Constitutional Review Process 1967-1971

On May 10th, 1967, the then Prime Minister, Mr. Pearson, announced plans for holding a special federal-provincial conference to consider a constitutionally entrenched Bill of Rights for Canada. Subsequently language rights were added to the agenda because a federal Royal Commission on that subject was in the process of reporting. The provinces were invited to suggest "any related matters" for the agenda. Two additional agenda items were added for the meeting which eventually took place in February 1968: regional disparities and further constitutional review. Out of this grew a federal-provincial constitutional review process which was to last more than three years and which discussed the following subjects:

- (1) fundamental rights;
- (2) official languages and language rights;
- (3) equalization and regional disparities;
- (4) amending procedure;
- (5) patriation process;
- (6) mechanisms of federal-provincial relations (e.g. annual First Ministers' Conferences);
- (7) Supreme Court;
- (8) modernization of the Constitution;
- (9) income security and social services;
- (10) principles and objectives of the Constitution;
- (11) Senate reform;
- (12) external relations;
- (13) taxing powers (especially sales taxes and death duties);
- (14) the federal spending power;
- (15) capital markets and financial institutions;
- (16) environmental management.

In June 1971, a tentative agreement was reached on proposals respecting the first nine items listed above (in a document known as the Victoria Charter). However, in the end the Quebec government refused to agree to the proposals, mainly on the ground that it wished to see increased provincial control in the area of income security and social services. The Saskatchewan government did not formally accept the Charter either. It was newly elected at the time and it was felt that Quebec's refusal made further action essentially academic.

1975-1976

In April 1975, the then Prime Minister, Mr. Trudeau, while meeting with the provincial Premiers on another matter, suggested they might collectively try once again to get agreement at least on an amending formula and patriation procedure in order to terminate the need for United Kingdom involvement in Canadian constitutional amendments.

This led to discussions with the provinces in which additional provisions were added at their request to the proposal. Thus, in April 1976, a draft proposal for constitutional reform was put forward which included provisions respecting:

- (1) official languages and language rights;
- (2) equalization and regional disparities;
- (3) amending procedure;
- (4) patriation process;
- (5) federal-provincial agreements;
- (6) Supreme Court;
- (7) Senate representation.

The Premiers responded on October 14, 1976, indicating the following:

- all provinces agreed with the objective of patriation;
- eight provinces agreed with the amending formula being proposed (i.e. that which was drafted and agreed to by all 10 provinces in 1971 in Victoria);
- patriation would not be agreed to, however, *unless* “accompanied by the expansion of provincial jurisdiction and involvement in certain areas”, i.e.:
 - (1) A greater degree of provincial involvement in immigration;
 - (2) A strengthening of jurisdiction over taxation in the areas of primary production from lands, mines, minerals and forests;
 - (3) A provision that the declaratory powers of the federal government to declare a particular work for the general advantage of Canada would only be exercised when the province affected concurred;
 - (4) That a conference composed of the eleven First Ministers of Canada should be held at least once a year as a constitutional requirement;
 - (5) That the creation of new provinces should be subject to any amending formula consensus;
 - (6) A new concurrent power with respect to culture;
 - (7) Greater provincial control over communications;
 - (8) A greater role for the provinces in the appointment of Supreme Court judges than provided for in the draft;
 - (9) Limitations on the exercise of the federal spending power.

1978-1979

Another initiative was started in October 1978, following the introduction into Parliament in June of that year of a Constitutional Amendment Bill (Bill C-60 of session 1977-78). The subjects dealt with this time included:

- (1) fundamental rights, including official languages and language rights;
- (2) equalization and regional disparities;
- (3) amending procedure;
- (4) patriation process;
- (5) Supreme Court;
- (6) Senate;
- (7) indirect taxation;
- (8) the federal spending power;
- (9) limitations on the federal declaratory power;
- (10) communications;
- (11) family law;
- (12) resource ownership and interprovincial trade;
- (13) ownership of and jurisdiction over offshore resources;
- (14) fisheries jurisdiction;
- (15) the monarchy.

Agreement by all governments was limited. It was agreed that no changes should be made in the monarchy and that that item should be dropped. It was agreed that additional legislative authority allowing the provinces to levy indirect taxation was not necessary and, therefore, that item should be dropped as well. There was agreement on the family law proposals and almost unanimous agreement on those relating to regional disparities and communications.

June 1980—September 1980

The process of constitutional discussion was reactivated in June 1980, when Prime Minister Trudeau again suggested to the provincial Premiers that an attempt should be made to reach agreement so that the Constitution could be "brought home". The agenda items this time included:

- (1) fundamental rights, including official languages and language rights;
- (2) equalization and regional disparities;
- (3) amending formula (and the patriation process);
- (4) Supreme Court;
- (5) Senate reform;
- (6) communications;
- (7) family law;
- (8) resource ownership and interprovincial trade;

- (9) offshore resources;
- (10) fisheries;
- (11) statement of principles of the federation/preamble;
- (12) powers over the economy—economic union.

Despite intensive and almost continuous negotiations over the course of the summer of 1980 involving two first ministers' meetings, four ministerial meetings and innumerable meetings of officials, unanimous agreement was not reached on any item. Even that which had previously been agreed to in the family law area—increased provincial jurisdiction—did not this time receive unanimous provincial consent.



Ref. A04597

PRIME MINISTER

Patriation of Canadian Constitution

You are to hold a meeting at 5.30 this evening with the Chancellor of the Duchy of Lancaster, the Lord Privy Seal and the Attorney General on how the handling of this should be presented at Cabinet next week.

BACKGROUND

2. When this was last discussed in OD, the general view was that, when the request of the Canadian Government and Parliament was received, the Government would have to introduce the Bill in the House of Commons in accordance with the Canadian request and without delay. It was recognised, however, that there would be a considerable body of opinion in the House of Commons opposed to proceeding with the Bill, and that there might well be a reasoned amendment on Second Reading to the effect that the House of Commons declined to give a Second Reading to the Bill until the Supreme Court of Canada had ruled on the legality in Canadian law of the Canadian request. Ministers thought that such a reasoned amendment would be difficult to resist, and might well carry the day, particularly if the Attorney General made clear his own view that as a matter of propriety (rather than law) it would be well to wait until the Supreme Court of Canada had ruled on the Manitoba judgment before proceeding with the Bill in the British Parliament.

3. The Foreign and Commonwealth Office reply to the report of the Foreign Affairs Committee (FAC) has been drafted on the assumption that the Government would introduce the Bill as soon as it was received. When the Chancellor of the Duchy and the Lord Privy Seal saw the Canadian Minister of Justice last week, they told him that it was the Government's intention to introduce the Bill as soon as possible after it was received - which means soon after Easter - though the Chancellor of the Duchy left the Canadian Administration in no doubt about the risk of a reasoned amendment for delay being accepted by the House.



4. The Foreign and Commonwealth Office position seems, however, suddenly to have changed. The Lord Privy Seal told the Chancellor of the Duchy this morning that it was now his view that the Government should not introduce the Bill until after the Supreme Court of Canada had pronounced on the Manitoba judgment. The Supreme Court hearing is expected to begin on 28th April, which was considerably earlier than had previously been expected, and should be completed by about the end of June. Technically there may also be appeals from other Provincial Courts; but the Manitoba judgment goes to the centre of the issue, and it seems to be generally agreed that, if the Supreme Court finds in favour of the Manitoba judgment - or at least does not find against them - and the Federal Government, that can be regarded as in effect settling the legal issue in Canada.

5. This considerable volte face on the part of the Foreign and Commonwealth Office is one with very considerable consequences. It will mean rewriting a paragraph in the reply to the FAC. It will also mean telling the Canadian Federal Government that the United Kingdom Government has changed its position since the Chancellor of the Duchy and the Lord Privy Seal saw the Canadian Minister of Justice last week. It was known at that time that the Supreme Court hearing would begin on 28th April; it will not therefore be very easy to explain such a volte face to the Canadian Government.

6. In the discussion of this it has to be remembered that the Attorney General has throughout taken the view that it would be proper for the British Government to delay the introduction of the Bill at Westminster until the Supreme Court of Canada had concluded its proceedings on the Manitoba judgment. That is a judgment on a matter of propriety, not a judgment on a matter of law. Nonetheless, if the Attorney General were to express that view in the House of Commons, it would carry great weight.

7. It has also to be remembered that both the Chancellor of the Duchy and the Lord Privy Seal believe that it would be easier to get the Canadian Bill through the Westminster Parliament after the Supreme Court judgment than it would be if we went ahead without waiting for that.



8. I think that the question which Ministers have to decide, eventually at Cabinet on 9th April but in a preliminary way now, for the purposes of preparing a paper for Cabinet, is whether the Government should from the outset take the responsibility of deferring the introduction of the Bill until after the Supreme Court judgment, or whether to go ahead with the Bill soon after Easter, as the Canadian Government has been told to expect, and allow the House of Commons to defer its progress by means of a reasoned amendment. In terms of Parliamentary handling the latter course might be easier; in terms of relations with the Canadian Government, there would be much to be said for letting the House of Commons carry the can rather than the Government carrying it itself.

HANDLING

9. I suggest that you ask the Chancellor of the Duchy to outline the problem, and the Lord Privy Seal to follow him with the Foreign and Commonwealth Office view. The Lord Privy Seal might be pressed to explain why the Foreign and Commonwealth Office has changed its view at this late date. You will probably also wish to ask the Attorney General if his view has changed since he expressed it in OD. Since much could turn on the way he puts his view, if he were asked to express it in the House of Commons, you may like to ask him to recapitulate it now.

CONCLUSION

10. If the view of the meeting is that the Government should stick to its mind, introduce the Bill soon after Easter and let the House of Commons take the responsibility for deferment, you may wish to invite the Lord Privy Seal to express his paper for Cabinet accordingly; and you may wish to suggest that the Chancellor of the Duchy should be prepared to help behind the scenes with the preparation of a reasoned amendment, if that seems to be called for.

11. If the Foreign and Commonwealth Office change of view is accepted, then the Lord Privy Seal would have to be invited:-

- (a) To amend the draft reply to the FAC.
- (b) To circulate a paper to Cabinet accordingly for discussion on 9th April.
- (c) To advise on how we should explain and justify the change of view to the Canadian Federal Government.

31st March, 1981

ROBERT ARMSTRONG

Checked - 13/4

Overdue

30 March 1981

Chaxpl - emphasis; need to get it
before Indie 9/4

Broadcasts in French to Canada

Michael Alexander wrote to you on 20 February about a letter the Prime Minister had received suggesting that there might be some advantage in transmitting BBC programmes in French to Canada. George Walden replied on 2 March.

The Prime Minister's original correspondent was David Ginsburg, M.P. I attach a copy of his letter, which was dated 12 February. He has now telephoned us to say that, notwithstanding the note on his letter that he did not want a full reply, he would now like one.

I should be grateful if you could suggest a short draft reply for the Prime Minister to send to Mr. Ginsburg, to reach us here by Wednesday 8 April.

NJS

Lynne dealing with this.

F.J. Richards Esq
Foreign and Commonwealth Office

VLS



10 DOWNING STREET

CAROLINE

DG's original letter specifically

asked us not to reply: may we

have a word?

MS
30/13



10 DOWNING STREET

From the Private Secretary

Mr. Sanders.

Mr. David Ginsberg W.
called. He wrote a few
~~days~~^{weeks} ago, so far
acknowledgement but has
not received a full
reply. Subject was
BBC French Broadcast to
Canada. I find we wd
be writing ~~and~~ made
all the right notes.
Hope that was OK.

E.S.

27/3.

He wd like a
copy despite what
Mr. Sanders says!

QRS 805
UNCLASSIFIED
FM OTTAWA 172210Z MAR 81
TO PRIORITY FCO
TELEGRAM NUMBER 147 OF 27 MARCH

Canada
AMC 012/1
30 MAR 1981
(284)

CANADIAN CONSTITUTION

1. AN EVENTFUL AND LIVELY WEEK IN THE HOUSE OF COMMONS WITH THE PROGRESSIVE CONSERVATIVE PARTY NOT ONLY CONTINUING TO DRAG OUT THE CONSTITUTIONAL DEBATE, BUT NOW ALSO FILIBUSTERING TO BLOCK MR PINARD'S MOTION TO CURTAIL THE CONSTITUTIONAL DEBATE. THIS WEEK HAS BEEN MARKED BY BITTER AND OCCASIONALLY DEMEANING EXCHANGES BETWEEN THE PRIME MINISTER AND THE LEADER OF THE OPPOSITION.

2. ON MONDAY, 23 MARCH, PRIME MINISTER TRUDEAU ADDRESSED THE HOUSE FOR OVER 2 HOURS. HIS SPEECH CONTAINED NO NEW ARGUMENTS BUT WAS A FORCEFUL REITERATION OF THE FEDERAL GOVERNMENT'S CASE FOR THE SUBSTANCE METHOD AND TIMING OF ITS PROPOSALS. (YOU WILL HAVE FULL TEXT BY NOW.) FOLLOWING HIS ADDRESS, THE DEBATE CONTINUED WITH A SPEECH BY MR NYSTROM, THE CONSTITUTIONAL SPOKESMAN FOR THE NDP UNTIL HE BROKE RANKS RECENTLY. HE ARGUED THAT IN A FEDERAL SYSTEM, IT WAS WRONG FOR ONE ORDER OF GOVERNMENT ACTING ALONE, TO AMEND THE CONSTITUTION IN SUCH AN IMPORTANT RESPECT, AND THAT MR TRUDEAU'S REFERENDUM TECHNIQUE WAS DESIGNED TO WORK IN FAVOUR OF THE FEDERAL GOVERNMENT. HE CONTENDED THAT IT WAS NOT FAIR TO ASK THE BRITISH PARLIAMENT TO PROCEED UNTIL THE SUPREME COURT HAD GIVEN ITS JUDGEMENT.

