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Canada

Ref. A03402

PRIME MINISTER

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Patriation of the Canadian Constitution

You are due to have a meeting on this subject on Monday, 3rd November with the Home Secretary, Lord Chancellor, Chancellor of the Duchy of Lancaster, Lord Privy Seal, the Chief Whip and the Minister of State at the Foreign and Commonwealth Office, Mr. Ridley.

2. The basic Canadian constitutional instrument is the British North America Act 1867 which is an Act of the Westminster Parliament. In certain important respects this Act can only be amended by Act of Parliament in Westminster, notably as regards distribution of powers between the Federal and Provincial legislatures. This situation remained when Canada became fully independent under the Statute of Westminster in 1931 because the Canadian Delegation to the preceding imperial conferences were unable to agree on any changes in the status quo. Section IV of the 1931 Statute enacts as law the Constitutional Convention that the Westminster Parliament will not pass legislation extending to a Dominion other than at the express request and with the consent of the Dominion. The British North America Act has been so amended 14 times, invariably at the Canadian request. The British Government under both Labour and Conservative Administrations has consistently taken the general line that patriation would go through in this country if requested by the Canadian Government. You will recall that when you met Mr. Trudeau on 25th June last you said that a request to patriate would be agreed by us if it was the wish of the Government of Canada. You gave similar assurances to Mr. MacGuigan and Mr. Roberts, Mr. Trudeau's emissaries, when they called on you on 6th October. At that meeting Mr. MacGuigan told you that the Canadian Government was requesting something that was in their judgment necessary for the survival of Canada in its present form. There can be no doubt about the strength of Mr. Trudeau's resolution in the matter. He would certainly be very angry if he was now to be told that the British Government were not prepared to pass the legislation including the Bill of Rights through

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Parliament. Delay beyond the Canadian deadline of 1st July 1981 may not be quite so disastrous in terms of Anglo-Canadian relations. The Canadian reaction would probably depend on how hard they felt the British Government had tried to meet their wishes.

3. The Canadian Federal Government has now laid its proposals in the form of a proposed Resolution in front of the Federal Parliament. An account of its stormy passage so far, and our High Commissioner's conclusions, are contained in Ottawa telegrams 450, 451 and 452 of 27th October of which I attach copies. Six (Alberta, British Columbia, Manitoba, Newfoundland, Prince Edward Island and Quebec) out of the ten Canadian Provinces now formally oppose Mr. Trudeau's proposals. Ottawa telegram 452 makes some interesting points about Mr. Trudeau's own attitude in this matter, his relative ignorance of the processes of the Westminster Parliament, and his possible actions if his legislation encounters serious Parliamentary difficulties or obstruction at Westminster. The dissentient Provinces are already lobbying for support in Westminster, and this is likely to intensify during the coming months. They will lobby through their Agents General and possibly through visits by the Provincial Premiers. Although this is not a matter which is likely to become a great popular cause in this country, it seems probable that what popular interest and sympathy is aroused, and (more immediately) what Parliamentary views are expressed, are likely to be on the side of the Provincial Governments rather than in support of Mr. Trudeau.

4. We have the authority of Sir Kenneth Wheare for the proposition that the Westminster Parliament is bound by convention not to alter the British North America Act except with the request and consent of the Dominion Government and (usually) Parliament, but that it is not bound by convention to alter the Act if and when the Dominion Government and Parliament request it to do so. The implication of this must be that, in terms of constitutional doctrine, the Westminster Parliament can, either for its own reasons or because persuaded by the Provincial Governments, decide not to act on a request from the Federal Government and Parliament. The Provincial Governments will argue that, to the extent that the Westminster Parliament



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is allowed to intervene in Canadian domestic matters, not only must it do so only at the request and with the consent of the Federal Government but also that it must not do so in such a way as to take sides in a dispute between the Federal and Provincial Governments.

5. If this is right - and you may think that one of the conclusions from your meeting should be that an opinion should be sought from the Law Officers on the matter - we are not constitutionally bound to introduce at Westminster whatever Resolution is passed by the Canadian Parliament. You have of course said that the British Government will introduce at Westminster whatever Resolution is passed by the Canadian Parliament, and there are good political reasons for doing so: a refusal to do so would certainly be castigated by Mr. Trudeau as an intrusion in the internal affairs of Canada, and he would no doubt blame the British Government for whatever consequences might follow. On the other hand, assuming that Mr. Trudeau has not reached agreement with the Provincial Premiers on the contents of the Federal Resolution, a decision by the British Government to introduce a Resolution at Westminster would be attacked by them as an intrusion in the internal affairs of Canada and as a breach of the trust placed by the Provinces of Canada in Britain by virtue of the British North America Act. Mr. Trudeau's actions are putting the British Government and Parliament in a very difficult position.

6. There is one further difficulty. We are told that the legality of the Federal Resolution and of Mr. Trudeau's actions is being challenged in the Canadian courts, and that the Provincial Premiers propose to press the challenge to the Supreme Court. Presumably we should not wish to introduce legislation at Westminster until the Resolution's legality in Canadian law had been established in the Canadian courts.

