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1 October 1981

CABINET

PATRIATION OF THE CANADIAN CONSTITUTION

MINUTES of a Meeting held in
Conference Room C, Cabinet Office on
WEDNESDAY 30 SEPTEMBER 1981 at 4.00 pm

PRESENT

The Rt Hon William Whitelaw MP
Secretary of State for the Home Department
(In the Chair)

The Rt Hon Lord Hailsham
Lord Chancellor

The Rt Hon Francis Pym MP
Lord President of the Council

The Rt Hon Humphrey Atkins MP
Lord Privy Seal

The Rt Hon Baroness Young
Chancellor of the Duchy of Lancaster

The Rt Hon Sir Michael Havers QC MP
Attorney General

The Rt Hon Michael Jopling MP
Parliamentary Secretary, Treasury.

The Rt Hon Lord Denham
Captain of the Gentlemen-at-Arms

SECRETARIAT

Mr R L L Facer
Mr D H J Hilary

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PATRIATION OF THE CANADIAN CONSTITUTION

(Previous Reference: OD(81)3rd Meeting)

The meeting had before it a minute from the Lord Privy Seal dated 30 September on the options before the Government as a result of the judgements of the Supreme Court of Canada published on 28 September; and a letter from the Lord Chancellor dated 29 September giving preliminary views on the judgements.

THE LORD PRIVY SEAL said that the Supreme Court of Canada had ruled, by a majority of six to three, that there was a constitutional convention under which Canada would not request the United Kingdom Government to put to Parliament a measure to amend the constitution of Canada affecting Federal-provincial relationships without first obtaining the agreement of the provinces; but had found by a majority of seven to two, that there was no legal requirement to follow that convention. The Prime Minister was likely to discuss the implications of the Supreme Court judgements with the Prime Minister of Canada, Mr Trudeau, in the margins of the Commonwealth Heads of Government meeting in Melbourne. He had sent preliminary advice to the Prime Minister suggesting that she should take the line that the judgements had created a new situation which deserved close study by the experts. This line could not be maintained for long, though it was open to the Government to await developments in Canada before taking up a firm position. Alternatively, the Prime Minister might be advised to warn Mr Trudeau that under the new circumstances the proposals of the Federal Government to amend and patriate the Canadian Constitution were unlikely to pass through Parliament, and she might go further and expressly ask Mr Trudeau not to send the patriation request in its present form. Although Mr Trudeau had said publicly that he intended to proceed with the legislation, he did not appear to have ruled out further discussions with the Provinces. It was also necessary to re-consider the proposed reply to the report of the House of Commons Foreign Affairs Committee published in January and decide whether to arrange an early debate in the House.

THE LORD CHANCELLOR said that the judgements of the Supreme Court had created the possibility of a constitutional crisis in Canada and greatly worsened the Parliamentary difficulties at Westminster. The judgements were complex, but his preliminary view was that if Mr Trudeau pressed his existing proposals unamended

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in the form of a request from the Canadian Parliament under the Statute of Westminster 1931, the conventions precluded the United Kingdom Parliament from either amending a request validly made for an amendment to the British North America Act 1867 or simply repatriating the Canadian Constitution on any terms other than contained in such a valid request. As Canada was an independent nation, only the views of the Federal Government and Parliament could influence the decision of the United Kingdom Parliament. Breach of convention as between a Federal Government recognised as the Government of an independent nation, and its constituent Provinces, did not justify the Westminster Parliament in disregarding the Ottawa Parliament's request.

THE ATTORNEY GENERAL said that his preliminary view was that the Supreme Court's judgement that the Federal Government was in breach of the conventions might make it possible for the United Kingdom Parliament to enact a short Bill patriating the Canadian Constitution without at the same time enacting the Federal Government's proposals for amendment. He had noted the Supreme Court's statement that some conventions might be more important than some laws and that it was appropriate to say that to violate a convention was to do something which was unconstitutional although it entailed no legal consequences.

In discussion the point was made that further study of the legal and constitutional position was required before clear advice could be offered to the Government. Any attempt by Mr Trudeau to obtain an early indication of the Government's intentions should therefore be resisted. The United Kingdom had a moral obligation to avoid simply returning the problem to Canada by enacting the patriation Bill without the proposed amending formula, since to do so against the advice of the Federal Government would have severe repercussions in Canada. Nevertheless, it was clear that the Supreme Court's judgements had considerably worsened the prospects of securing the passage of the present Federal proposals through both Houses of Parliament. Government backbenchers who would previously have supported the legislation might well in the new circumstances oppose it. The tendentious nature of the pamphlet recently circulated by the Canadian High Commission would only serve to make matters worse. Even if the Bill passed the House of Commons, it could be delayed in the House of Lords through the right of Peers to petition against it: such petitions might be referred to a Select Committee. It would not be appropriate to introduce the Bill first in the House of Lords. Furthermore, it would be difficult to discover

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at this stage how the Opposition parties intended to vote. Mr Trudeau should be asked to seek a measure of consensus within Canada before submitting any request.

THE HOME SECRETARY, summing up the discussion, said that the judgements of the Supreme Court of Canada had created a new situation. The Law Officers would wish in due course to tender their formal advice to the Government on the legal and constitutional implications of the judgements. But the meeting, which included all the Ministers with a responsibility for advising on the legal, constitutional and Parliamentary aspects, was in no doubt that if Mr Trudeau persisted with his proposals without obtaining a greater degree of consensus within Canada, there would be great difficulty in passing them through Parliament. The Prime Minister should be advised to take the opportunity of explaining this to Mr Trudeau and indicating that the problem would be eased if he were able to secure a broader measure of agreement within Canada. If Mr Trudeau asked whether the Government would confirm their earlier undertaking to submit to Parliament whatever request was received from the Federal Government and would make every effort, if necessary by a three-line whip, to secure its passage, he should be told that the Government would of course urge Parliament to accede to a proper Canadian request, but that British Ministers should be left to decide how best to handle it in Parliament. At this stage only a short reply, couched in neutral terms, should be given to the Foreign Affairs Committee, and a debate in the House of Commons should be avoided until the Canadian Government's intentions became clearer.

The meeting -

1. Invited the Lord Privy Seal to arrange for advice to be sent to the Prime Minister in Melbourne for her forthcoming meeting with Mr Trudeau on the lines indicated in the Chairman's summing up.
2. Invited the Lord Privy Seal, in consultation with the Lord Chancellor, the Lord President of the Council and the Attorney General, to draft a neutral interim reply to the Foreign Affairs Committee.

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Circulated to:

The Prime Minister
Secretary of State for the Home Dept
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