3. THROUGHOUT THE REST OF THIS WEEK, COMMONS BUSINESS WAS VIRTUALLY PARALYSED BY THE CONSERVATIVES RAISING PROCEDURAL POINTS OF ORDER ON THE PINARD MOTION. THEY ARGUED THAT THE PRECEDENTS AND THE TRADITIONS OF THE HOUSE MUST BE RESPECTED, WHILST MR PINARD CLAIMED THAT THEY WERE THERE TO BE CHANGED. THE CONSERVATIVES ALSO RAISED A WHOLE SERIES OF QUITE UNRELATED QUESTIONS OF PRIVILEGE.

4. IN THE LATTER PART OF THE WEEK, QUESTION PERIOD WAS DOMINATED BY EXCHANGES BETWEEN MR TRUDEAU AND MR CLARK. ON SEVERAL OCCASIONS MR CLARK ASKED THE PRIME MINISTER TO CALL ONE MORE ROUND OF FEDERAL-PROVINCIAL TALKS, AND DARED HIM TO CALL AN ELECTION ON THE CONSTITUTIONAL ISSUE BEFORE SEEKING ACTION IN WESTMINSTER. MR TRUDEAU MAINTAINED THAT THE PROVINCES HAD HAD LONG ENOUGH ALREADY TO COME TO AN AGREEMENT AND HAD FAILED TO DO SO. AS FOR AN ELECTION, MR TRUDEAU SAID HE WOULD NOT DO THE TORIES' DIRTY WORK FOR THEM (IE TO GET RID OF THEIR LEADER). HE THEN SAID "LET US PASS THIS BILL IN ALL STAGES, BOTH HOUSES OF PARLIAMENT, LET US SEND IT TO BRITAIN AND THEN LET US CALL A GENERAL ELECTION". HE AMPLIFIED THIS IN A PRESS CONFERENCE ON THURSDAY. HE SAID "LET'S GET THE CONSTITUTION HOME: THEN IF ANY PARTY WANTS AN ELECTION ON THE PLATFORM THAT WE SEND THE CONSTITUTION BACK TO BRITAIN OR HAVE IT WITHOUT A CHARTER OF BASIC RIGHTS, I AM PREPARED TO CALL AN ELECTION ON THAT..... NOTHING IS IRREVERSIBLE, BUT I DON'T WANT IT TO BE STOPPED NOW BY THE PROCESS OF A GENERAL ELECTION". AT HIS PRESS CONFERENCE, MR TRUDEAU ALSO INDICATED A PREPAREDNESS TO MODIFY THE PROVISION

IN THE RESOLUTION REGARDING PROVINCIAL PROPOSALS FOR A NEW PERMANENT AMENDING FORMULA, PERHAPS BY LOWERING THE REQUIREMENT FOR PROVINCES REPRESENTING 80% OF THE POPULATION.

5. ON 26 MARCH, MR CLARK ARGUED THAT THE CONSTITUTIONAL RESOLUTION SHOULD NOT BE BEFORE THE HOUSE AND THE SUPREME COURT OF CANADA AT THE SAME TIME. THE SPEAKER RULED ON 27 MARCH THAT THE SUB JUDICE RULE WAS A VOLUNTARY RESTRAINT ON THE PART OF THE HOUSE AND APPLIED TO BILLS, NOT MOTIONS. IN THE MEANTIME MR TRUDEAU ARGUED THAT IF PARLIAMENT INTERRUPTED ITS BUSINESS EVERY TIME SOMETHING WAS ALLEGED TO BE ILLEGAL THEN NO WORK WOULD EVER GET DONE.

6. IN THE SENATE AN AMENDMENT CONCERNING THE RIGHTS OF WOMEN WAS TABLED BY A CONSERVATIVE. THIS COULD HAVE A DISRUPTIVE EFFECT ON THE GOVERNMENT'S TIMETABLE SINCE CLOSURE IS NOT POSSIBLE IN THE SENATE AND ON THE FACE OF IT MIGHT REQUIRE REFERRAL TO THE COMMONS IF AN IDENTICAL AMENDMENT IS NOT PASSED THERE.

7. ON 24 MARCH THE CANADIAN GOVERNMENT'S REPLY TO THE FAC REPORT WAS TABLED. THIS ARGUED IN BRIEF THAT THERE IS A LONGSTANDING CONVENTION THAT THE LEGAL POWER OF THE UK PARLIAMENT TO AMEND THE CANADIAN CONSTITUTION IS EXERCISED IN ACCORDANCE WITH THE WISHES OF THE GOVERNMENT AND PARLIAMENT OF CANADA, THAT THIS CONVENTION HAS ALWAYS BEEN HONOURED BY THE UK AND THERE IS NOTHING IN THE PROPOSED PATRIATION PACKAGE WHICH WOULD JUSTIFY DEVIATION FROM THIS CONVENTION. FAILURE TO RESPECT THIS CONVENTION WOULD PLACE SEVERE STRAINS ON BRITISH-CANADIAN AND COMMONWEALTH RELATIONS.

8. BY FRIDAY AFTERNOON NO ANNOUNCEMENT HAD BEEN MADE OF AGREEMENT BETWEEN THE DISSENTING PROVINCES ON A REVISED AMENDING FORMULA. MINISTERS HAD MET IN WINNIPEG AND PREMIERS HAD BEEN IN CONTACT BY TELEPHONE, AND BROAD HINTS HAD BEEN DROPPED BY SOME OF THE PARTICIPANTS THAT AGREEMENT WAS IMMINENT.

9. THE PREMIER OF SASKATCHEWAN, ALLAN BLAKENEY, SPEAKING AT THE PRESS CLUB IN OTTAWA ON 26 MARCH, SAID HE DID NOT SHARE THE VIEW THAT NO CHANGE COULD TAKE PLACE WITHOUT THE UNANIMOUS AGREEMENT OF ELEVEN GOVERNMENTS. HE FAVOURED A DOUBLE MAJORITY: IE A MAJORITY IN THE HOUSE OF COMMONS AND A MAJORITY OF THE PROVINCES REPRESENTING MAJORITIES IN THE FOUR REGIONS OF CANADA.

10. IT WAS REVEALED ON 27 MARCH THAT THE SUPREME COURT WOULD OPEN THE HEARING ON THE MANITOBA APPEAL ON 28 APRIL. THIS IS MUCH EARLIER THAN GENERALLY ANTICIPATED AND CREATES THE POSSIBILITY OF A SUPREME COURT DECISION BEFORE ITS SUMMER RECESS AT THE END OF JUNE.

FORD
LIMITED
NAD
CCD
NEWSD
PS
PS/LRS
PS/MRRIDLEY
PS/MR BLAKER

PS/MR HURD
PS/POS
SIR E. YOUNG
MR DAY
MR URE
LORD N. & L. LENNOX

COPIES TO:
MR FREELAND LEGAL
MR PARRY ADVISERS
J.R. ROSE FAC.
THIS TELEGRAM
WAS NOT
ADVANCED

LORD MORRISON
MR HEYHOE

893

Original filed on:

Euro Pol: May 1979

Salaries and Pensions of Euro MPs

Ref. A04546

PRIME MINISTER

Cabinet: Parliamentary Affairs

There are several matters likely to be mentioned after the Chancellor of the Duchy has announced next week's business.

Telephone Tapping and the Interception of Mail

2. As you know, the Government were defeated in the Standing Committee on the British Telecommunications Bill when Mr John Gorst supported an Opposition clause seeking to impose statutory controls on telephone interception. The Home Secretary will seek to persuade the House to remove the clause during the Report Stage of the Bill next week. Mr Gorst has, however, secured the support of some 40 Government back-benchers for a motion arguing that statutory provision needs to be made.

3. There is no need for this subject to be discussed but if it is mentioned in the context of the Report Stage of the British Telecommunications Bill, you will want the Home Secretary briefly to explain the problem and the Chancellor of the Duchy and the Chief Whip to say what steps are being taken to ensure that the Government is able to win the necessary division.

Pay of Members of the European Parliament

4. An unfortunate problem has arisen over the pay of Members of the European Parliament (MEPs). It is summarised in a letter from the Chancellor of the Duchy to the Home Secretary of 24 March (copy attached). Briefly, the Government decided shortly after taking office that MEPs, who are paid out of the consolidated fund, should receive the same salary as Members of the Westminster Parliament, and this requirement was embodied in the European Assembly (Pay and Pensions) Act 1979. By an oversight, the necessary resolution was not put before the House of Commons last summer when (after a good deal of argument) the pay of Westminster MPs was increased from £10,725 to £11,750. Nevertheless, MEPs were paid the higher figure. The mistake was discovered by Parliamentary Counsel last month and, when brought to the notice of the Comptroller and Auditor General, the latter said that MEPs would have to revert to the lower salary unless the Government took immediate steps to put matters right.

I gather that
the Business Manager
want to raise
this MS

5. The Home Secretary, who is responsible for the relevant legislation, can briefly explain the problem and tell the Cabinet that he thinks the Government should take early steps to table the necessary resolution giving legal authority to the payment of £11,750 with retrospective effect from 13 June 1980. The Chancellor of the Duchy can say when he proposes to find time for what will inevitably be an awkward debate. (Luckily there is statutory cover for giving the necessary resolution retrospective effect, but the opportunity will no doubt be taken to criticise the alleged extravagance of the European Assembly).

Canada: Reply to Report of Select Committee on Foreign Affairs

6. When OD Committee considered the handling of the Canadian Government's request for amendment of the British North America Act on 23 February, they invited the Foreign and Commonwealth Secretary, in consultation with the other Ministers concerned, to draft a reply to the report of the Foreign Affairs Committee setting out the main arguments in favour of accepting the Canadian request without amendment. An agreed draft reply is now ready and it had been proposed to publish it this week. The reply will make quite clear that the Government intends to accede to Mr Trudeau's request and the Chancellor of the Duchy feels that from both the Westminster and the Canadian point of view it would be better for the Government not to show its hand until the debate has been completed in both Houses of the Canadian Parliament.

7. The Chancellor of the Duchy can explain this and indicate that he favours publication of the reply at some point between the completion of the Canadian debates and the official receipt of the Canadian request by The Queen in London. The Lord Privy Seal can confirm that he agrees.

8. OD Committee also invited the Chancellor of the Duchy to consider the best way of handling the Canadian request in Parliament. He has been considering this and is having a further meeting with the Lord Privy Seal and the other business managers next week to discuss the possibility of a debate on the Government's reply to the Foreign Affairs Committee as a prelude to the Second Reading debate on the necessary United Kingdom legislation. You will not want the Cabinet to discuss these issues tomorrow but you may want to record the need for the Chancellor of the Duchy to bring early proposals to his colleagues.



PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

24 March 1981

Chancellor of the Duchy of Lancaster

CONFIDENTIAL

How Nice,

CANADA

... I attach a copy of a letter which I have today sent to Adam Wood in the Lord Privy Seal's Office recording discussion with the Chancellor of the Duchy of Lancaster and the Chief Whip yesterday evening about the timing of the Government's reply to the Foreign Affairs Committee Report on Canada.

You will see that the Chancellor of the Duchy has it in mind to raise this question orally at Cabinet on Thursday morning and I should be grateful if you would confirm that you see no difficulty about this or about the proposed course of action.

I am copying this letter to David Wright.

*Yes over,
David.*

D C R HEYHOE

Nick Sanders Esq
10 Downing Street

CONFIDENTIAL



Chancellor of the Duchy of Lancaster

PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AJ

24 March 1981

Dear Adam,

At their meeting yesterday evening, the Chancellor of the Duchy, the Lord Privy Seal and the Chief Whip discussed the timing of the Government's reply to the Foreign Affairs Committee Report on Canada. The Chancellor of the Duchy explained his concern that publication now would adversely effect the Parliamentary handling here of the eventual Canadian request and it was agreed that, with this in mind, publication of the Government's reply should be deferred at least until after the debate in Canada was concluded. The right time for publication would need to be judged in the light of events. It was also agreed that the Chancellor of the Duchy should raise the point orally under Parliamentary affairs at Cabinet on Thursday.

The Chancellor of the Duchy also has it in mind to hold a further meeting next week to discuss the general question of Parliamentary handling with those most concerned and in the light of the latest available procedural advice. I will be in touch about this in due course. Meanwhile, I am copying this letter to Henry Steel, Murdo Maclean, David Wright and Sir Henry Rowe.

Yours ever

D C R HEYHOE
Private Secretary

Adam Wood, Esq
Private Secretary to
the Lord Privy Seal
Foreign and Commonwealth Office
LONDON

CONFIDENTIAL



10 DOWNING STREET

Mr Sanders.

I have spoken to
~~MOJBA~~ F.C.O. who will come to
Cabinet approximately briefs.

I should be glad to have a ^{short}
word about this

MS

24/3

P.S. I suggest that you tell Mr
Heyhoe that it is O.K. to
raise at Cabinet & that
we will be putting papers to
P.A.

Short, 24/3

attached to T.P.M. when received

Canada

GRS 330

RESTRICTED

ms

RESTRICTED

FM OTTAWA 241738Z MAR 81
TO IMMEDIATE FCO
TELEGRAM NUMBER 135 OF 24 MARCH

MY TELNO 134: CONSTITUTIONAL DEBATE

1. THE SPEECH LASTING OVER 2 HOURS, WAS MR TRUDEAU'S FIRST IN PARLIAMENT ON HIS CONSTITUTIONAL RESOLUTION. MOST PUBLIC COMMENT HAS ACKNOWLEDGED THAT IT WAS A COMPELLING PARLIAMENTARY PERFORMANCE BUT ADDED NOTHING NEW IN SUBSTANCE TO THE DEBATE. IT IS UNLIKELY TO HAVE MUCH EFFECT ON PUBLIC OPINION. CLARK AND BROADBENT HAVE BOTH RECONFIRMED THEIR PARTY POSITIONS.

