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CABINET

THE CANADIAN CONSTITUTION

Memorandum by the Secretary of State for Foreign and Commonwealth Affairs

1. The Canadian Government have informed us that the Canadian Federal Parliament are likely, towards the end of this year or early next year, to send a joint Address to the Houses of Parliament in Westminster seeking the patriation of the Canadian Constitution, with additional provisions for an Amending Formula, a Bill of Rights and an equalisation formula. The current proposals of the Canadian Government have given rise to serious objections from the majority of the Canadian Provinces and have also led to criticism and public discussion in this country.

2. I attach a paper (Annex A) summarising the main legal arguments in favour of acceding to a request from the Canadian Government, and some of the counter-arguments. It also briefly considers a possible alternative course.

3. Mr Trudeau informed the Prime Minister on 25 June of a possible request for patriation, but without mentioning the Bill of Rights. The Prime Minister told Mr Trudeau that, whether or not the request was made with the agreement of all the Provinces, a request to patriate would be agreed if it was the wish of the Government of Canada. On 6 October the Canadian Secretary of State for External Affairs, Mr Mark MacGuigan, and the Minister for the Environment, Mr John Roberts, called on both the Prime Minister and myself. The Prime Minister repeated her undertaking regarding patriation, but made it clear that the inclusion of a Bill of Rights was liable to cause controversy and delay in this country. The Canadian proposals are now being considered by a Joint Committee of both Houses, which reports on 9 December.

4. The Progressive Conservatives, the main opposition party, maintain their fundamental objection to Mr Trudeau's proposals. Provincial objections have now crystallised; six of the Provinces are broadly opposed to the proposals; three of the others are, to a greater or lesser extent, on the fence and Ontario alone is happy with the proposals.

5. A potential complication is the involvement of the Canadian courts. Five of the Canadian Provinces have decided to refer constitutional questions to the Provincial courts prior to putting them to the Supreme Court. Our legal advice is that, if the matter is sub judice in Canada when a request for patriation is received in this country, we should not proceed. I attach a paper setting out the considerations (Annex B).

6. We have a major interest in maintaining good relations with Canada - an important Commonwealth country with a significant role to play in the Western alliance and on the international scene generally. To go back now on what the Canadians will regard as our undertakings over patriation would be to invite a major row. As Annex A makes clear, the legal arguments justifying our acceding to a Federal request for patriation are not unassailable; but we cannot please both the Federal Government and the Provinces. It is with the Federal Government that we deal. Mr Trudeau is in full control of the majority party, and wedded to the idea of patriation with a Bill of Rights. It is thus in my view inconceivable that we should fail to meet this request as quickly as possible if and when it comes. This is of course provided that the question of possible reference to the Canadian courts is resolved.

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Foreign and Commonwealth Office

11 November 1980

ANNEX A

THE CANADIAN CONSTITUTION: LEGAL ARGUMENTS

Part A of this annex summarises briefly the main legal arguments which can be deployed in support of a decision to go ahead on the basis of a request from the Federal Government without taking account of objections from the Provinces, and Part B some of the more persuasive of those which may be deployed against. Part C considers the possibility of an alternative course.

A. Legal Arguments for Proceeding Despite Provincial Objections

2. The arguments are two-fold. First, the Statute of Westminster, which governs the question of constitutional amendment, makes no mention of a role for the Provinces; nor have they in practice played a substantial role in the past. Second, there is the comity argument; as a sovereign state, Canada is represented internationally by the Federal authorities alone and to take cognisance of Provincial views would be an unwarranted interference in Canadian internal affairs.

Statute of Westminster

3. The effect of the Statute of Westminster is that no particular procedure is prescribed for the repeal, amendment or alteration of the British North America Acts. The constitutional convention reflected in the third preambular paragraph of the Statute and enacted as law in its section 4 is that legislation enacted by the United Kingdom shall not extend to a Dominion otherwise than " at the request and with the consent of that Dominion" . In the case of Canada, there has been no question that the " request and consent" required has been that of the Federal Government and Parliament. In practice, the method of conveying " request and consent" has been by means of a joint address of both Houses of the Canadian Parliament.

