

Canada



PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

Chancellor of the Duchy of Lancaster

11 November 1980

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Dear Michael,

PATRIATION OF THE CANADIAN CONSTITUTION

... You sent me a copy of your letter to George Walden of 5
November on this subject. I now enclose a note of a meeting
held yesterday by the Chancellor of the Duchy with
... representatives of the Canadian Government, and also of a
note I have sent to Miles Wickstead in the Lord Privy Seal's
Office.

In your letter you recorded that the Chancellor of the Duchy should arrange through his officials to obtain the views of the Clerk of the House of Commons on whether a Bill requested by the Canadian Government and Parliament would be unamendable, or if not, whether it was feasible by suitably entitling the draft Canada Act to make it proof against amendment in the House of Commons.

I have consulted Sir Henry Rowe, who has been in touch with the Chief Clerk of the Public Bill Office. I understand that his informal advice was that if the Bill were drafted as one to give effect to a request from the Canadian legislature it would not be possible to move substantive amendments to the Bill in the Commons. There would, however, remain the risk of substantive discussion of the content of the Canadian Act in the House of Lords.

It is also of interest that, as you will see from the note of yesterday's meeting, the Canadians have already taken aboard the need for them to consider how the drafting of their Bill can be adapted to conform as closely as possible to UK practice. They did not elaborate, but I assume that the FCO have been in touch with them on this question.

I am sending copies of this letter to the recipients of yours.

Yours ever,

Robin

R A BIRCH

M Alexander Esq
10 Downing Street



PATRIATION OF CANADIAN CONSTITUTION: NOTE OF A MEETING BETWEEN
THE CHANCELLOR OF THE DUCHY OF LANCASTER AND REPRESENTATIVES
OF THE CANADIAN FEDERAL GOVERNMENT ON 10 NOVEMBER 1980

Present: Chancellor of the Duchy of Lancaster
Mr MacGuigan
Mr Gottlieb
Mrs Wadds

Mr R A Birch

In welcoming the Canadians, the Chancellor referred to the very tight legislative session confronting the Government, and emphasised that what could be done depended very much on the date on which the Canadian Government put their request for legislation to us. The latest date which would give any reasonable prospect of getting the Bill through the current session would be early January.

In reply, the Canadian representatives said that no formal request can be made to the British Government until the Bill has completed its passage through the Canadian Parliament. The matter would be at Committee Stage until 9 December, and further debate would be needed in both houses. The legislative process should finish in January, and they would aim at as early a date as possible. It was not yet clear if the guillotine would be used again; this might be necessary if the Opposition mounted a long filibuster, but they would not pursue this option if the debate was likely to be over in 3 or 4 weeks. They thought that mid-January was probably an attainable date.

In reply, the Chancellor stressed that the Bill would have to be received as early as possible in January, as otherwise no guarantee of passage in the forthcoming session was possible. The Canadians noted this point, saying that they were most anxious to conclude the matter in the forthcoming session, since this would be the end of the domestic Canadian debate.

The Chancellor raised the question of the Bill of Rights and whether the inclusion of this in the legislation could give rise to challenge in the courts of Canada; if this happened difficulties might be created for the British Government. The Canadians replied that the Bill of Rights was the most essential feature of the measure, since it was a mutual guarantee of language rights to French Canadians in Canada as a whole and to the English in Quebec. This could not be accomplished in the Canadian Parliament, but change must begin with the Statute of Westminster.

Some challenges were proposed by the Provinces, beginning with Manitoba; others could be expected to follow in succession.

The view of the Federal Government was that there was no legal issue, but that the point was one of policy. If the Province were unsuccessful in its challenge it could appeal to its own Supreme Court, but it was doubtful if it could go to the Supreme Court of Canada, since it was thought that reference of the issue to this court could be made only by the Federal Government.

The Chancellor stressed the importance of checking this point. We could not put a Bill forward to the House of Commons if the issue was still subject to dispute in the Canadian courts, since the House of Commons would be likely to regard the matter as sub-judice. It would be necessary to look into the matter further with the Law Officers; he could foresee considerable difficulties on the point. Although he appreciated that the Federal Government urged that these were not issues of law but of policy, it was unavoidable that the British Government and Parliament should see the issue in terms of our own political situation; back-benchers and indeed the official Opposition, could decide to make difficulties if they regarded the basis for the legislation as unsatisfactory. He referred to the forthcoming investigation of the issue by the Select Committee on Foreign Affairs; the position in Parliament might depend in part on what they said in their report. The Canadian representatives commented that there might be a compromise position if it were accepted that the Bill should not proceed until the completion of the first appeal; it would not, however, be acceptable for the Bill to be deferred until all appeals had been exhausted.

The Chancellor said that another important issue for the British Government would lie in the need to render the Bill immune from amendment. This would call for a degree of co-operation from the Federal Government; it was important that the request and the Bill should be so framed as to give it the greatest possibility of success.

The Canadians replied that they were already engaged in drafting but had already taken this point and were changing the pre-ambule to conform with UK practice. They hoped the Government would do all they could to get the Bill through Parliament, and understood that the Prime Minister had promised a Three-Line Whip for this purpose. They were themselves very dependent on the British Government since they could not deal directly with MPs. Nevertheless, if private Members were to try to prevent Parliament from enacting the Bill they would see this as interference in Canadian affairs. They were themselves restrained by their wish not to interfere in UK Parliamentary affairs.

In response, the Chancellor said that he would not wish to leave them in any doubt about the Parliamentary difficulties the Government would face. The Government would use its best endeavours, but the problems could not be ignored. Even with a Three-Line Whip the scope for procedural obstruction was still very great; nor would such a whip extend in its operation to the Select Committee. The Commons would be likely to insist on taking a Bill of such importance on the Floor of the House.

As to the likelihood of private Member interest, the Chancellor said that there were a number of close connections between the UK and Canadian legislatures, and the House of Commons was not biddable, so that procedural devices were certain to be employed. This is why unamendability was important. On the timetable, if we received the Bill in January, Second Reading could perhaps be achieved in February.

On more general attitudes, the Canadian representatives said that there was considerable support in Canada for the Bill, and the Leader of the opposition had admitted that he had little support. The issue was mainly one which concerned the provincial governments. Quebec had drawn back from court action when they had perceived the likelihood of losing; their opposition to the Bill was founded on the recognition that the proposed changes would undermine the case for separatism. The Canadian Government was a majority Government and accountable, and the subject of patriation had been an issue at the last general election, though on a small scale. The Canadian representatives added that they would be contacting the new Labour Party leader and David Steel, and were considering what they might do to offset lobbying from the Provinces in this country.

On the activities of the Select Committee on Foreign Affairs, they foresaw difficulties in Canada if the Committee proceeded to hear Canadian witnesses. The Chancellor said that he could foresee considerable activity by the Committee if they decided that the issue was of major importance. He would, however, speak to the Chairman of the Committee to see what the situation might be. In response, the Canadians said that they recognised that the Committee's terms of reference were so framed as to avoid interference in Canadian internal affairs, but that they hoped that the Committee would be equally careful in considering the context of its hearings.

In conclusion the Chancellor said that within the limits of their powers the British Government would do all they could to help, but in particular stressed the importance of receiving the Bill early and in an unamendable form.

RAB

cc: Chancellor of the Duchy of Lancaster
 Mr Hyde
 Mr Harris
 Mr M Wickstead (Lord Privy Seal's Office)
 Mr Brian Berry (FCO)
 Mr M Alexander (No 10)
 Mr M MacLean (No 12)