2 THE TIMING OF THE SPEECH MAY BE SIGNIFICANT. IT IS GENERALLY CONSIDERED THAT TRUDEAU WOULD PREFER TO HAVE HIS PACKAGE THROUGH PARLIAMENT BEFORE THE QUEBEC ELECTION ON 13 APRIL. EITHER A RECONFIRMED LEVESQUE WHOSE PARTY PLATFORM IS PLAYING DOWN SOVEREIGNTY ASSOCIATION OR A NEWLY-ELECTED RYAN WHO AFTER ALL PLAYED A MAJOR PART IN DEFEATING THE SEPARATISTS IN LAST YEARS REFERENDUM, AND WHO HAS BEEN DEMANDING ANOTHER FEDERAL/PROVINCIAL MEETING, WOULD HAVE GREATER WEIGHT THAN THE PRESENT QUEBEC GOVERNMENT IN ANY CASE MR TRUDEAU IS NO DOUBT ANXIOUS TO HAVE PARLIAMENT COMPLETE ITS BUSINESS ON THE CONSTITUTION BEFORE THE EASTER RECESS ON 16 APRIL. IT IS NOW ASSUMED THAT TO MEET THIS TIMING THE MOVE TOWARDS CLOSURE WILL BE STARTED LATER THIS WEEK. THE FIRST STEP WOULD BE TO FORCE THROUGH THE MOTION TO LIMIT DEBATE TO A FURTHER 4 DAYS OF EXTENDED SITTINGS. THIS WOULD ALLOW THE SENATE, WHERE CLOSURE CANNOT BE APPLIED BUT WHERE THE LIBERALS HAVE A SECURE MAJORITY, A FINAL WEEK OR SO TO ROUND OFF THE PARLIAMENTARY PROCESS. HOWEVER, THE LIBERALS STILL FACE PROBLEMS OF PARLIAMENTARY MANAGEMENT. MR BROADBENT, AFTER A CAUCUS MEETING YESTERDAY, PUBLICLY RESTATED NDP OPPOSITION TO CLOSURE BUT SUPPORT FOR THE CONSTITUTIONAL PROPOSALS. THE NDP ARE EXPECTED TO TABLE FURTHER AMENDMENTS TO THE RESOLUTION ON NATIVE RIGHTS AND POSSIBLY ON EQUALITY BETWEEN THE SEXES. FURTHER ACCEPTABLE SMALL CHANGES MAY BE FORTHCOMING FROM THE CONSERVATIVES AND LIBERALS THEMSELVES. ALL SUCH AMENDMENTS WOULD HAVE TO BE TABLED IN THE FOUR-DAY PERIOD IF THE GOVERNMENT DECIDED TO FOLLOW THE SCENARIO ABOVE. IT IS DIFFICULT TO SEE HOW IN THESE CIRCUMSTANCES THE NDP COULD PROMOTE THEIR AMENDMENTS WITHOUT IN PRACTICE ACCEPTING CLOSURE.

FORD
FCO | WH
NAD

THIS TELEGRAM
WAS NOT
ADVANCED

RESTRICTED



Gouvernement du Québec
Délégation générale
Londres

Canada

19 March 1981

The Rt Hon Mrs Margaret Thatcher MP
Prime Minister
House of Commons
London
SW1A 0AA

Dear Mrs Thatcher,

Recent statements from the Canadian Federal Government seem to indicate that it no longer believes Canada to be a federation and that, consequently, it has the right to take unilateral action to amend the Canadian Constitution in the unprecedented manner proposed.

The federal nature of Canada lies at the heart of the problem faced by the Canadian Federal Government in imposing its will on the other members of the Canadian federation. This problem will also shortly be imposed on Westminster, if the Federal Government pursues its proposed course of action.

Since unitary, devolved and federal constitutional systems are very different in essence, theory and practice we have prepared the enclosed briefing paper on the Canadian federal principle.

I would be very pleased to discuss with you any questions you may have arising from this paper. Please do not hesitate to contact me.

Yours sincerely,

Gilles Loiselle
Agent-General for Quebec

Encl.



THE CANADIAN CONSTITUTION

Background Brief No. 5

The Nature of Canadian Federalism

1. Introduction

- 1.1 In the controversy over the Canadian Federal Government's unilateral proposals to "patriate" and substantially amend the Canadian constitution, a major consideration is the federal nature of Canada itself.
- 1.2 An appreciation of the nature of federalism in Canada is central to an understanding of the environment in which the federal government's unilateral proposals are being made and of the reasons why eight provincial governments out of ten oppose them in Canada.
- 1.3 This background briefing paper discusses the basic constitutional principles of a federal system, the federal nature of Canada, the amending process of the constitution and the implications of the federal government's proposed unilateral modification, for the federal principle on which Canada is founded.

2. The Essential Features of a Federal System

- 2.1 Three essential features are traditionally cited by authorities to characterise the federal nature of a constitution:
 - the supremacy of the written constitution;
 - distribution of powers between different levels of government;
 - the authority of the courts to act as interpreters of the constitution.

2.2 It is of the essence of a federal state, that there must be a written constitution setting out the fundamental body of laws and principles by which the state is to be governed. This written constitution is supreme since the federal state derives its existence from it. This constitution also has to be resistant to change.

2.3 The second and probably most important feature of a federal system is the distribution of powers:

"In a federal system sovereignty is divided between two levels of government. The federal government is sovereign in some matters and the provincial governments are sovereign in others. Each within its own sphere exercises its power without control from the other, and neither is subordinate to the other. It is this feature which distinguishes a federal from a unitary constitution."

Par. 502, Royal Commission of the Constitution, Vol. 1, Report, HMSO Cmnd. 5460.

2.4 Finally, in order to assure the supremacy of the constitution, the courts have, in most federal systems, the authority to interpret the constitution.

2.5 A federal system is essentially different from unitary or devolved systems of government where sovereignty is not shared, but resides with the central government and is delegated by it. In a unitary system such as the United Kingdom, the powers allocated to other subordinate authorities are held at the discretion of the central government.

3. The Federal Nature of Canada

3.1 Canada, as it is known today, was established by an Act of the Imperial Parliament; the British North America Act (BNAA) of 1867.

3.2 Under this Act, three existing British colonies agreed to be federated into one nation divided into four provinces: Ontario (formerly Upper Canada); Quebec (formerly Lower Canada); Nova Scotia; and New Brunswick. Provision was made in the Act for the extension of the federation to include other provinces and today Canada consists of

ten provinces. The preamble to the BNAA expressed the federal principle as the 'Desire' of these provinces 'to be federally united into One Dominion under the Crown of the United Kingdom.'

- 3.3 Under the BNAA, Canada's legislative sovereignty is divided between the federal parliament and provincial legislatures. Neither is subordinate to the other, since each level of government is absolutely sovereign in its own sphere of jurisdiction. Their respective fields of jurisdiction are principally defined in sections 91 and 92 of the BNAA.
- 3.4 Section 92 of the BNAA gives the provinces exclusive jurisdiction, among other things, in matters of property and civil rights, direct taxation, municipal institutions, the administration of justice and, generally, in all matters of local and private nature in the province. In addition, section 93 gives the provinces jurisdiction over education.
- 3.5 Section 91 of the BNAA details the legislative competence of the federal parliament: defence, international relations, criminal law, money and banking, the regulation of trade and commerce, navigation, Indians and their lands, among other things.
- 3.6 Further to those enumerated powers, the federal parliament also possesses: a general spending power by which it can spend its money at its discretion; the power to make laws for the peace, order and good government of Canada - this power has been restrictively interpreted by the courts in order to safeguard the autonomy of the provinces; and a general residuary power by which all the competences not specifically attributed to the provinces are deemed to be of federal jurisdiction.
- 3.7 Given the specific way powers are distributed, it is clear that Canada, both in theory and in practice, is a federal state. However, certain extraordinary powers were allocated to the federal government by the BNAA. These include the power of the Governor General to disallow any provincial statute (ss 54, 55, 56, 57 and 90 BNAA) and the power of the federal government to appoint judges of

the provincial superior courts (s 96 BNAA) and the Lieutenant Governors of each province (ss 58 and 92 (1) BNAA).

- 3.8 Although widely used in the early years of the Canadian federation, the power of disallowance by the Governor General has not been used since 1943. That this power is obsolete in practice is acknowledged by many authorities including The Hon P-E Trudeau:

"Personally I would be prepared to argue that they (the federal right to disallow and to reserve provincial laws) are obsolete in any case."

Federalism and the French Canadians, P.149.

- 3.9 The federal right to appoint provincial superior court judges and the Queen's representative in the provinces (Lieutenant Governor) was originally intended to guard against local political influences. It was never intended, and indeed the practice has never been, that the appointees would be biased in favour of either the federal or the provincial authorities. This power is, therefore, in practice of very little consequence.
- 3.10 It has been argued that these powers prevented Canada from being considered a truly federal system. In this context, K C Wheare called Canada a "quasi-federal" state.
- 3.11 Despite these minor encroachments on the strict theory of federalism, in practice the Canadian constitution is truly federal, and nearer to true federalism than the Australian :

"In Canada on the other hand the Constitution, though in law quasi-federal, is in practice nearer to federalism than the Australian."

K C Wheare, Modern Constitutions, P.21.

- 3.12 There is hardly an example of a federal system in which the parties to the federation are not to a degree subject to interference from the centre. In the United States, for instance, Article 4:4 and 1:(10) (3) and the 13th 14th and 15th amendments manifestly allow the federal authorities to interfere within the state's exclusive jurisdiction. Yet, it would be impossible to argue that the United States does not have a federal system.

3.13 It must therefore be concluded that the federal principle forms the very basis on which the Canadian constitution lies. This federal principle is reflected in each and every aspect of the Canadian system of constitutional law. The following example plainly illustrates the sovereignty of the provinces' legislative powers in Canada.

3.14 Canada, as a fully independent and sovereign country, possesses an unchallengeable power to enter into treaties and other international obligations binding in international law. However, in the Labour Conventions case (1937), the Privy Council firmly decided that federal government can only legislate to implement a treaty in matters within its own jurisdiction (as defined in s 91 of the BNAA). When the subject-matter of the treaty falls within provincial competence, the federal government can only bring the treaty to the attention of the provinces.

4. The Amendment of the Canadian Constitution

4.1 It is the essence of all constitutions, whether written or unwritten, that they should be resistant to change. The rules for amendment to constitutional instruments are generally designed to make such changes difficult.

4.2 In a federal state these factors are even more important, since the powers of the various levels of government are defined in the written constitution.

4.3 In the United States, for instance, constitutional amendments have to be initiated by a two-thirds majority in both Houses of Congress, and must be subsequently ratified by the legislatures or by convention in three-fourths of the states. Since 1789, more than 5,000 proposals have been introduced before the Houses of Congress; of these, only 26 have received sufficient support at the federal level and have been ratified by the necessary number of state legislatures.

4.4 The amendment procedure for Australia was designed to be more flexible than that in the United States. Under Section 128 of the Australian constitution each amendment must be adopted by an absolute

majority of each House of Commonwealth (federal) Parliament and must be subsequently approved, in a referendum, by a majority of electors voting in a majority of states and also by a total majority of the electors voting. Since 1900, only five amendments have obtained the required consent.

- 4.5 The scope of the amendment process for the Canadian constitution set out in the BNAA is very limited. The BNAA, from the outset, granted the provinces the power to amend their own provincial constitutions (s 92 (1), BNAA). Originally, the federal parliament possessed no equivalent amending power. In 1949, it acquired the power to modify exclusively its own internal constitution (now s 91 (1) BNAA).
- 4.6 It has been recognised as recently as December 1979, by the Supreme Court of Canada in the Senate Reference case, that the federal parliament does not have the power to "alter in any way the provisions of ss 91 and 92 governing the exercise of legislative authority by the Parliament of Canada and the legislatures of the provinces."
- 4.7 In 1931 with the Statute of Westminster, the Parliament of the United Kingdom was asked by Canada to retain the exclusive competence to amend the Canadian constitution relating to the distribution of powers between the federal parliament and the provincial legislatures. Since 1867, there have been fourteen amendments to the Canadian constitution.
- 4.8 With its current proposals, the Canadian Federal Government is attempting to do indirectly through Westminster what it cannot do directly in Canada; that is use the old colonial machinery in order to diminish the sovereignty of the provinces without their consent and despite their opposition. Were the federal government to have this important power of unilateral amendment without provincial consent, it would surely be explicitly granted by the BNAA. It is not.
- 4.9 This proposed action by the federal government threatens the very federal nature of the Canadian constitution.

5. The Federal Principle and the Federal Government's Proposals

- 5.1 In order to establish whether the current federal government proposals affect the "federal principle" on which the Canadian constitution is based, the effects of these proposals on the provinces' legislative sovereignty have to be examined.
- 5.2 The federal government's current proposals include an extensive, entrenched Charter of Rights and Freedoms, "equalization" provisions and a procedure to amend the Canadian constitution in the future.
- 5.3 Any constitutionally entrenched Bill of Rights, by definition, restricts the legislative sovereignty of a parliament. In a federal system it is indeed implicit that both levels of government will be equally affected by the provisions of such a charter.
- 5.4 The Federal Government's proposals would fundamentally change one very important principle of our constitution: the supremacy of the authority of parliament and the legislatures. Under the current proposals, it would be the court's role to decide the extent to which the legislative sovereignty of parliament and the legislatures can be exercised.
- 5.5 One of the principal motivations for the provincial governments' opposition is that the sovereignty of the provincial legislatures would be directly diminished as a result of the proposed Charter of Rights being imposed on the provinces without their consent.
- 5.6 It must be explained that the Government of Quebec does not oppose the principle of an entrenched Bill of Rights, as such. It does, however, oppose the imposition of such measures by the federal parliament in fields of exclusive provincial competence.
- 5.7 It is the basic contention of the Government of Quebec that the federal principle on which the whole Canadian constitution lies, legally, constitutionally and politically prevents the federal government, under the pretext of the international sovereignty of Canada, from unilaterally restricting or altering the legislative authority of the provinces, as defined in the BNAA, either directly or through the medium of the UK Parliament.

