



Ref. A03657

PRIME MINISTER

The Canadian Constitution

(C(80) 69)

The only significant development on this subject which has taken place since the Cabinet discussion which was due to take place on 13th November was postponed has been the receipt by the Chancellor of the Duchy of Lancaster of the attached letter dated 21st November from the Canadian High Commissioner.

2. This letter confirms a point on which there has hitherto been doubt, that a right of appeal to the Canadian Supreme Court exists from an opinion or judgment given by a Court of Appeal of a Province, except in the case of Quebec (which is however proposing to change its law on this point).

3. In opening the discussion on this subject at the Cabinet meeting on 27th November, after the Foreign and Commonwealth Secretary has introduced his paper, you may care to ask the Attorney General how this letter affects the issue. Does it strengthen the argument that the Government should regard themselves as relieved of the commitment to proceed with this Bill until the issue before the Canadian courts has been resolved?

4. Does the Chancellor of the Duchy of Lancaster consider that this delay will mean that the requirement thereafter to legislate will be unlikely to fall within the present Session of Parliament?

5. How does the Foreign and Commonwealth Secretary believe Mr. Trudeau will react to the news of this delay? At what stage and in what way should the Canadians be warned of its likelihood?

6. You may also wish to ask the Attorney General for his views on the proposition that Parliament cannot amend the Bill implementing the request of the Canadian Federal Government, but can only accept or reject it in toto. You may seek to draw a distinction in his views between the legal point concerning Parliament's theoretical omniscience, and the procedural point that suitable drafting of the Bill's long title can cause substantive amendments to be ruled out

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of order in the House of Commons. Does the Chancellor of the Duchy of Lancaster consider that such a procedural device will work? What is the likelihood that the House of Lords will pass amendments which will be subsequently taken up in the House of Commons? Does the Lord President see any danger of the Bill being defeated in the House of Lords?

7. In concluding this discussion, you may wish to guide the Cabinet to agree that the Government should still respond to the request of the Canadian Federal Government when this is received. But if you decide in the light of discussion that the Government should wait to introduce the new Bill until the matter has been resolved before the Canadian courts, and this is likely to result in considerable delay and a strongly adverse reaction from Mr. Trudeau, you may wish to invite the Foreign and Commonwealth Secretary to bring the matter back to the Cabinet for further consideration in the light of whatever new circumstances have developed.

A handwritten signature in black ink, consisting of the letters 'RA' in a stylized, cursive font.

ROBERT ARMSTRONG

26th November, 1980

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Canadian High Commission



Haut Commissariat du Canada ³²

Macdonald House
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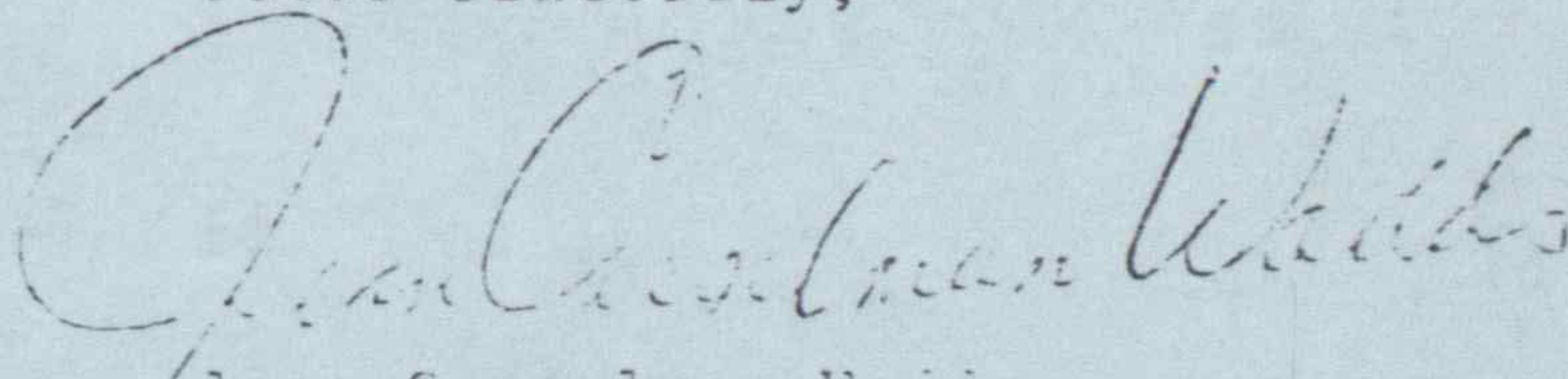
November 21, 1980

Dear Mr. St. John-Stevas,

In follow-up to your meeting of November 10th last with the Honourable Mark MacGuigan, Secretary of State for External Affairs, I have the pleasure of appending a paper which is meant to clarify certain technical matters which arose during the discussion.

I should add that this information, as stated by my Minister, does not alter in any way the position of the Government of Canada on its understanding of procedures to be followed by the Government of the United Kingdom and its Parliament.

Yours sincerely,


Jean Casselman Woods
High Commissioner

The Rt. Hon. Norman St John-Stevas, M.P.
Chancellor of the Duchy of Lancaster
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PATRIATION: TECHNICAL ISSUES

The Governments of the Provinces of Québec, Manitoba, and Newfoundland have publically announced their intentions to refer the Federal Government's proposed constitutional measure to their respective courts of appeal, the highest courts of final resort in each of these provinces. Under the laws of the several Canadian provinces, the Lieutenant-Governor in Council of each province has the authority to refer matters to the court of appeal in the province for an opinion of that court. While provincial laws governing references are not identical in every respect, in general a reference can be made by the Lieutenant-Governor in Council to the provincial court of appeal for hearing or for consideration on any matter which, in his discretion, he thinks fit to refer. Such a reference has now been made by the Lieutenant-Governor of Manitoba, asking the Manitoba Court of Appeal to give an opinion on several issues related to conventions that apply to constitutional amendments in Canada. We have not yet been notified of the terms of the anticipated Québec and Newfoundland references.

It is useful to point out that there is very little to restrict Lieutenant-Governors of provinces (i.e. the provincial governments) from referring at their discretion any legal issues at any time to provincial courts of appeal for consideration. Where such references involve a point of constitutional law, the Attorneys-General of any other provinces have the right to be heard in reference. In the forthcoming Manitoba reference, of course, the Attorney-General of Canada will be represented.

For the purposes of clarifying the situation concerning appeals from the opinions of the courts of final resort (i.e. the courts of appeal) of the provinces, the following should be noted. In all cases except Québec, a right of appeal lies from an opinion or judgement given upon a reference by a court of appeal of a province to the Supreme Court of Canada. In the case of the present constitutional references, therefore, should a particular provincial government not be satisfied with the opinion expressed by its court of appeal, it could appeal matter as of right to the Supreme Court of Canada. This right of appeal is given under the governing federal statute, the Supreme Court Act, but it depends upon whether provincial law also recognizes such a right of appeal. We understand that Québec will be changing its law to permit an appeal to the Supreme Court of Canada from an opinion of the Québec Court of Appeal given upon a reference to that court.