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Ref. A03543

MR. ALEXANDER

Patriation of the Canadian Constitution

(C(80) 69)

As a postscript to the brief that Sir Robert Armstrong has submitted on the paper which the Cabinet will be discussing on 13th November I attach an Opinion by the Attorney General which the Prime Minister may care to see.

2. It makes two important points. It is the view of the Attorney General that if this issue is still being considered by the Canadian courts, the Government are entitled, if they so wish, to adopt the position that they are relieved by this new factor from any commitment to proceed with the Bill at this stage. He also considers that Parliament cannot be prevented from amending the Bill, although the Government can and should do whatever they can to dissuade Parliament from seeking to amend it.

D. J. Wright

D. J. WRIGHT

12th November, 1980

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Communications on this subject should be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

Lq.

Ronnie Flanagan

(2)

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

A useful & clear exposition of the A-G's position

12 November, 1980

Rund 12/11

Dear John,

PATRIATION OF THE CANADIAN CONSTITUTION

You told me on Monday that the Lord Privy Seal had asked if the Attorney-General could give an informal indication of his thinking, in advance of tomorrow's Cabinet meeting, on two procedural questions which may well be raised at that meeting. I have discussed the two questions with the Attorney-General and this letter sets out his views on them for the Lord Privy Seal's benefit. Since my discussion with the Attorney-General took place, I have seen copies of Robin Birch's letters of 11 November to Miles Wickstead and to Michael Alexander, in the former of which he reports that theChancellor of the Duchy has also asked for the opinion of the Law Officers on one of the Lord Privy Seal's questions. I am therefore copying this letter to Birch and to the various recipients of his letters (including George Walden, Miles Wickstead and Ken Temple in the FCO).

The two questions which the Lord Privy Seal asked to be put to the Attorney-General were these:

(a) What would be the effect on the proposed Parliamentary proceedings here of litigation being actually pending in theCanadian courts to challenge the legitimacy of the Federal request and consent? (The factual background to this question is explained in Annex B to your Secretary of State's paper for Cabinet and you also referred me to certain supporting material relating to the 1949 Newfoundland case.)

(b) Does the Attorney-General agree with the proposition (apparently advanced by the Lord Chancellor at the meeting on 3 November) that a Bill implementing the Federal request and consent could not be amended by Parliament, which could only either pass it or reject it?

The Attorney-General wishes me to make it clear that, in considering question (a), he has not thought it necessary to address himself at this stage - and you have not asked him to do so - to the general

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question whether, when faced with a request and consent by the Canadian Government and Parliament, the British Government would ordinarily be under an unqualified obligation to introduce the necessary legislation here (and, if possible, get it through) irrespective of the views of the Canadian Provinces. In the light of the apparently conflicting and uncertain state of the authorities and precedents, such as they are, that is a question which could not be answered without more research and study than we have had the chance to give it and we should certainly need considerable FCO assistance with it. But, more important, the Attorney-General considers that, in view of the Prime Minister's assurances to Mr. Trudeau, it is a question which does not arise in practice in the present case - and that is presumably why it has not been thought necessary specifically to seek his advice on it. The fact is that, whether or not such a general obligation might attach in ordinary circumstances, we have given a clear commitment to the Canadian Government that we will in fact introduce the legislation if we receive a request and consent duly made by their Parliament and the only question that therefore falls to be considered at this stage is whether the institution of litigation in the Canadian courts constitutes a relevant new factor which would entitle us, at least temporarily, to claim relief from that commitment.

In the Attorney-General's view, the litigation does constitute such a new factor. While the ordinary sub judice rules have no operation in this situation and the existence of the litigation cannot therefore be said to be a legal or technical bar to our proceeding with the Bill, it does give rise to strong considerations of propriety (respect for the Canadian courts and legal processes in Canada) against our doing so. It might be different if the litigation were obviously frivolous or vexatious or manifestly ill-founded; but we have no grounds, at least at present, for taking that line. In these circumstances the Attorney-General considers that the situation has changed materially, and in a very important respect, from what it was when Mr. Trudeau was given his assurances. Accordingly, his advice is that the Government are entitled, if they wish, to adopt the position that they are relieved, by this new factor, from any commitment to proceed with the Bill at this stage. He adds that since the proprieties are an element which, in his view, should weigh heavily with us in this case, he would hope that his colleagues would indeed be disposed to adopt that position. He also thinks it right to point out that any attempt by the Government to ignore the considerations of propriety would be likely to attract very heavy criticism in Parliament which could not simply be brushed aside. The task of attempting to refute it would no doubt fall to him and he has to say that he is not confident that it could convincingly be

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done. He asks me to point out, however, that this advice relates to the position as it now is. It is conceivable that the outcome of the early rounds of the litigation in the Canadian courts may show that the Provinces do not have a respectable legal case: we should then be much closer to the 1949 Newfoundland precedent and we might then be able to take a more relaxed view of the formal proprieties. But this is speculation and we should not put any reliance on it at this stage.

As regards question (b), the Attorney-General does not share the view that there is some inherent limitation on Parliament's legal competence in this field which would make it impossible for amendments to the Bill to be moved during its passage through either House so that it would be necessary for the Bill either to be passed in toto as originally introduced or rejected in toto. He regards that view as incompatible with Parliament's legal supremacy and theoretical omnicompetence. In his view the correct proposition is not that Parliament may not amend the Bill but rather that Parliament should not amend it and that, if there is any obligation at all in this matter, it is an obligation which rests on the United Kingdom Government to do whatever they can - and in practice they can do whatever is necessary - to dissuade and prevent Parliament from amending it. His advice is therefore that Ministers should not seek to argue that amendments are legally inadmissible but should argue instead that the adoption of the amendments would constitute an unwarranted interference in Canadian internal affairs and that they should therefore be rejected.

In giving his advice on this point, the Attorney-General is not, of course, adverting to the rather different question of whether the Bill (and especially the long title) could be so drafted that any amendment of the sort we fear (perhaps any amendment at all) would have to be ruled out of order. Whether and how that result could be achieved is a question essentially for Parliamentary Counsel and the House authorities. It seems from Robin Birch's letter to Michael Alexander that it might be possible to achieve it in the Commons but there would be less certainty about the position in the Lords.

Yours ever,
Henry

H. STEEL

J R Freeland Esq CMG
Second Legal Adviser
Foreign and Commonwealth Office
London, SW1.

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