- 5.8 To conclude otherwise would in fact mean that the federal parliament could modify unilaterally any part of the Canadian constitution and even abolish Canada as a federation.
- 5.9 The history of constitutional amendments in Canada confirms this contention. It shows that the BNAA has never been modified in the past so as to affect the legislative authority or to affect the status of the provinces without their consent. Furthermore, this was recognised by the federal government and all the provincial governments and regarded as a binding constitutional convention:

"The Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces."

Canadian Federal Government White Paper, 1965.

- 5.10 The fact that governments in Canada have not been able to agree on patriation and amendment of the BNAA does not legally or constitutionally empower the federal parliament to modify the Canadian constitution at will.

6. The Role of Westminster

- 6.1 The Select Committee on Foreign Affairs of the House of Commons recently noted that:

"The federal character of Canada's constitutional system affects the processes for amending that system. For it would be inconsistent with that federal character to treat the Canadian Federal Government or Parliament as having the power to secure the amendment of all parts of that system on its own initiative, regardless of the will of provincial governments and legislatures affected by those amendments."

par. 129.

- 6.2 This supreme power of amendment was from the outset reserved to the UK Parliament. In 1931, section 7 of the Statute of Westminster was included at the specific request of all Canadian authorities and full responsibility for proper amendment of the Canadian constitution was accepted by the UK Parliament, together with the potential embarrassment that might result.

6.3 The Select Committee concluded:

"In such circumstances, it would be in accord with the role accepted by the UK authorities in 1931 for those authorities to satisfy themselves that the request conveyed the clearly expressed wishes of the Canadian people as a whole."

par. 134.

6.4 The Government of Quebec respectfully submits that the right and proper thing for the United Kingdom Parliament to do is to decline any request that may be made for enactment of the Canadian government proposals, since they deny the federal principle which lies at the very heart of the Canadian constitution.

7. Conclusion

- 7.1 In any federal state it is vital that the parties to the federation consent to any changes to the constitution of that federation.
- 7.2 Agreement in principle between all the provinces on an amending formula, was reached at the Provincial First Ministers Conference in September 1980. But the federal government was not prepared to allow further discussion on this formula, since they had already committed themselves to a unilateral course of action.
- 7.3 In recent weeks the provincial governments have yet again expressed their willingness to negotiate an agreed patriation package. But the federal government has repeatedly refused to negotiate again.
- 7.4 This unilateral action is opposed by eight of the ten provincial governments, as well as the vast majority of the Canadian people.
- 7.5 The federal government's capricious action has precipitated the present constitutional crisis. Given that the federal government has no mandate for its present action and that it is opposed both by a majority of the Canadian people and the Canadian provinces, it must be hoped that good sense will prevail even at this late stage and the present proposals will be dropped.



MS
R. Sanders
to file

Foreign and Commonwealth Office

London SW1A 2AH

Print
1983

19 March 1981

Dear Michael,

The Canadian Constitution

*attach
at front of
file*

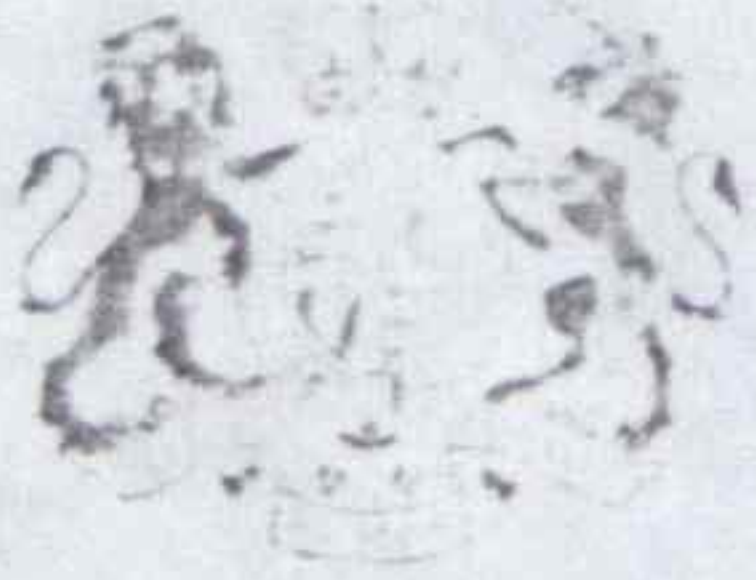
You saw a copy of the draft of the Government's Observations on the Foreign Affairs Committee's Report. I now attach a printed version which incorporates the comments we have received from the Lord Chancellor, the Attorney-General, and the Chancellor of the Duchy of Lancaster. These did not necessitate major alterations to the version previously sent to you.

yours ever

Roderic Lyne

(R M J Lyne)
Private Secretary

M O'D B Alexander Esq
10 Downing Street
LONDON



Chancellor of the Duchy of Lancaster

PRIVY COUNCIL OFFICE
WHITEHALL LONDON SW1A 1AA

19 March 1981

Adam Wood

Paul
MODBA
to sec + PA
MS
19/3

CANADA

This is just to record our various telephone conversations today about the publication date of the Government's reply to the Foreign Affairs' Committee's Report on Canada. As I explained, the Chancellor of the Duchy believes Wednesday, 25 March is too soon for publication. He is also not yet persuaded that Friday, 27 March may not be too soon as well. He would therefore, as a next step, like to discuss the point with the Chief Whip before a final decision is reached.

You kindly agreed to try to find out:

- (a) our own High Commission's latest estimate of when a Canadian request can be expected. (Does it need to go through the Senate?)
- (b) the date on which Mr Trudeau is expected to speak in the debate.
- (c) Why we are apparently limited to a Wednesday or a Friday for publication.
- (d) the date by which a decision was needed if in the event, the Government's reply was to be published on Friday, 27 March.

I am sending a copy of this letter to Nick Sanders, Murdo Maclean and David Wright.

D C R HEYHOE

Adam Wood Esq
Private Secretary to
The Lord Privy Seal



with compliments

**Private Secretary to
CHANCELLOR OF THE DUCHY OF LANCASTER
68 Whitehall London SW1A 2AS
Telephone 01-233-7113**

CONFIDENTIAL

Canada ✓
MS



Chancellor of the Duchy of Lancaster

PRIVY COUNCIL OFFICE
WHITEHALL LONDON SW1A 2M

16 March 1981

M S Berthoud

CANADA: GOVERNMENT REPLY TO THE FOREIGN AFFAIRS COMMITTEE

The Chancellor of the Duchy of Lancaster has seen the draft Government reply to the Foreign Affairs Committee report on the Canadian Constitution which you sent to Henry Steel with your letter of 12 March.

The Chancellor has no comments to offer on the substance of the arguments advanced in the draft paper, but he does wonder whether it strikes quite the right tone in all places, from the point of view of future parliamentary handling. For example, paragraph 15 of the draft reply might be regarded as unnecessarily patronising about the evidence heard by the Select Committee, and to describe the Committee's conclusions as "surprising" (paragraph 18), even if the Government does not agree with them, could also be provocative. More generally he is concerned to ensure that the tone, perhaps especially of the final paragraph, does not needlessly irritate members of both Houses who might otherwise have been disposed to accept the Government's case on its merits.

The Chancellor would therefore be grateful if the wording of the paper could be looked at again with this in mind.

I am copying this letter to the recipients of yours.

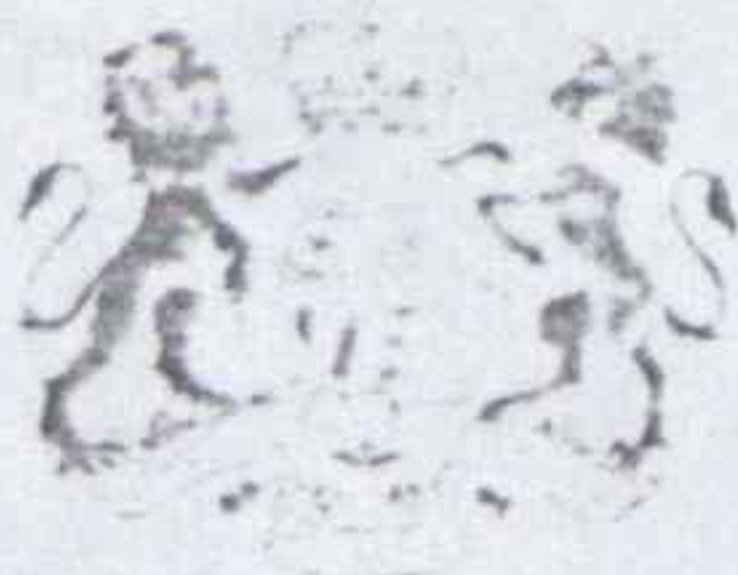
D C R Heyhoe
D C R HEYHOE
Private Secretary

M S Berthoud
North America Department
Foreign and Commonwealth Office
LONDON

CONFIDENTIAL

CONFIDENTIAL

2 PPS 5*



PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2B1

Chancellor of the Duchy of Lancaster

16 March 1981

PA

N Sanders

MS

Murdo

Adam Wood

CANADA

I attach a note of the Chancellor of the Duchy's discussion with the Canadian High Commissioner last Friday. Mrs Wadds left two advance copies of the Canadian Government document referred to in paragraph 5 of the note and I attach one of these for your retention.

I think that the other two main points to emerge, which are relevant to the timing of our own reply to the FAC Report, are the firm forecast of end March/ early April for receipt of the Canadian request and the fact that Mr Trudeau is expected to speak in the debate on about 23 March.

I am copying this letter, with the note for the record, to Nick Sanders (No 10), Beckett (Attorney General's Office), Sir Henry Rowe, Wilfred Hyde (Cabinet Office), David Wright and Murdo Maclean.

Yours ever,

David

D C R HEYHOE
Private Secretary

Adam Wood, Esq
Private Secretary/Lord Privy Seal
Foreign and Commonwealth Office
LONDON

Enc

NOTE OF MEETING BETWEEN THE CHANCELLOR OF THE DUCHY OF LANCASTER
AND THE CANADIAN HIGH COMMISSIONER - 11.30 am, FRIDAY 13 MARCH, 1981

1. As requested in her letter of 17 February, the Canadian High Commissioner called on the Chancellor of the Duchy on Friday, 13 March to discuss the position reached in the debate on the Canadian Constitution. Mrs Wadds was accompanied by Mr Reeves Haggan and Mr Dan Gagnier from the Canadian High Commission.
2. Mrs Wadds said that the Committee stage of the debate in Ottawa had continued for a week longer than expected and that the main debate had now been underway for about three and a half weeks. The best current estimate was that it would come to an end in the last week of March or the first week of April. It was hoped not to use a guillotine, but this was not yet certain. There were in her view straws in the wind to suggest that the heart had gone out of the opposition and that, all in all, the main push was over.
3. Mr Pym asked about reference to the Supreme Court following the decision of the Court of Appeal of Manitoba. Mr Haggan said that they had no news on this. The opinions of the Newfoundland and Quebec courts were expected in three or four weeks time and it may be that these were awaited before any reference was made (the period for which formally expired on 6 April, but could be extended).
4. Mr Pym said that there was nothing to add at this stage about problems of substance, of which both sides were aware. On justiciability, however, it would be seen as an important aspect here if the question was before the Canadian courts at the time of a request to Westminster; he fully recognised (and Mrs Wadds underlined) that the question was a political one for Canada, but nevertheless such a situation could lead to arguments in

Cont.... /

in the United Kingdom for delay. Finally, there were genuine timing difficulties arising from the established procedures and institutions of the United Kingdom Parliament and these would not be eased by receipt of a request in April. He hoped that this aspect was understood on the Canadian side. Mrs Wadds said that for its part the Canadian Government understood and was sympathetic, but the subject had undoubtedly acquired its own momentum in Canada and there was a general wish among Canadians for matters to continue now to a successful outcome in the traditional manner. She hoped that problems could be solved in the best way possible. There were plans for the Queen to visit Canada in the summer.

5. Mr Pym said that the Government would soon be replying in the normal way to the Report by the Foreign Affairs Committee. He confirmed, in reply to a question by Mrs Wadds, that the reply would be directed specifically to the matters raised in the FAC report. Mrs Wadds said that the Canadian Government itself proposed to table in the Canadian Parliament next week a background paper on the "Role of the United Kingdom in the Amendment of the Canadian Constitution."

6. In response to a question from Mr Haggan, Mr Pym explained that he could not at this stage give a precise estimate on timing. It was necessary first to receive the Canadian request, so that discussion of it could begin. Mr Haggan commented that, in Mr Trudeau's view, it would be best for all concerned if the matter was dealt with as soon as possible. Mr Pym agreed, but added that success should not be sacrificed for speed.

7. Mrs Wadds said that a cooperative effort was needed and it would be important to retain "a cooperative image". She expressed her willingness to help in any way possible. Mr Pym agreed that this was the right approach. It would be helpful if there were no comments from Canada on the United Kingdom Parliamentary debate while the matter was at Westminster. Mr Haggan noted that Mr Trudeau was likely to speak in the debate in the Canadian Parliament on about 23 March and would probably say something about Canadian expectations. He acknowledged Mr Pym's observation that Mr Trudeau's remarks on that occasion could influence matters here.

CONFIDENTIAL

8. In conclusion, Mrs Wadds said that she well understood all the points that had been made from a United Kingdom point of view. She hoped that she might call again on Mr Pym if this seemed helpful as matters developed. Mr Pym agreed.