7. The problem is created for us, not by the proposal for patriation as such but by the Federal Government's decision to incorporate in the Resolution and the draft Bill constitutional provisions on such matters as legal rights, official languages and educational rights which are matters for the Canadians themselves to decide and go well beyond the question of patriation. You will

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not wish to go back on your commitment to Mr. Trudeau to introduce at Westminster whatever Resolution is passed by the Canadian Parliament. But it would be open to you to say to Mr. Trudeau that, in the form which the Resolution now takes, and given the certainty that the Provincial Governments will lobby in London, the Bill he now proposes would be controversial at Westminster, that at best we could find ourselves unable to meet his timetable for completing the Bill by 1st July 1981 and at worst the Bill could fail to pass, particularly in the House of Lords. In addition - you might say - you understand that the legality of the proposed Resolution is being challenged in the Canadian courts, and you think that it would be difficult for Her Majesty's Government to introduce the Bill at Westminster until the outcome of that challenge was finally known. None of these difficulties would arise if what was proposed was a simple patriation of the British North America Act to Canada, leaving the constitutional additions proposed to be the subject of debate and legislation in the Canadian Parliament once the Constitution has been patriated. You therefore hope that he will consider very seriously amending his request, so that all that Westminster is required to do is simply to patriate the British North America Act, leaving other matters to be dealt with in Canada where they belong.

HANDLING

8. Against this background the immediate aim of your meeting could be to consider what the British Government's decision and posture should be. You may care to begin the meeting by inviting the Lord Privy Seal to say something about the Canadian Constitution and the question of external relations between Britain and Canada. You will want to make it clear to the meeting that you are committed to Mr. Trudeau to introduce at Westminster whatever Resolution is passed by the Canadian Parliament, and that there would be grave political disadvantages in going back on that commitment. You could then discuss the potential dislocation of the Parliamentary timetable, the damage to the Government's legislative programme and the possibility of political upset inherent in taking the proposed 59 clause Bill through the Westminster Parliament. If the meeting is disposed to share my view that it may be difficult to get the Bill through, particularly in the House of Lords, you may



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wish to consider with your colleagues whether even now to urge Mr. Trudeau to go for simple patriation, leaving the additional matters to be dealt with in Canada, once the British North America Act has been patriated.

9. If the meeting decides to take that course, there will be an opportunity to discuss that alternative with Mr. Michael Pitfield, the Secretary to the Cabinet in Ottawa and a close confidant of Mr. Trudeau, when he is in London on Monday, 10th November.

10. If the meeting decides that that course is not practicable, then you will wish to concentrate on how to minimise the potential dislocation of the Parliamentary timetable and the damage to the Government's legislative programme of taking the Bill through Parliament. The discussion might cover the following points:

(a) You may like to invite the Chancellor of the Duchy of Lancaster to say something about the timetable and to describe the outcome of his telephone call to Mr. Yvon Pinard, Leader of the Canadian Lower House on 27th October. He or the Lord Privy Seal may be able to say when the Canadians are likely to get their Bill to London. When can it be expected to be passed by the Westminster Parliament? Would the timetable be significantly affected if it was a simple Bill which did not include a Bill of Rights?

(b) Would there be any advantage to the Government in introducing the Bill without putting the Whips on? How would Mr. Trudeau react to such a procedure? What would its advantages and disadvantages be from a domestic political point of view?

(c) Are there any procedural devices which might be adopted to simplify the passage of the Bill through Parliament? It has been suggested that the draft Canada Act should be re-entitled "a Bill to give effect to a request by the Senate and House of Commons of Canada". This would prevent amendments at least in the Commons being put down to delete for example the Charter of Rights as being out of order, since such a deletion would not give effect to the Canadian request.

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This device might abbreviate but not stop debate in the House of Commons and make clear the basis of the legislation. But since the House of Lords rules of procedures are more flexible, the Lords might not feel so inhibited about introducing amendments. What do the Chancellor of the Duchy of Lancaster and Chief Whip feel about a device of this kind? Are there any other devices which ought to be considered?

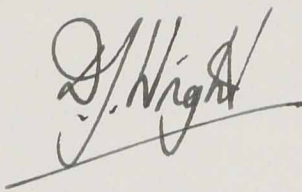
- (d) It seems certain that the dissentient Provinces and probably the Canadian Indians will start lobbying the British Government against the proposed legislation soon. What line should the Government take to counter the accusation that the British Government and the British Parliament are guilty of a breach of trust in not taking account of the strong objections to the proposed legislation? What is the feeling likely to be among the Government's supporters in the House of Commons and in the Opposition on this issue? What should the Government's public posture be on the issue as a whole?

CONCLUSIONS

11. There are in broad terms three possible courses of action which the British Government can take to implement a policy of acceptance. The Government can accept the Resolution wholeheartedly and try and push it through the House of Commons and the House of Lords, using whatever pressures are necessary to complete this process. Or the Government can launch the Resolution in the House of Commons, stand back and let it take its chance. This would be an unusual course to take with a Constitutional Bill, but the situation is unusual. Or the Government can go back to Mr. Trudeau and suggest some simpler procedure from a Westminster point of view which would remove the onus of having to pass his proposed Bill of Rights. The discussion at the meeting may lead you to decide which of these courses of action offer the best chance of success. You may care to conclude the meeting by inviting the Chancellor of the Duchy of Lancaster in consultation with the Lord Privy Seal and the Attorney General, to produce a paper for the Cabinet

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setting out the problem and the preferred solution. If you decide to go for the third course - going back to Mr. Trudeau with the proposal for a simpler Bill - it would be convenient to take advantage of Mr. Pitfield's visit to London on 10th November to raise this with him, however informally, and you might wish to instruct me to do so.



(Robert Armstrong)

*(approved by Sir R Armstrong  
and signed on his behalf)*

31st October, 1980