



W. M. M.

See by his (own) Minister

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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 ^{in his view} ~~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