RESTRICTED

RESTRICTED

DESKBY 131000Z

FM OTTAWA 122246Z MAR 81

TO IMMEDIATE FCO

TELEGRAM NUMBER 117 OF 12 MARCH

INFO PRIORITY WASHINGTON UKMIS NEW YORK

REAGAN'S VISIT TO CANADA: 10-11 MARCH

1. PRESIDENT REAGAN COMPLETED YESTERDAY A VISIT TO OTTAWA LASTING 27 HOURS, HIS FIRST OUTSIDE THE US SINCE ASSUMING OFFICE AND THE FIRST BY A US PRESIDENT TO CANADA SINCE PRESIDENT NIXON'S IN 1972. HE WAS ACCOMPANIED BY MRS REAGAN AND A LARGE TEAM OF MINISTERS AND OFFICIALS INCLUDING MR HAIG, SECRETARY OF STATE, MR ALLEN, NATIONAL SECURITY ADVISOR, MR REGAN, TREASURY SECRETARY AND MR BALDRIGE, SECRETARY OF COMMERCE.

2. THE VISIT TOOK PLACE AGAINST A BACKGROUND OF SEVERAL LONGSTANDING BILATERAL DIFFICULTIES AND INCREASING CANADIAN APPREHENSION ABOUT THE EFFECT ON CANADA OF REAGAN'S ECONOMIC AND ENVIRONMENTAL POLICIES, INCLUDING FEAR THAT RELAXATION IN AIR POLLUTION STANDARDS COULD EXACERBATE THE ALREADY SERIOUS PROBLEM OF ACID RAIN. CANADIANS' SENSE OF IMPOTENCE AND INFERIORITY BESIDES THE US HAS ALWAYS BEEN ACUTE. IN THIS CASE IT WAS AGGRAVATED BY A NUMBER OF US ACTIONS IN THE DAYS PRECEDING THE VISIT THAT THEY FELT TO BE PROVOCATIVE OR INSENSITIVE AND TO BODE ILL FOR CANADIAN-US RELATIONS: THE ISSUE OF A NOTE COMPLAINING ABOUT THE NATIONAL ENERGY POLICY, UNHERALDED CHANGES IN US REPRESENTATION ON THE INTERNATIONAL JOINT COMMISSION, PRESIDENT REAGAN'S WITHDRAWAL OF THE EAST-COAST FISHERIES TREATY FROM SENATE CONSIDERATION AND THE DECISION TO REVIEW US POLICY TOWARDS THE LAW OF THE SEA TREATY. THERE HAD ALSO BEEN CONTROVERSY IN CANADA OVER US POLICY TOWARDS EL SALVADOR. THESE AND OTHER CONCERNS WERE REPRESENTED BY NUMEROUS NOISY BANDS OF DEMONSTRATORS WHO CONFRONTED REAGAN ON HIS ARRIVAL AT PARLIAMENT HILL AT THE OUTSET OF HIS VISIT. THE DEMONSTRATIONS WERE RAUCOUS BUT NOT VIOLENT, HANDLED WITH SKILL AND APPARENT EQUANIMITY BY BOTH TRUDEAU AND REAGAN, AND PROBABLY PRIVATELY WELCOME TO CANADIAN MINISTERS AS A USEFUL UNDERLINING OF CERTAIN OF THE GRIEVANCES THEY HOPED TO RAISE IN BILATERAL DISCUSSIONS LATER IN THE DAY.

3. ON 11 MARCH, IN SPEECHES TO A JOINT SESSION OF PARLIAMENT, TRUDEAU EMPHASISED CANADA'S DISTINCTIVENESS FROM THE USA AND THE RESPONSIBILITY OF INDUSTRIALISED DEMOCRACIES TO HELP DEVELOPING COUNTRIES: REAGAN STRESSED RATHER THE COMMON INTEREST OF THE TWO COUNTRIES AND THE PRIORITY OF REPAIRING THE US ECONOMY.

4. THE VISIT ACHIEVED NO REAL PROGRESS ON THE BILATERAL PROBLEMS. THE MORE THOUGHTFUL POLITICAL COMMENTATORS ARE ACKNOWLEDGING THE MISTAKENNESS OF HIGH EXPECTATIONS FROM A SHORT VISIT SO EARLY IN

RESTRICTED

/THE

THE LIFE OF THE NEW ADMINISTRATION BUT MEDIA COMMENT AS A WHOLE HAD TENDED TOWARDS ACERBITY. IT IS GENERALLY APPARENT THAT THE US HAVE CONCEDED NOTHING TO THE CANADIANS. THE US EMBASSY HAVE TOLD US PRIVATELY THAT NOTHING CAN DISGUISE THE SERIOUSNESS OF THE BILATERAL ISSUES, AND THAT US POSITIONS ON THEM ARE DEEPLY FELT BY THEIR MINISTERS WHO CAN BE EXPECTED TO GIVE NOTHING AWAY. ON SOME POINTS CANADIAN MINISTERS ARE CLEARLY PIQUED AND DISAPPOINTED. HOWEVER MEMBERS OF BOTH CANADIAN AND US PARTIES HAVE CONFIRMED THAT REAGAN AND TRUDEAU ESTABLISHED SURPRISINGLY CLOSE PERSONAL RAPPORT. IN SO FAR AS THIS IS THE MAIN PURPOSE OF SUCH VISITS, THIS ONE MAY BE RATED A SUCCESS.

5. DISCUSSIONS COVERED THE FOLLOWING MAIN SUBJECTS:

(A) EAST/COAST FISHERIES:

BEFORE THE VISIT THE US ANNOUNCED THAT REAGAN HAD WITHDRAWN FROM SENATE CONSIDERATION ONE OF THE TWO EAST COAST FISHERIES TREATIES SIGNED 2 YEARS AGO — THAT COVERING MANAGEMENT OF STOCKS AND FISHERIES THE OTHER COVERING THE INTERNATIONAL SEA BOUNDARY WOULD STILL GO TO THE SENATE AND THENCE TO THE I-C-J. THE US HAS NOW STATED ITS READINESS TO TAKE FISHERY CONSERVATION MEASURES AND NOT TO ARREST CANADIAN FISHERMEN IN THE DISPUTED WATERS. THE CANADIANS HAVE NOT YET ACCEPTED THE US MOVE ON THE TREATIES AND HAVE EXPRESSED SCEPTISM ABOUT, THE CONSERVATION PROMISE, " GIVEN THE RECORD OF THAT INDUSTRY IN THE US IN NOT PROTECTING STOCK".

(B) GARRISON RIVER PROJECT: CANADIANS ARE CONCERNED THAT THE GARRISON RIVER IRRIGATION PROJECT WILL INTRODUCE ALIEN FISH SPECIES AND FISH DISEASES INTO THE RIVER SYSTEM OF MANITOBA WHICH DRAINS INTO THE HUDSON BAY. THERE HAD ALREADY BEEN UNANIMOUS CRITICISM IN THE HOUSE OF COMMONS OF REAGAN'S DECISION TO APPROVE EXPENDITURE OF DOLLARS 4 MILLION IN NEW FUNDS ON THE PROJECT. WE UNDERSTAND THAT THE US SIDE GAVE ASSURANCES THAT THEY WOULD MEET THEIR OBLIGATIONS UNDER A 1909 BOUNDARY WATERS TREATY AND NOT INTRODUCE HARMFUL SUBSTANCES INTO CANADIAN WATERS: NOR WOULD THEY SPEED UP THE PROJECT.

(C) ENVIRONMENTAL: THE US WOULD USE THEIR "BEST EFFORTS" TO CONTAIN POLLUTION OF THE GREAT LAKES AND EMISSIONS CAUSING ACID RAIN.

(D) NATIONAL ENERGY PROGRAMME: A US STRONGLY WORDED NOTE TO CANADIAN MINISTERS CRITICISING CANADA'S NEW ENERGY POLICY (WHICH DISCRIMINATES SEVERELY AGAINST FOREIGN OIL COMPANIES, THE MAJORITY OF WHICH ARE AMERICAN OWNED) WAS LEAKED IN WASHINGTON BEFORE THE VISIT. HOWEVER, DURING THE VISIT MR HAIG DISOWNED THE LETTER SAYING IT HAD FLOWED OUT OF CONTINUING GIVE AND TAKE AT LOWER LEVELS AND DID NOT REPRESENT THE OPINION OF HIMSELF OR THE ADMINISTRATION.

(E) AUTO PACT: BOTH SIDES PLEDGED CLOSER COOPERATION IN FIGHTING OFF IMPORTS: AND DISCUSSIONS ON A CONTINUING BASIS. THE US AVOIDED COMMITMENTS ON THE BASIS THAT THEY WERE STILL FORMULATING POLICY.

RESTRICTED 2

/(F)

RESTRICTED

(F) ALASKA HIGHWAY GAS PIPELINE: REAGAN CONFIRMED HIS PREDECESSOR'S SUPPORT FOR THE PROJECT. HE EMPHASISED THAT FINANCE SHOULD COME FROM THE PRIVATE SECTOR.

(G) THE US PUSHED HARD ON FIRA AND MR GRAY, MINISTER OF INDUSTRY TRADE AND COMMERCE AGREED TO LOOK AT MATTERS ON A CASE BY CASE BASIS.

(H) MULTILATERAL: THE MAIN MULTILATERAL ISSUE, BECAUSE OF PUBLIC CONTROVERSY IN CANADA, CONCERNED EL SALVADOR. CANADA MADE CLEAR ITS OPPOSITION TO SUPPLYING ARMS. MR MACGUIGAN SAID HE WELCOMED US EXPLANATIONS THAT THEIR ARMS SUPPLY WAS NOT A HARBINGER OF MASSIVE MILITARY INVOLVEMENT AND THAT THEY HAD NO INTENTION OF SEEKING A MILITARY SOLUTION. WE HOPE TO GAIN BETTER INSIGHTS INTO THE MULTILATERAL DISCUSSIONS DURING THE COURSE OF THE NEXT FEW DAYS.

(I) LAW OF THE SEA: CANADA ALSO EXPRESSED STRONG CONCERN ABOUT THE DECISION OF THE NEW ADMINISTRATION TO REVIEW THEIR STAND AND HOLD UP NEGOTIATIONS.

FORD

FCO | WH
NAD

3
RESTRICTED



Foreign and Commonwealth Office

London SW1A 2AH

01.233.4173

12 March 1981

Have looked through - will circulate comments. especially for A.G. (2)
Prime Minister

H Steel Esq
Law Officers' Department
Attorney-General's Chambers
Royal Courts of Justice
Strand
LONDON WC2

I have not yet seen any comments on this paper but you may like to look through it over the weekend. It takes a v. short time

Dear Henry,

GOVERNMENT REPLY TO THE FOREIGN AFFAIRS COMMITTEE
REPORT ON THE CANADIAN CONSTITUTION.

As you know, we are required by OD to clear our draft reply with the Lord Chancellor, the Chancellor of the Duchy of Lancaster, and the Attorney-General. I now attach a draft and would be most grateful for the earliest possible comments.

2. The exigencies of the printing operation mean we need to put the draft into final form on Monday next, 16 March. I would therefore be most grateful if it were possible for any minor amendments to be telephoned to me prior to the weekend or first thing on Monday, and for written amendments to reach me as early as possible on Monday morning.

3. I am sending copies to Collon in the Lord Chancellor's Office and Hayhoe in the Office of the Chancellor of the Duchy of Lancaster. Also, for information, to Alexander at No.10.

Yours ever,

Martin Bertrand

M S Berthoud
North America Department

P.N. has agreed that reply may issue.

Ag. Phil - 12/3

FIRST REPORT FROM THE FOREIGN AFFAIRS COMMITTEE
SESSION 1980-81
BRITISH NORTH AMERICA ACTS:
THE ROLE OF PARLIAMENT

Government Observations

Introduction

1. The British North America Act 1867 is the basic Canadian constitutional instrument. That Act was an Act of the United Kingdom Parliament. It can in certain important respects be amended only by Act of the United Kingdom Parliament. It has been so amended some 14 times. This apparently anomalous situation whereby particular provisions of the constitution of one sovereign nation can be amended only by the legislature of another sovereign nation is preserved by section 7(1) of the Statute of Westminster 1931, under which Canada's complete independence was otherwise confirmed. The historical background is touched on in the Memorandum by the Foreign and Commonwealth Office to the Foreign Affairs Committee (147/79-80/FM; 362-xxii, p. 2) and generally in the Report of the Foreign Affairs Committee itself.
2. It is expected that the Canadian Federal Parliament will soon request that a Bill be laid before the United Kingdom Parliament which would essentially do two things. It would amend the Canadian constitution in a number of respects, notably by providing for a Canadian Charter of Rights and Freedoms. Further, it would terminate the remaining responsibility of the United Kingdom Parliament in connection with amendment of the Canadian constitution and confer the relevant powers of amendment on Canadian institutions, thereby "patriating" the Canadian constitution, to use what has become the habitual term.
3. These Canadian proposals have provoked extensive public discussion in Canada and the United Kingdom. The Government welcome the Report of the Foreign Affairs Committee as making a significant contribution to this debate.
4. The Government note that in accordance with the mandate which the Foreign Affairs Committee gave itself, the Report of the Committee understandably concentrates on the role of Parliament in relation to the British North America Acts and accordingly deals from the Parliamentary angle with the constitutional history, with precedent and with legal propriety. The Government, while recognising the importance of these aspects, will in the Observations that follow draw attention to certain broader considerations which in their view are crucial to an overall examination of this issue and should accordingly be taken into account by Parliament.

The Committee's Conclusions

These Observations are directed primarily to the Committee's Conclusions as presented at pages xi to xiii of its Report. The Government find no difficulty in principle with Conclusions 1 to 3, while not necessarily accepting in detail the reasoning on which they are based. The Government fully accept Conclusions 7 and 11 (i) to (v). But for reasons which will be developed in these Observations, they are unable similarly to endorse the remaining Conclusions.