4. As to the relevance of Provincial attitudes, the precedents in relation to the British North America Acts show that even where there have been Provincial misgivings or objections we have acted on a request of the Federal Government and Parliament, whether or not the " request and consent" convention has been regarded at the time as applying. This seems generally to have been the case even before the Statute of Westminster: thus, Mr Churchill in his Second Reading Speech on 15 June 1907 (H.C.Deb 1616) said that :

> '' He did not pretend to go into the merits of the difference on a constitutional question between British Columbia and the Federal Government. We on this side did not know enough to decide upon the merits of the claim. On the other hand, he would be very sorry if it were thought that the action which His Majesty's Government had decided to take meant that they had decided to establish as a precedent that whenever there was a difference on a constitutional

question between the Federal Government and one of the provinces, the Imperial Government would always be prepared to accept the Federal point of view as against the provincial. In deference to the representations of British Columbia the words " final and unalterable" applying to the revised scale had been omitted from the Bill."

This statement, despite its acknowledgement of a Provincial concern, seems to have constituted, essentially, a refusal to enter the arena of Federal/Provincial dispute which is even more appropriate now than it was then.

5. Since the Statute of Westminster, practice seems to have been consistent: thus, Mr Attlee on 22 July 1943 (H.C.Deb 1102) in the Second Reading Debate on the Bill which became the British North America Act 1943, said that :

" I have no information as to any province objecting, but, in any case, the matter is brought before us by an Address voted by both Houses of [the Canadian] Parliament, and it is difficult for us to look behind that fact."

6. On this view, it is wrong to treat the Statute of Westminster as involving a preservation of the status quo as between the Federal authorities and the Provinces of which the United Kingdom was to be the stake-holder. The most that the Statute and the history of its enactment show is that a decision was consciously taken not to deal with the question of amendment of the British North America Acts in substance because (as had been asserted in the course of discussions in Canada) :

" no restatement of the procedure for amending the Constitution of Canada can be accepted by the Province of Ontario that does not fully and frankly acknowledge the right of all the Provinces to be consulted and to become parties to the decision arrived at"

and other Provinces agreed with this. Accordingly, in its application to Canada, the Statute is more properly to be seen as a reflection of Canadian inability to agree on the issue of amendment, with the question of appropriate Canadian procedures being left in abeyance.

Comity

7. The comity argument was stated by Sir Edward Grigg (Altrincham) as follows in the course of the debate on 22 July 1943 (H.C.Deb 1103):

" I suggest that it is really improper in present circumstances for the House to question the discretion of a sovereign Parliament in the Commonwealth of Nations. It

> is owing to a technical legislative pecularity that it comes to the House at all, and it is very improper that the House should question the discretion of a national and absolutely sovereign Parliament. I hope that this will be accepted by the House and that this legislation will be passed without further comment."

The argument, which apparently enjoyed the support of other Members of Parliament in that debate, has two elements. First, it recognises that the reservation of an amending power by the Statute of Westminster has become an anachronism. To look behind a request to exercise the power would be to lend a weight to the legal effect of the reservation which is not now justified. Second, as regards the international relations aspects, Canada has been fully independent at least since the Statute of Westminster. Our relationship with Canada is in international law no different from that with any non-Commonwealth independent sovereign state. The sole representative in international law of a Federal State is the Federal Government. To look behind a request from the Federal Government and enquire into the basis on which it was put forward would rightly be regarded as an unwarranted interference in the internal affairs of an independent friendly state. It has already been made abundantly clear that Mr Trudeau would regard it as such.

B. Legal Arguments for Having Regard to Provincial Objections

8. The main arguments, some of which have already been aired in The Times (notably in letter from Dr Geoffrey Marshall on 18 September and from Professors Bernier and Treblay on 29 October) are, in summary, that :

(a) the precedents should be discounted because the current case is in reality quite different in kind;

(b) the claim that the Federal Government, as speaking for an independent sovereign state, need alone be heeded in the dealings of that State with another is artificial in this case; and

(c) the Statute of Westminster was intended to prevent amendments at the unilateral request of the Federal Government and Parliament.

