FROM:

THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.

HOUSE OF LORDS,
SW1A 0PW

Canada

CONFIDENTIAL

23rd February, 1981

The Right Honourable
The Prime Minister

Dear Margaret

Patriation of the Canadian Constitution

In any constitutional question, and in this in particular, there are at least four separate questions to answer and in the following order.

1. The strict legal position. This is as the Attorney General says. But it is entirely barren, since, as often, the strict legal position is over laid by convention as binding as law.

2. The position under established constitutional convention. This is expressly recognised, as the Attorney General points out, by the third paragraph of the preamble to the Statute of Westminster Act 1931. It is relevant to the present discussion because, at least in my opinion, it completely prohibits either (a) Plain "patriation" or (b) amendment except in accordance with a "request and consent" of the relevant Commonwealth Member.

3. Constitutional propriety. By this phrase I mean something which is not governed by an established convention, but action which will be treated as a precedent establishing a convention if it is correctly answered and lead to a shambles if the action taken is a mistake (e.g. the House of Lords' rejection of the Budget in 1909). I agree with the Attorney General that though convention completely governs and inhibits simple "patriation" or amendment, it is not yet expressly established by convention that Parliament may not refuse to accept a "request and consent". It is at this stage that the case becomes arguable.

In their report the FAC argue that it would in this sense be constitutionally proper to reject a Bill. I am sure they are wrong. They found their belief on the supposition that s.7 of the Statute of Westminster Act constitutes the U.K. Parliament a guardian, arbiter or trustee, or, in a sense the guarantor of the rights of the provinces under the BNA 1867 as amended. Historically I do not believe that this is correct. S.7 is there because Canadians in 1931 were not prepared to say what should take the place of the legal status quo. Even if I were wrong about this I would agree with the Attorney General and the Lord Privy Seal that it is perverse to believe that, in 1981, the constitutional proprieties remain unchanged from 1931. In the 50 years which have supervened the standing of Canada has completely altered. Her Government is the only entity which in international law, in the community of nations, can represent her people and the machinery

/Contd.

by which Canada can consent and request is the machinery established by custom of Parliamentary approval in Ottawa, initiated by the Government in Ottawa responsible to that Parliament. It may be true that by the Canadian proprieties that Government has blundered in its treatment of the provinces. I am prepared to assume in favour of the FAC that this is correct, without necessarily thinking that this is so. But we are not concerned with the Canadian proprieties. It would be a constitutional impropriety on our part, at least in my view, quo ad Canada even more so than quo ad Australia, where the case is not the same, but even quo ad Australia for the U.K. Parliament to reject a request from the Parliament passed in accordance with existing machinery. I would be prepared to accept that there might be a case for delay out of respect for the Canadian judiciary, but, speaking personally I cannot conceive what justiciable issue can exist for the Canadian Courts to decide. I therefore basically agree with the conclusion of the Lord Privy Seal.

4. There remains the fourth question which may be the most important. In the last resort a British Government and a British Parliament are bound to act in the interests of the U.K. What is that interest here? I cannot conceive any advantage accruing to the U.K. by disregarding a "request and consent" properly passed by the established machinery in Ottawa which could possibly compensate for the infinite damage which would accrue to the U.K. interests in Canada, to our relations with Canada, bilaterally, in the Commonwealth, in NATO, in the UNO were we to disregard a "request and consent", if we were to purport to act in the interests of the Provinces - or rather the Provincial Governments and legislatures - against the expressed opinion of the Ottawa Parliament and Government in the present instance. Such action would, I believe, be a blunder only equalled by the action of the House of Lords in 1909.

I am copying this to the other members of OD, the Attorney General, the Parliamentary Secretary, Treasury and Sir Robert Armstrong.

yrs:
Q.H