Conclusions 11 and 7

6. The Government are in complete agreement with what they regard as the central conclusions of the Committee, namely Conclusions 11 (ii), (iii) and (iv). The Government endorse Conclusion 11(iii) that it would not be in accord with the established constitutional position to patriate the Canadian Constitution unilaterally, and Ministers have so stated in the House. Unilateral patriation could hardly be reconciled with the convention by which the United Kingdom Parliament acts only at the request and with the consent of Canada. Unilateral patriation without provision of a formula for Canadian amendment of the British North America Acts would in addition, as the Committee points out, deprive the Canadian people of any lawfully established means of amending their own Constitution and would accordingly amount to a gross interference in the internal affairs of Canada and a grave breach of relations between the United Kingdom and Canada. Conclusion 11(iv) that it would be similarly improper to enact a requested constitutional package with amendments not consented to by the Canadian Government and Parliament is founded on the same basis as Conclusion 11(iii) and the Government likewise agree with it: as the Report says (paragraph 122), "A partial package is a new package". The Government are in no doubt that unilateral action would be deeply resented in Canada.

7. The Government also endorse Conclusion 11(ii) that it would not be in accord with the established constitutional position for the United Kingdom Parliament to undertake any deliberation about the suitability for the peoples of Canada of a requested constitutional package.

8. The Government likewise accept Conclusion 7, that there is no rule, principle or convention that the United Kingdom Parliament, when requested to enact constitutional amendments directly affecting Canadian Federal-Provincial relations, should accede to that request only if it is concurred in by all the Provinces directly affected.

9. The Court of Appeal for Manitoba has come to a similar view, looking at the question from the Canadian end, in a judgment of 3 February (which the Committee therefore did not have the advantage of seeing before it reported) relating to the draft Canadian request. In response to questions whether there was a constitutional convention as to prior Provincial agreement to a Canadian request for constitutional amendments affecting Federal-Provincial relationships, or a legal requirement for Provincial agreement to such amendments, the Court held, by differing majorities of its five Judges, that there was no such convention and no such legal requirement.

10. Dealing with the question of constitutional convention in his leading majority judgment, Chief Justice Freedman of Manitoba said, after a careful analysis of all the previous cases of amendment by the United Kingdom Parliament and of the relevant parts of the Federal Government's 1965 White Paper :

" As recently as December 21 1979 the Supreme Court of Canada in the Senate Reference could write thus :

" The practice, since 1868, has been to seek amendment of the Act by a joint address of both Houses of Parliament. Consultation with one or more of the Provinces has occurred in some instances. "

This is not language appropriate to the existence of a convention full-blown, vigorous and operative. A convention should be certain and consistent; what we have here is uncertain and variable. "

Dealing with the question of legal requirement, Freedman CJM was able to dispose of the matter very shortly :

" No convention, no rule of law. The matter is as simple as that. "

11. A further point which the Government consider significant is the finding, not in the Conclusions of the Report of the Committee but in paragraph 99, that the objective of section 7(1) of the Statute of Westminster " ... was simply to maintain the status quo in relation to constitutional amendments. We cannot see in that status quo ... any evidence of a requirement ... of unanimous consent [of the Provinces] " .

12. The Manitoba Court of Appeal in the case referred to came to the same conclusion. Matas J.A. examined in detail the history of section 7(1) and its effect, which he described as being neutral. He concluded :

" ... neither the preceding Imperial Conferences nor the

/Statute

Statute [of Westminster] pretended to grant the provinces a legal right they did not have prior to the Statute with respect to amendments to the British North America Act."

13. The Government regard the common thread in Conclusions 7 and 11 as being that the United Kingdom Parliament will not examine the suitability for Canada of constitutional amendments requested by the Federal Parliament and in particular that there is no legal requirement for agreement to such amendments by all the Provinces directly affected. Certainly it has not been the practice of the United Kingdom Government or Parliament before or after the Statute of Westminster to concern themselves either with the fact or with the degree of Provincial consent.

Conclusions 4 to 6

14. These Conclusions refer to the need to take account of the federal character of Canada's constitutional system (Conclusion 4); assert that the United Kingdom Parliament is left free to decide whether a request is so out of line with the established constitutional position that it can rightly be rejected (Conclusion 5); and assert also that it would not be in accord with the established constitutional position to accept unconditionally the constitutional propriety of every request from the Canadian Parliament (Conclusion 6).

15. These Conclusions set the scene for Conclusions 8 to 10, of which more will be said below. They appear to proceed from the assumption that such precedent as there is admits of measuring constitutional propriety against some objective indicator as to the nature of Canada's constitution. This approach is a striking feature of some of the evidence given to the Committee, to which the Committee seems to have attached importance and which appears to have involved a preconception of some fixed and immutable form of federalism to be upheld objectively by the United Kingdom Parliament. For example, the Committee cites a witness as arguing that the United Kingdom Parliament has "political responsibility for upholding the federal constitution of Canada". To suggest that it is the United Kingdom Parliament that has the political responsibility for upholding the federal constitution of Canada is to overlook the extent to which constitutional change has been effected in Canada over the years and has remained the constant preoccupation of Canadian institutions, as demonstrated by the long series of constitutional conferences designed to reach agreement on an amending formula.

16. This approach also seems to give insufficient weight to the consideration that there has been no instance where the United Kingdom has declined to act on the basis of a Canadian request or has purported to examine whether provincial consent existed or was required. The repeated statements by Ministers of successive Governments that it would be in accordance with precedent for the Government to introduce, and for Parliament to enact, legislation on the basis of a Canadian request have been statements of plain fact: in every one of the numerous cases where there has been a request from the Federal Parliament for amendment, the Government of the day have introduced, and Parliament has enacted, legislation in accordance with it.

17. In view not only of the consistent line taken by Ministers since 1940, if not earlier, but also of what has happened in practice on the occasion of previous requests, the Government regard as too dismissive the evidence, quoted at length in paragraph 80 of the Report, to the effect that "the series of Ministerial statements in the British Parliament ... cannot therefore properly be regarded as providing a clear convention for action in the present case". While the Government accept that there is in the nature of things never an exact precedent for a particular constitutional amendment, and certainly no precedent for patriation, the consistent practice has been to act in accordance with the request and consent of the Federal Parliament. The force of this consistent practice cannot be ignored. This does not mean the United Kingdom Parliament is under some legal obligation automatically to enact whatever Canadian proposals are put before it; but it does point overwhelmingly in the direction of acceding to a Canadian request for patriation. Certainly for the United Kingdom Government and Parliament not to act on such a request would be entirely unprecedented.

Conclusion 8 to 10

18. It follows that the Government do not agree with the Committee's Conclusions 8 to 10 which conclude, broadly, that it would be proper for the United Kingdom Parliament to decide that the request did not convey the clearly expressed wishes of Canada as a federally structured whole because it did not enjoy a sufficient level and distribution of Provincial concurrence. Indeed the Government find these conclusions surprising: they are not readily reconcilable with the Committee's own Conclusion 11. A number of points arise here.

19. In the first place, the Committee's view seems to be based on an assumption that section 7(1) of the Statute of Westminster in some way implied conferral of a positive role: that is, a role as in some sense custodian for the wishes of Canada as a federally structured whole if not guardian or trustee for the Provinces themselves. And yet the Committee itself concludes that section 7(1) merely preserved the status quo. The Government have already concurred in the Committee's conclusion that there is no legal requirement to obtain the agreement of all the Provinces directly affected to requested amendments of the constitution. This point is mentioned in paragraphs 11 to 13 above.

20. Secondly, the Committee assumes that the United Kingdom Parliament has "a duty or responsibility to the Canadian people or community as a federally structured community" (paragraph 103) or, in the words of Conclusion 10, "to Canada as a federally structured whole".

21. Thirdly, the Committee concludes, also in Conclusion 10, that it would be proper to test the level and distribution of Provincial concurrence against the "least demanding of the formulae for a post-patriation amendment ... which have been put forward by the Canadian authorities".

22. The Government consider that these Conclusions fail to take sufficiently into account more than fifty years of constitutional and political development and the realities of present day international relations.

23. Canada has been a sovereign and fully independent nation at least since enactment of the Statute of Westminster. The Balfour Declaration, contained in the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926, said of relations between the United Kingdom and the Dominions that:

"They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or internal affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations" (Cmd. 2768 p. 14).

24. Relations with Canada are conducted at the diplomatic level exclusively with the Federal Government. Access by the Provinces to the Crown is exclusively through Her Majesty's

/Ministers

Ministers in Canada. For very many years, all Canadian requests for constitutional amendments have been acted on by the United Kingdom exclusively at the behest of the Federal Parliament. The Government are not persuaded that any of the earlier cases show that Provincial objections must be heeded. To refuse now to give effect to a request from the Federal Parliament would cause grave offence to Canada. Canada is a key member of the Commonwealth, linked with the United Kingdom through centuries of common history, including the comradeship of two World Wars. Apart from these undoubted ties of kinship and of sentiment, there are further links in the form of common membership of the NATO Alliance, of the OECD group of industrialised countries and of many other international organisations. Canada is a valued member of the international community with special influence in the Third World. Much is therefore at stake; the repercussions of a rift over the constitutional issue between the United Kingdom and Canada could well spread beyond the bilateral relations between the two countries.

25. Apart from international relations, there is, however, another and probably more fundamental reason why the United Kingdom should not purport to put in question a request from the Federal Parliament for constitutional amendment. Canada is a parliamentary democracy which has common roots with our own. The Federal Parliament is not a body isolated from and unrepresentative of the Provinces and the Canadian peoples. It is as representative of the Canadian peoples as is the United Kingdom Parliament of the peoples of the United Kingdom. The Federal Parliament represents Canada as a whole. The Ministers of the Canadian Government are elected members of the Federal Parliament. It is to that Parliament and to that Parliament alone that they are answerable. The members of that Parliament are sensitive to Canadian sentiments and Canadian opinion. If the members of the Federal Parliament were to misread the wishes of the Canadian people, it is they who would be answerable to the Canadian electorate.

26. The United Kingdom Parliament has no constituency in Canada. It is answerable to no electorate there. In the view of the Government, the Federal Parliament is the best judge of what is right for Canada. The United Kingdom Parliament would be unwise to take on itself a responsibility which belongs properly to the duly elected representatives of Canada, by whom the issues have been exhaustively considered, particularly when such a role would involve judgments of a kind that, in 1981, it is not in a position to make.

27. The Committee suggests that the test of whether any proposals have a sufficient level and distribution of Provincial concurrence should be the least demanding of the formulae which have been put forward by the Canadian authorities for a post-patriation amendment (Conclusion 10). If it is accepted that, as the Committee also suggests (Conclusion 7), there is no requirement of concurrence by all the Provinces directly affected, this would mean that a line is to be drawn somewhere short of full concurrence. The Government consider that there is no defensible basis for the drawing of such a line by the United Kingdom. There is certainly no precedent for it doing so: and certainly no precedent for any particular degree of Provincial opposition being critical. Moreover, to select a particular post-patriation formula for amendment as a yardstick for determining Canadian consent, as the Committee suggests, would involve a substantial incursion into Canadian prerogatives. It is true that the formula suggested has at one time or another been broadly accepted by all the Provinces, but this acceptance was conditional upon agreement on a wider package (and what may be acceptable as a formula for post-patriation amendment is, in any event, not necessarily appropriate as a criterion for patriation itself). In fact, it has seemed to the Canadian authorities that complete agreement has always been just beyond reach. Discussions have continued on and off for many years. Each time the issues have widened. The Canadian Parliament seems now to be on the point of deciding that after so many abortive attempts to find an agreed solution the constitutional issues must be finally resolved. With this prize at last within their grasp, the repercussions of the United Kingdom Parliament obstructing the considered request of the Canadian Government and Parliament by interposing a criterion of its own selection would be all the more serious. Any attempt by members of the United Kingdom Parliament to question the right of their Canadian opposite numbers to ask for and obtain patriation on terms decided in Canada would be regarded as gross interference in Canadian affairs.

Conclusion 12

28. The Government acknowledge the force of the view expressed by the Committee that the question of how far the United Kingdom's response to a request ought to be affected by the existence of substantial litigation in the Canadian courts is a question best left to be considered in the light of all the circumstances at the time when such a request is received in London. Reference has already been

made in these Observations to the judgment of the Court of Appeal Manitoba delivered on 3 February (paragraphs 9, 10 and 12 above). Other proceedings, raising issues similar to those argued before the Court of Appeal of Manitoba, have been commenced in Newfoundland and, more recently, in Quebec. There is every likelihood that the judgment of the Court of Appeal of Manitoba will be appealed to the Supreme Court of Canada, but there is no certainty as to when the Supreme Court of Canada will rule on any such appeal. The Government feel bound to point out however that the current litigation in Canada turns primarily on the propriety of the request to be made by the Federal Parliament in terms of Canadian constitutional practice and convention rather than on the propriety of the United Kingdom Parliament's response to that request; and that there is no technical bar (eg under the sub judice rule) to the United Kingdom Parliament's proceeding with legislation to give effect to the request while litigation is still pending before the Canadian courts.

Conclusions of the Government

29. The powers of the United Kingdom Parliament are as a matter of strict law undoubtedly unfettered. But the realities of fifty years and more of post-Colonial development have to be recognised. The exercise of such powers as still remain in the hands of the United Kingdom Parliament under the Statute of Westminster depend on the request and consent of Canada, that request and consent being expressed through the Federal Parliament. In this the Provinces have as a matter of law no standing.

30. The Government therefore concur fully in the conclusion of the Committee that the United Kingdom Parliament should not unilaterally modify a Canadian request for constitutional amendment. But it is necessary to go further. It is the Federal Parliament which is empowered to act for Canada as a whole and, in the view of the Government, is the legislature which is the proper guardian of the interests of the Canadian people as a whole. The Government would not think it right to reject a request for constitutional amendment which on its face reflects the will of the duly elected representatives of that legislature. Rejection of such a request would imply that the United Kingdom still exercises constitutional control over Canada. This would not be compatible with the full sovereignty and equal status of the two nations recognised by the Balfour Declaration and

/with

with the relationships between the two countries as they have developed since then.

