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CABINET

DEFENCE AND OVERSEA POLICY COMMITTEE

THE CANADIAN CONSTITUTION

Memorandum by the Lord Privy Seal

The proposed patriation of the Canadian Constitution gives rise to legal, political, and parliamentary problems. A separate paper by the Attorney-General deals with the legal position which is, however, so important to the general scene that I am bound to touch on it here. In an annex, I set out the position in the Canadian Parliament and in the Canadian courts, the attitude of the Canadian Provinces and political parties, and the parliamentary attitude in the UK.

Courses Open to HMG

2. Two possible suggestions have been put forward. One is that HMG should unilaterally patriate the Constitution with or without an amending formula and let the Canadians get on with the rest. The major objection to this is that it runs contrary to the "request and consent" convention recognised in the Statute of Westminster. The FAC have rejected this possibility and there can be no doubt that the Canadians would react extremely adversely to what they would interpret as British interference (Mr Trudeau publicly confirmed this in a statement on 12 February).
3. Another possibility would be to leave the Canadian proposals to one side while the matter was sub judice in Canada. This could involve deferring action until later in the year. The trouble here is that whatever the British position, the Canadian Government takes the view that this is a political matter and not one for the courts. They are likely to take the view that if they feel able to ignore the court cases pending in their own country in putting the proposals to us, all the more should the UK Government be prepared to so and proceed here. On the other hand, there could be legal difficulties in Canada and political embarrassment here if, after the UK had acted on a Federal request, the Canadian Supreme Court were to conclude that the making of the request had been unconstitutional.

Degree of Commitment

4. The Prime Minister, when she saw Mr Trudeau on 25 June, said that her line would be that whether or not the request was with the agreement of all the Provinces, a request to patriate would be agreed if it was the wish of the Government of Canada. We were not, at that stage, aware that the Canadian proposals would include a Bill of Rights. On 6 October, when full proposals, including the Bill of Rights had been published, the Prime Minister informed two Canadian Ministers (Messrs MacGuigan and Roberts):-

"...that there was no question of the British Government refusing a request from the Canadian Government for patriation of their Constitution. The inclusion of the Bill of Rights might have made the situation more complicated, but had not changed it in its essentials".

5. On 5 December, the Prime Minister sent a message to Mr Trudeau as a prelude to the Chancellor of the Duchy of Lancaster's visit, in which she said: "I should say at once that there has been no change in our policy since I saw you in June and we had the further discussions in September". There can thus be no doubt over HMG's commitment to put the Canadian proposals to Parliament. There is none in Canadian minds. Mr Trudeau said on 29 January: "I have her [the Prime Minister's] word and I still have her word that she will make this a Government measure and she will put on a three line whip to pass it through the House of Commons". Mr MacGuigan said on 1 February: "We've had assurances, not only from the British Prime Minister ... we've had assurances by at least four other Ministers".

6. The Canadians have, however, been consistently warned of likely parliamentary difficulty. The Prime Minister told the Canadian Ministers that the Bill of Rights meant the issue would become more controversial and passage of the proposals would be more prolonged. The Chancellor of the Duchy of Lancaster warned Mr Trudeau in December that it was "highly questionable whether it would be possible at present to achieve the passage of the necessary legislation through Parliament".

UK/Canada Relations

7. Since Canadian independence we have dealt exclusively with the Federal Government and it is with them that we shall have to conduct relations in future. Our bilateral relationship has always been close. Canada is an important member of the Commonwealth, and a linchpin of the Western Alliance. Canada also has considerable influence in the third world and plays a significant part in peace-keeping and in international groups such as the Namibia Five. There are therefore many areas where UK interests could be adversely affected by the souring of the Federal Government's attitude towards us, which would be inevitable if HMG failed to act on the Canadian request for patriation. The Canadian Minister for External Affairs,

in a recent speech, underlined the damage to Canadian/British relations which would result from a failure on our part to act on the Canadian proposals. He said of the FAC Report that it :
" ... reached certain conclusions which, if accepted by the British Parliament, would produce a major constitutional crisis between our two Parliaments and Governments".

Parliamentary Handling

8. At present Parliamentary opinion on both sides of the House would be hostile to a request by the Federal Government on the basis of the proposals in their current form. A debate in Parliament prior to receipt of the Canadian proposals might be designed to clarify issues and to lower the temperature prior to a later substantive debate. However I doubt whether it would have this effect: positions might well be adopted by some members from which they would have difficulty in retracting. Moreover a debate held before we had received the Canadian request for patriation, and (thus) while the question was still before the Canadian Parliament, would have a very bad impact on Canadian parliamentary and other opinion. Our High Commission at Ottawa agree with this view.

9. Another possibility, suggested by the Chancellor of the Duchy of Lancaster, is to hold a separate initial debate, after the Canadian request had been received, on the question of whether the Canadian proposals were amendable. It is the strong view of the Canadian Government that their proposals should not be amended in any way in the British Parliament. Such is the conclusion also of the FAC Report. The substance of such a debate would thus be distasteful to the Canadians, but they might find it acceptable if it could be demonstrated that it was necessary in order to secure the later passage of the Bill.