Argument (a) is that, whatever the precedents, never before have the proposals of the Federal Government been objected to by the majority of the Provinces, nor have the amendments requested hitherto been of such a far-reaching character. In these circumstances any convention against looking behind a Federal request does not apply. This argument is met by the comity agreement (paragraph 7 above).

THE CANADIAN CONSTITUTION ANNEX B

REFERENCE TO THE CANADIAN COURTS.

The Times of 6 November quotes extracts from the Federal 'Report to Cabinet on Constitutional discussions 1980'dated 30 August. A copy of the report has been supplied by our High Commission. The following passage appears on page 52 under the side-heading 'Legal Strategy'.

> 'There would be a strong strategic advantage in having the joint resolution passed and the UK legislation enacted before a Canadian court had occasion to pronounce on the validity of the measure and the procedure employed to achieve it. This would suggest the desirability of swift passage of the resolution and UK legislation.'

On the next page, the paper makes the point:

> 'This would also require careful explanation to the British Government, which might otherwise take the position that it would not submit the matter to its Parliament until the Supreme Court of Canada had pronounced'.

2. On 23 October, the Attorneys-General of six of the Provinces (Manitoba, Quebec, British Columbia, Newfoundland, Nova Scotia and Alberta) agreed to launch actions in the provincial courts of Manitoba, Quebec and Newfoundland as a preliminary to reference to the Supreme Court. Nova Scotia has subsequently withdrawn from this action. In Manitoba, the provincial cabinet is hoping for a court date before Christmas. The High Commission have just informed us that in Quebec a date is hoped for before the end of November. The questions to be put before the court in Manitoba will be as follows:
(a) whether, if amendments to the Constitution as sought by the Federal Government were enacted, Federal-provincial relationships, rights, powers and privileges as described in the Constitution would be changed, and if so, in what way;
(b) whether it is a constitutional practice that the Federal Government should ask The Queen to put before the British Parliament a measure to amend Canada's Constitution in a way that would alter Federal-provincial relationships without first obtaining agreement of the Provinces;
(c) whether the agreement of the Provinces is required for amendment to the Constitution where Federal-provincial relationships would be affected.

3. The basis upon which such proceedings may be instituted remains obscure. If, however, any legal proceedings instituted in Canada were to include an application for an interim injunction, declaration or equivalent order restraining the Canadian Parliament from making the request, the possibilities for legal action in Canada should be clarified or exhausted before any issue arises as to whether to legislate here.

4. Another possibility is that the matter might come before the Canadian Supreme Court by way of a reference requesting an Advisory Opinion. There is at least one precedent for this in the reference made by the Federal Attorney General on Constitutional Bill C.60. The questions referred asked whether the Federal Parliament had certain powers to legislate. The Court replied very clearly, saying 'no' in terms to the questions it was able to answer (1980 1 S.C.R. 54).

5. Particularly in the case of a request for an advisory opinion, the Federal Government might claim to be free to act regardless of the outcome. In general terms, however, if proceedings were being entertained in the Canadian courts, in whatever form and whether in a provincial court or in the Supreme Court, which put in issue the validity of the request or which sought to challenge the validity in Canada of any resultant United Kingdom legislation it would, in our view, be wrong to act on the request while the matter was sub judice. (A case in 1949, when the legislation confirming the Terms of Union between Canada and Newfoundland went ahead in the United Kingdom despite the fact that an appeal in proceedings by six inhabitants of Newfoundland had been made to the Privy Council, is in our view distinguishable).

6. When the Prime Minister saw Messrs Roberts and MacGuigan on 6 October, she asked whether there was likely to be an appeal in the Canadian courts against the legality of what the British Government were doing. Mr Roberts replied that this was not on the cards. Mr Ridley then commented that it would, nonetheless, be very awkward if the British Government were to patriate a Constitution that the Canadian Courts might subsequently find illegal.