31. To fail to act on a request from the Federal Parliament would be to flout the independence achieved by Canada in the opening decades of this century. It would set at naught more than fifty years of autonomous and democratic development in a country which is accustomed to thinking itself master of its own destiny.



File

cc: CDH

CWO

bc: FCO Canada

359

10 DOWNING STREET

From the Private Secretary

10 March 1981

~~BF 16.3.81~~

BNA ACTS: GOVERNMENT OBSERVATIONS ON FAC REPORT

Thank you for your letter of 9 March. We should be grateful if you could do all that you can to aim for a publication date earlier than 27 March, and we look forward to receiving an agreed draft as soon as may be.

I am sending copies of this letter to David Heyhoe (Chancellor of the Duchy of Lancaster's Office) and Peter Moore (Chief Whip's Office).

N. J. SANDERS

E. R. Worsnop, Esq.,
Foreign and Commonwealth Office.

C

SIR ROBERT ARMSTRONG

The Prime Minister has seen and taken note of your two minutes to me of 9 March about the patriation of the Canadian Constitution.

MICHAEL ALEXANDER

10 March 1981

May

010



(2)

Ref. A04419

MR ALEXANDER

Prime Minister
To note - tho' I think it far too
late for us to start running this kind of
idea unless the Canadians adopt it unprompted.

Lord Trend has sent me a copy of a recent address by Mr Gordon Robertson, a former Secretary to the Canadian Cabinet, on the Canada constitutional issue. In particular, Mr Robertson endorses a suggestion by Mr J W Pickersgill that the Canadian proposals should be amended in such a way that the proposed Charter of Rights would not be binding on any provincial legislature for four years, unless the legislature during that time declared its wish to be bound. At the end of four years it would be binding in all provinces in which the legislature had not, during the third or fourth year, passed a resolution declaring that the Charter should not apply to it.

Am
9/3

2. I am sending copies of this minute to the Private Secretaries of the Foreign and Commonwealth Secretary and the Chancellor of the Duchy of Lancaster and Paymaster General.

MR

REA

ROBERT ARMSTRONG

9 March 1981

010

CONFIDENTIAL



(2)

Ref. A04425

MR. ALEXANDER

Premier Minister
ms *Am*

I was rung up on the evening of Friday, 6th March by Mr. Michael Pitfield, the Secretary to the Canadian Cabinet. The call was concerned with two matters, both relating to the Canadian constitutional issue:

- (a) Mr. Pitfield said that his Prime Minister had been wondering whether there should be at this stage any further contact on the issue between himself and Mrs. Thatcher. Mr. Pitfield said that he had been advising Mr. Trudeau that any such contact, if it was visible or avowable, was more likely to be embarrassing to both of them than useful at this stage. He wondered whether I would agree with this advice. I said that on the whole I would agree. I did not think that this was the moment for any visible contact like that made by Mr. Pym before Christmas. If Mr. Trudeau wanted to suggest some very private and confidential contact, I was sure that we would co-operate; but we would not be proposing or seeking any such contact ourselves.
- (b) Mr. Pitfield said that Mr. Trudeau was anxious that Mrs. Thatcher should be aware that he was following with close attention the way in which she dealt with the Canadian constitutional issue in answer to questions in the House of Commons, and was full of gratitude and admiration for the skilful way in which she was handling the matter.

I am sure this is still right.
Am

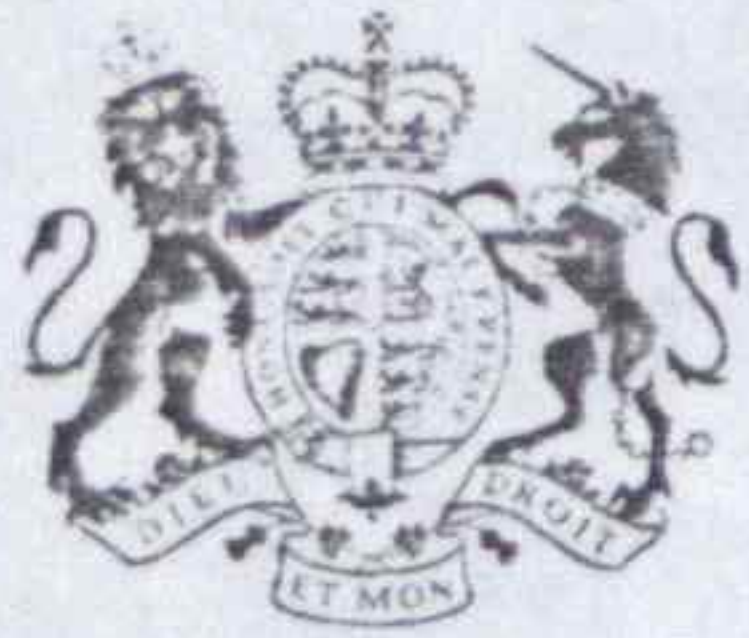
2. I am sending copies of this minute to the Private Secretaries of the Foreign and Commonwealth Secretary and the Chancellor of the Duchy of Lancaster and Paymaster General.

RA

ROBERT ARMSTRONG

9th March, 1981

CONFIDENTIAL



Chancellor of the Duchy of Lancaster

PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

9th March 1981

New Group

BNA Acts: Government observations on FAC Report

Thank you for copying your letter to Nick Sanders of 4 March to David Heyhoe.

I have also seen Nick Sanders reply. I agree that the timing of publication is to be decided after a draft reply has been circulated. The Chancellor of the Duchy of Lancaster will, of course, wish to see this draft at an early stage in view of his responsibilities as Leader of the House of Commons.

Copies of this letter go to Nick Sanders (No 10) and Peter Moore (Chief Whip's office).

Yours sincerely

N P M HUXTABLE
Private Secretary

E R Worsnop, Esq
Parliamentary Clerk
Foreign and Commonwealth Office
SW1



10 DOWNING STREET

MOJBA

This looks a bit better — but
wd it be wise for us to suggest

- ① submission to us at the same time as it goes to colleagues;
- ② further consultations once we've got the draft; and
- ③ the use of our good offices to speed up printing if necessary (48 hours is surely long enough if need be) ?
.

MJS 9/3



Foreign and Commonwealth Office

London S.W.1

9 March 1981

N Sanders Esq
10 Downing Street
London
SW1

Dear Nick,

BNA ACTS : GOVERNMENT OBSERVATIONS ON FAC REPORT

Thank you for your letter of 4 March in reply to mine of the same date, about the timetable for publication of the Government's response to the Foreign Affairs Committee's Report.

I am not sure that we can go any faster. Our first draft is being submitted to Ministers today and, after clearance within the FCO, we propose to clear it with the Chancellor of the Duchy of Lancaster, the Attorney-General and the Lord Chancellor. Thereafter, we shall of course consult you over submission to the Prime Minister for final approval of a publication date.

Provided the draft, once cleared, reaches the printers very early on the morning of 16 March, we could possibly go for a publication date of 20 March, ie one week earlier than I originally suggested. But this would of course depend on the speed of reaction by various Ministers and we have already lost 24 hours on account of today's Civil Service strike. A more realistic deadline would be publication on 27 March, which we originally chose as being just within the two months grace normally allowed for reply.

Yours sincerely
Eric

E R Worsnop
Parliamentary Clerk

cc: D Heyhoe Esq
Office of the Chancellor of
the Duchy of Lancaster
70 Whitehall
London
SW1

P Moore Esq
Government Chief Whips Office
12 Downing Street
London
SW1



cc Cpl
CWO 2* HS
Canada

bcc FCO
Ingram
MOORFA

10 DOWNING STREET

From the Private Secretary

4 March 1981

BIF 11/3/81

BNA Acts: Government observations on FAC Report

Thank you for your letter of 4 March. We should be glad to have some amplification of the reasons for suggesting a date as late as Friday 27 March for publication of the Government's response to the Foreign Affairs Committee Report. I think that we had been anticipating an earlier publication date. In any case, I think that we shall wish to submit the draft response to the Prime Minister before giving final approval to a publication date.

I am copying this letter to David Heyhoe (Chancellor of the Duchy of Lancaster's Office) and Peter Moore (Chief Whip's Office).

N. J. SANDERS

E.R. Worsnop, Esq.,
Foreign and Commonwealth Office.



Foreign and Commonwealth Office

London S.W.1

4 March 1981

N Sanders Esq
10 Downing Street
London
SW1

Dear Nick,

BNA ACTS: GOVERNMENT OBSERVATIONS ON FAC REPORT

We propose to publish as a White Paper on Friday 27 March the Government's Observations on the Foreign Affairs Committee Report (published on 30 January) on the British North America Acts.

I should be grateful if you, and those to whom I am copying this letter, would kindly confirm that there is no objection to publication.

*Yours sincerely
Edric.*

E R Worsnop
Parliamentary Clerk

cc: D Heyhoe Esq
Office of the Chancellor of
the Duchy of Lancaster
70 Whitehall
London
SW1

P Moore Esq
Government Chief Whips Office
12 Downing Street
London
SW1

(2)



Foreign and Commonwealth Office

London SW1A 2AH

2 March 1981

~~Prime Minister~~

A comment on Mr Ginsburg's letter (attached). We have read Mr Ginsburg's letter & he is not expecting a further reply.

Phd 2/3

Phd

Dear Michael,

Broadcasts in French to Canada

Thank you for your letter of 20 February in which you asked for comment on the suggestion made by a correspondent to the Prime Minister that we should be letting French listeners in Canada receive an account of British views on the patriation problem.

It is indeed the case that there are no BBC broadcasts in French directed to Canada. As you will know from my letter to Mike Pattison (copy attached) we are at the moment involved in trying to persuade the BBC to cut their vernacular services. It would thus look odd for us to suggest now to the BBC that they initiate an entirely new service in French to a limited audience in French-speaking Canada to cope with an immediate problem, ie getting our views across on patriation. It takes time to get new listeners to a new service, and by the time such a service gained a worthwhile audience, the immediate political need would probably have disappeared. The Federal Government might also consider the service's appearance as smacking of interference in their affairs.

For these reasons, therefore, we consider the suggestion made by the Prime Minister's correspondent to be a non-starter.

Handwritten signature

(G G H Walden)

M O'D B Alexander Esq
10 Downing Street

Enter Inf Dept
H. Allister
P. B. ...
K...
6/2
(13)

Foreign and Commonwealth Office
London SW1A 2AH

5 February 1981



Dear Mike,

BBC External Services to Francophone Africa

Thank you for sending me a copy of your letter of 2 February to John Halliday enclosing copies of Mr Howard's letter of 16 January to the Prime Minister and its enclosures.

Mr Ridley is holding regular discussions with the Managing Director of the BBC External Services, Douglas Muggerridge, on how to apply their reduced resources to priority areas. One of the economies we have discussed is stopping French language broadcasts to France. But we have not asked for any cuts in the separate French service to Francophone Africa, which we genuinely value. There has also been some general discussion about a relay station in Hong Kong mentioned in paragraph 1 of Mr Howard's note.

The talks are at a delicate stage; and we are likely to be suggesting discussion of the matter by Ministers before too long, and before any decisions are reached. In the circumstances we do not think that the Prime Minister should send Mr Howard more than a simple acknowledgement. Incidentally, you may like to know that Mr Howard will be visiting Peru and Brazil from 6-17 February.

I am sending a copy of this letter to John Halliday (Home Office).

Handwritten signature

(G G H Walden)
Private Secretary

PA931248
11 FEB 1981
REGISTRY
Action Taken

M A Pattison Esq
Street

R 8/3



UNIVERSITY OF ABERDEEN

WITH THE COMPLIMENTS OF
PROFESSOR PAUL WILKINSON

Department of Politics
Edward Wright Building
Old Aberdeen
AB9 2UB

No ask
MA

OUR REPORT last year that the British Government were about to become embroiled in an embarrassing row about Canada's constitutional future turned out to be correct. Then the British North America Act of 1867 was, as far as most Westminster parliamentarians were concerned, an obscure piece of Victorian legislation about which they knew next to nothing.

Now, increasingly-heated arguments about that aged relic of empire have resulted in Britain's High Commissioner in Canada being recalled after accusations that he had interfered in Canadian affairs.

It has been alleged that Canadian representatives in London have had their telephones tapped. British M.P.s have been lobbied energetically by scores of Canadian interest groups ranging from oil-rich, but disgruntled, provincial administrations to representatives of minorities such as the Indians and the Inuit (Eskimos).

The 1867 Act was the measure which created the Canadian confederation out of a hotch-potch collection of British colonies. It was, and remains, the effective constitution of the Canadian State.

Now, Canadian Premier Pierre Trudeau has determined that the century-old Act should be reformed. Once he has obtained the approval of his Liberal majority in the Canadian House of Commons, Mr Trudeau will ask the British Parliament to make the desired amendments as a prelude to giving the Canadian Federal Government all future responsibility for the Canadian constitution.