Conclusion

10. I consider that we have no alternative to putting the proposals as presented to us by the Canadian Parliament to Parliament at Westminster as quickly as possible once we receive them. To do otherwise would be to risk a major row with the Canadians. And it is essential that we should be seen by the Canadian Federal Government to be pressing the measure through as best we can.

I H G

Foreign and Commonwealth Office

19 February 1981

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ADDENDUM TO OD(81)12

The annex referred to in paragraph 1 is attached.

Foreign and Commonwealth Office

19 February 1981

The Position in the Canadian Parliament

The constitutional proposals of the Federal Government were put to the Canadian Parliament on 6 October. A Joint Parliamentary Committee of both Canadian Houses of Parliament was charged with examining these proposals, taking evidence and devising amendments. It was originally due to report on 9 December; this date was successively postponed to 6 and then 13 February.

2. A very wide range of bodies and individuals have given evidence to the Joint Committee. As a result, there have been some fairly substantial amendments to the proposals, but these have not been sufficient to disarm the fundamental criticisms of those opposed to the Federal proposals (see below).

3. Now that the Committee has reported, debate in the Canadian Parliament is expected to last about four weeks. A formal request from the Federal Parliament for patriation is thus unlikely to reach the UK before mid March. If Mr Trudeau employs closure procedures, it could be earlier, but we know he is reluctant to do this again.

Court Action

4. After discussions among six of the Provinces objecting to the Federal proposals (British Columbia, Alberta, Prince Edward Island, Manitoba, Quebec and Newfoundland), it was decided to take the matter to the courts of three of the Provinces, Manitoba, Newfoundland and Quebec. The Manitoba court has recently delivered its opinion. By majority votes, the court found that there was no constitutional convention that a request would not be made for constitutional amendment affecting Federal/provincial relationships or provincial powers without provincial agreement; nor was provincial agreement required for making such amendments.

5. The other two provincial courts will be considering similar questions. The Manitoba ruling is expected to be appealed, but possibly not until the end of the 60-day period allowed (which began to run from 3 February). The earliest time for the Supreme Court to pronounce on an appeal from the Manitoba judgment would be the end of June but it is, according to the Federal Department of Justice, highly unlikely to do so before the autumn.

Opposition to the Federal Proposals

6. The six dissenting Provinces have been consistent in their opposition to Mr Trudeau's constitutional proposals. There are, in addition, two 'fence-sitting' Provinces. One of these, Saskatchewan, appears to be moving towards opposition to the Federal proposals. Its Prime Minister, Mr Blakeney of the New Democratic Party, in this respect differs from the national leader of the Party, Mr Broadbent, who has declared himself in favour of the proposals as amended. Nova Scotia is also reported to be moving towards opposition to the

Federal proposals. This leaves only Ontario and New Brunswick solidly in favour of the Federal position. At the national level, the Progressive Conservatives under Mr Joe Clark have consistently opposed the proposals, but their opposition is at the moment inhibited by in-fighting over the future leadership of the Party (after Mr Clark's failure at the elections). The New Democratic Party (see above) are on board with Mr Trudeau for the moment; but there is still a possibility of their defecting on a national and/or provincial basis. Even if they did so, Mr Trudeau would still have an overall majority in the House of Commons of 12. His majority in the Senate is 36.

7. The most important objection of the Provinces to the Federal proposals is the unilateral element, i.e. Mr Trudeau's desire to take them direct to the British Parliament without provincial consent. They also believe that the overall effect of the constitutional package, and particularly the Bill of Rights, would be to increase Federal powers at the expense of the Provinces (eg on language-teaching and movement of labour between Provinces). The Conservatives believe Mr Trudeau should drop the Bill of Rights and ask for simple patriation along with an amending formula. Such is the strength of objections to Mr Trudeau's unilateral approach, that it is possible that they would not diminish significantly if he were to drop the Bill of Rights (an unlikely contingency).

The Position in the UK

8. There is intense parliamentary interest. An All Party Group has been formed to consider the Canadian proposals. They seem generally to have adopted a position rather similar to that of the Foreign Affairs Committee (below). A Conservative Foreign Affairs Committee has also considered the matter, with similar results.

9. The House of Commons Foreign Affairs Committee (FAC) reported on 21 January. Their central conclusion implied that it would not be proper for the UK Parliament to enact the Canadian proposals while they enjoyed no more than their present level of agreement in Canada. They believed that the British Parliament was in some sort of a trusteeship position, with responsibilities towards Canada as a whole for the preservation of the Federal structure.

10. The FAC took evidence almost entirely from sources favourable to the provincial case. Their Report is largely dismissive of the international dimension and of the fact that HMG has relations only with the Federal Government. Particularly questionable is the Committee's suggestion that the UK Parliament should somehow decide whether a request conveyed the "clearly expressed wishes of Canada as a federally structured whole". While the FAC rightly point out that a request for patriation is in the nature of things unprecedented because it can only happen once, they have not been able to show any convincing legal or constitutional impediment to Westminster acting at the request of the Federal Parliament alone, following the precedent for ordinary amendments to the Canadian

Constitution. Indeed, what precedents there are (by way of earlier amendments) point in the direction of the proposals passing through Parliament unchanged.

11. Press and public opinion in the UK has been divided, but probably with a preponderance (eg of letters to the Prime Minister and The Times) in favour of the provincial position.