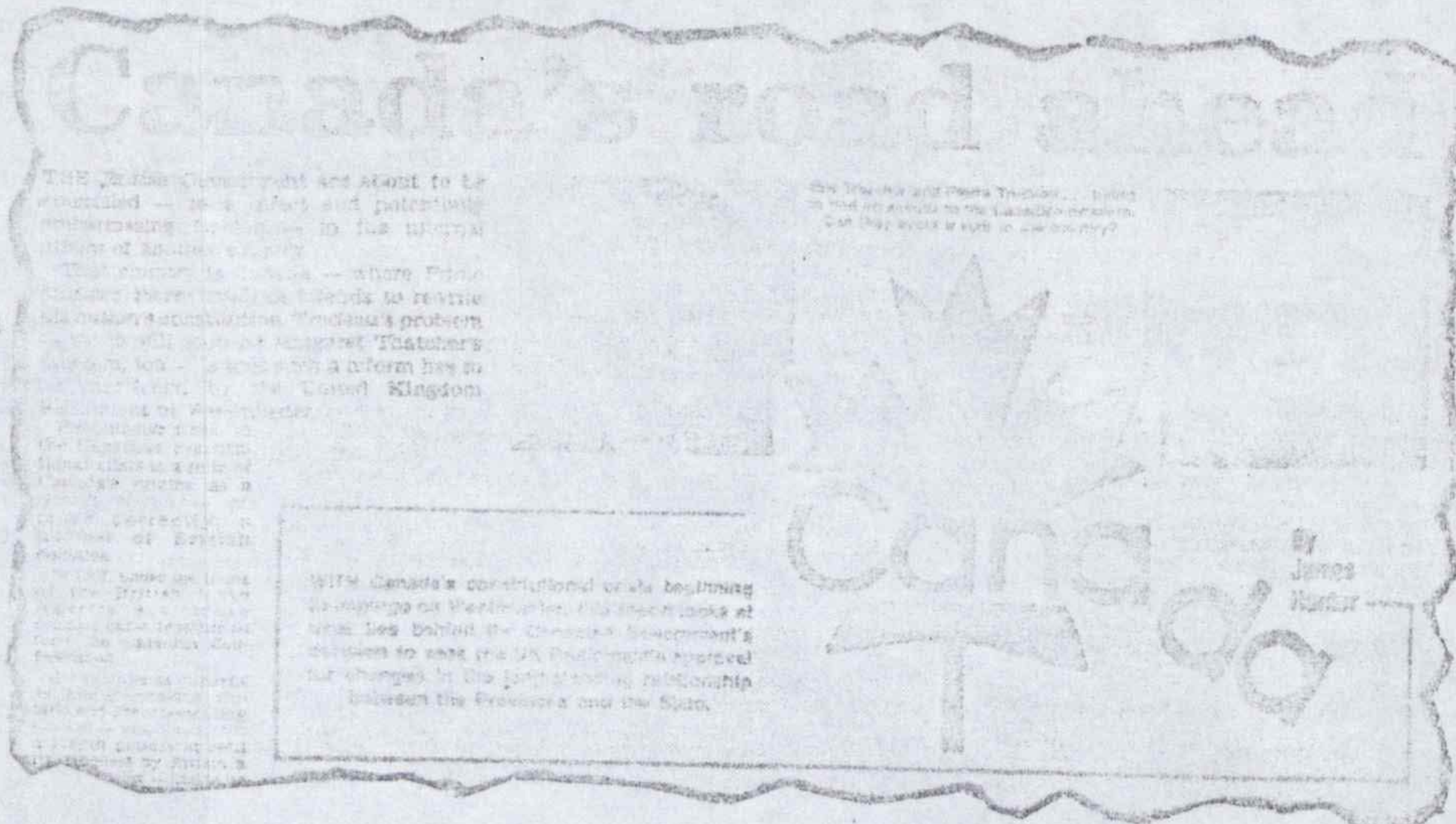
Britain's role in this procedure is an anachronism, a hangover from our imperial past. And, in the normal course of events, Westminster would accede automatically to such a request from a country which, though once a British colony, is now completely independent.

The snag is that Mr Trudeau's proposed reforms have less than universal support in Canada. And those Canadians who oppose the Trudeau plan, especially several of Canadian provincial prime ministers and their administrations, are urging the British Government to refuse to comply with the Canadian Federal Government's wish to have the British North America Act amended and "patriated" to Canada.

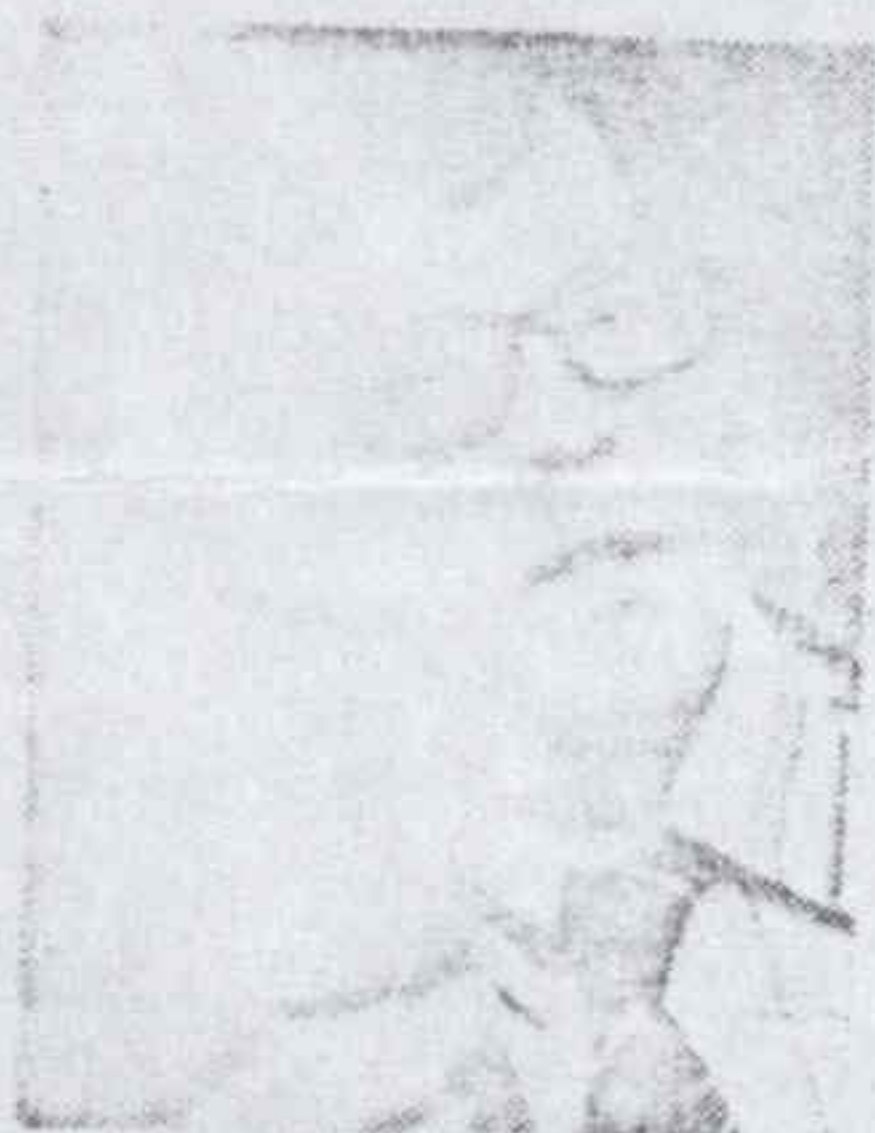
Hence the frenetic lobbying which has been going on in London. Hence, too, the mounting Canadian criticism of Britain on the grounds that

JAMES HUNTER reviews the latest position in the Canadian Government crisis.

from "The Press and Journal" October 23, 1980.



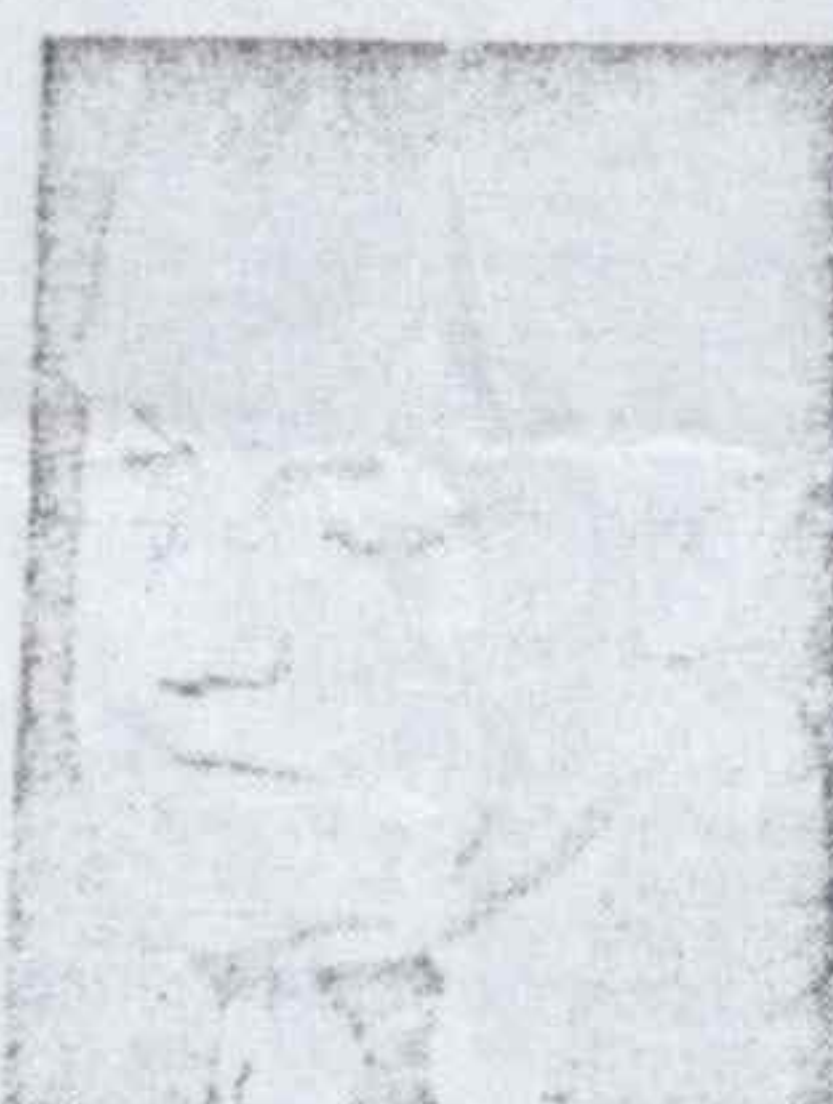
Temperature rises over the future of Canada



PROF. WILKINSON ... critical of the attitude of some M.P.s.



PREMIER TRUDEAU ... determined that old Act should be reformed.



SIR ANTHONY KERSHAW ... predicted there would be "blood on the floor."

the British are gearing themselves up to intervene in a matter which should be decided by Canadians in Canada.

The temperature has been raised recently by statements such as that made by British Conservative M.P. Sir Anthony Kershaw, who has predicted "blood on the floor" when Canadian constitutional change is debated at Westminster.

And, whatever the out-

come of that debate, the British Government will be criticised by Canadians — by the disaffected provinces if Mr Trudeau's formula is adopted at Westminster; by the Canadian Federal Government if Britain is seen to question that Government's authority to act on behalf of all of Canada.

With British-Canadian relations becoming increasingly strained by this sort of disagreement, Aber-

deen University's Professor of International Relations, Paul Wilkinson, believes that there is a possible way out of the dilemma in which Mrs Thatcher's Government find themselves. British approval of Canadian constitutional reform, he says, should be made conditional on that reform being approved in a Canada-wide referendum.

Prof. Wilkinson, whose department will soon be offering one of the few

courses on Canada available in British universities, is critical of the attitudes displayed by some British M.P.s. They have not thought through the Canadian issue, he asserts. And some British politicians, says Prof. Wilkinson, still have something of an imperial attitude to Canadian affairs. "One or two of our M.P.s seem to believe that they know what is best for Canada," he comments.

In this context, Prof. Wilkinson condemns any tendency for British M.P.s and officials to involve themselves directly in the Canadian constitutional wrangle.

"Imagine how we would have reacted if the Canadian or American Governments had sent official representatives to hold discussions with Scottish or Welsh groups when the Devolution Bill was before Parliament," he remarks. "It is equally improper for us to be seen to behave in that fashion in Canada."

Paul Wilkinson believes that it would be dangerous for the British Government

to underestimate the strength of Canadian feeling on the constitutional question.

"There is a real risk that, if our Government are seen to be acting obstructively, the Canadian Government and a good deal of Canadian public opinion will be so alienated that Canada might break with the Commonwealth. That would be tragic. Canada's contribution to Commonwealth affairs — not least in the Third World — has been outstanding."

It is important for Westminster politicians to grasp that Pierre Trudeau's proposals are designed to grapple with a long-standing Canadian crisis, stresses Prof. Wilkinson. Canadian unity is fragile. And should reform be thwarted by Britain refusing to comply with Mr Trudeau's wishes, observes Prof. Wilkinson, Canada may begin to disintegrate, a development which, Prof. Wilkinson points out, could only weaken the NATO Alliance and would not be in this country's best interest.

"The British Government should also be wary of confusing provincial premiers' hostility to the Trudeau reform proposals with genuine public opposition to Canadian Government policy," says Prof. Wilkinson. "The provincial prime ministers have a vested interest in maintaining their power at the expense of the Federal Government in Ottawa. But all opinion-poll evidence points to overwhelming public backing for Trudeau's policy."

Nor is Mr Trudeau's support likely to be diminished by the acti-

vities of British M.P.s such as Sir Anthony Kershaw. When Sir Anthony's pronouncements enabled Pierre Trudeau to accuse him of masterminding a political spectacular to be entitled "The Empire Strikes Back", there is no doubt that the Canadian Prime Minister was identifying himself with a genuine Canadian nationalism which will respond angrily to any refusal to accede to Canadian Government plans for the British North America Act.

The British Government's obligations are quite clear, says Prof. Wilkinson. Mrs Thatcher and her colleagues ought to comply with Mr Trudeau's wishes. The Canadian provinces have no legal standing in this matter. And their opposition — in a legal sense, at any rate — is of no account.

But it would be quite legitimate for the British Government to add a rider to their amendment of the British North America Act, says Prof. Wilkinson. "Our Government could respond, in effect, 'Yes, Mr Trudeau, we are quite happy to do what you ask. But we have had representations from certain Canadian provinces and, in order to be sure that the Canadian people are on your side, we should like to make constitutional amendments conditional on your obtaining a majority in a nationwide referendum on the matter.'

"That should not worry Mr Trudeau too much. And it would be difficult for the provincial premiers to object to such a democratic exercise. It might well be the least painful way out of the present impasse."

PART

2

ends:-

27.2-81

PART

3

begins:-

2.3.87

