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Foreign and Commonwealth Office

London SW1A 2AH

3 October 1980

Dear Michael,

The Canadian Constitution: Briefs
for the Prime Minister

I attach briefs for the Prime Minister's meeting with Messrs Roberts and MacGuigan at 3.30pm on Monday, 6 October.

You may like to know that News Department here are coming under pressure from the Canadian media for Ministerial interviews on Canadian constitutional matters. We have declined any such interviews before the Prime Minister sees the two Canadian emissaries. Thereafter, it may be helpful to explain to the media our view that this is a matter for the Canadians; but in general we propose to say as little as possible to the press, not least because the question will, as from 6 October, be under consideration by the Canadian Parliament.

Yours etc

Paul

(P Lever)
Private Secretary

M O'D B Alexander Esq
10 Downing Street

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Pamie Austin
See also attached minute
from Lord Privy Seal.

Phub

VISIT BY THE HON JOHN ROBERTS, CANADIAN MINISTER OF STATE FOR SCIENCE AND TECHNOLOGY AND MINISTER OF THE ENVIRONMENT, AND THE HON MARK MACGUIGAN, SECRETARY OF STATE FOR EXTERNAL AFFAIRS TO LONDON ON 6 OCTOBER 1980.

POINTS TO MAKE.

Interested to know intentions of Canadian Government in respect of the Constitution. Mr Trudeau seems moving faster than he suggested at meeting in June. How does timing now look at Canadian end?

2. I told Mr Trudeau in June HMG would feel bound to recommend to Parliament that any Federal request to patriate the Constitution should be agreed. This remains our position, but a bit worried over timing and substance.

Timing

3. There now seems considerable provincial opposition to the constitutional proposals. Controversy in Canada likely to be mirrored in this country. This could lead to difficult debate in Parliament and attempts at amendment; thus delay. Legislative programme already overfull. Cannot make firm arrangements until formal request for patriation received. Wrong therefore at this stage to make any promises about legislative timing here.

Substance

4. Realise proposals still have to go through your Parliament. Hope they will emerge in form which will secure wide acceptance in Canada and thus avoid Canada's battles being fought over in British Parliament. Concerned about the incorporation of a 'Bill of Rights' in the draft legislation; it could arouse controversy here. Is this element necessary? A simple request for patriation with an amending formula would greatly simplify our procedures here.

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VISIT BY THE HON JOHN ROBERTS, CANADIAN MINISTER OF STATE FOR SCIENCE AND TECHNOLOGY AND MINISTER OF THE ENVIRONMENT, AND THE HON MARK MACGUIGAN, SECRETARY OF STATE FOR EXTERNAL AFFAIRS TO LONDON ON 6 OCTOBER 1980

ESSENTIAL FACTS.

The Constitutional Position

The basic Canadian constitutional instrument is the British North America Act 1867 (BNA), as from time to time amended. It is an Act of the Westminster Parliament. It conferred on Canada Dominion status and established a federal system of government in Canada and set out the powers of the Federal Parliament and the Provincial legislatures. While the Provincial and Federal legislatures are given powers to amend the BNA within their respective spheres of competence, the BNA can, in certain important respects, be amended only by Act of Parliament in Westminster, notably as regards distribution of powers between the Federal and Provincial legislatures.

2. All the Dominions became fully independent under the Statute of Westminster 1931. Section 7 reserves to the Westminster Parliament the power to amend the balance between Canadian Federal and Provincial powers in the BNA. This was because the Canadian delegations to the preceding Imperial Conferences were unable to agree on any change in the status quo. At the same time, Section 4 enacts as law the Constitutional Convention, which was already being applied in practice, that the Westminster Parliament will not pass legislation extending to a Dominion other than at the express request and with the consent of the Dominion. No Act of the UK Parliament affecting Canada has been passed unless Canada has requested it, and consented to its enactment. The BNA has been so amended 14 times. On occasions when provincial rights have been closely affected, the proposed amendments have enjoyed the support of all the Canadian provinces concerned. Although no clearly defined procedure for amendment was laid down in the BNA,

the practice has grown up over the years that Canadian requests for amendment are submitted by means of a formal Address to the Crown from both Canadian Houses of Parliament.

3. Over the years, at a series of Federal/Provincial Conferences, the Canadians have sought to agree first to seek repeal of the relevant parts of the Statute of Westminster so as to confer on Canada power of Constitutional Amendment (the process of patriation) and second, in that context, to present a formula agreed between the Federation and the Provinces for amending the Canadian Constitution in substance (the so-called amending formula).

4. The British Government, under both Labour and Conservative administrations, have consistently taken the general line that patriation would go through in this country if requested by the Canadian Government. Specifically, Mr Luce said in answer to a question on 27 July 1979 :

"The Canadian Prime Minister has expressed publicly his intention of working with the Provincial Governments of Canada towards an agreed package of constitutional changes which could lead to a request that this power of amendment should be a matter of Canadian competence and should no longer be exercisable by the UK Parliament. If a request to effect such a change were to be received from the Parliament of Canada it would be in accordance with precedent for the United Kingdom Government to introduce in Parliament and for Parliament to enact appropriate legislation in compliance with the request."

This followed the pattern of previous Parliamentary Questions; but these did not, at least in all cases, refer to 'an agreed package'. Hitherto, nevertheless, the assumption has been that the Address from the Canadian Parliament would be against a background of broad provincial agreement. There is no precedent for the UK purporting to question a Canadian request for amendment to the BNAA, although we have made technical adjustments to Canadian proposals.

5. In lobbying Westminster the Provinces can, nevertheless, be expected to argue that the absence of broad provincial agreement puts into question the convention on which we have acted in the past, and that we are in some sense guardians of the provincial interest, or at least of fair play, since the power to amend the Federal/Provincial balance is reserved by Section 7 of the Statute of Westminster (cf paragraph 2 above). We may legitimately argue that the Canadian Federal Government and the UK have, for 50 years, dealt with each other as independent sovereign powers and the UK Government cannot be expected to look behind the act of the legitimate representative of Canada, the Federal Government, unless its actions are clearly tainted with illegality. A request for patriation without provincial agreement would not be illegal, but merely unprecedented in constitutional terms. In the circumstances, only a challenge in the courts would put us on notice of a possible illegality.

6. This is reinforced by the consideration that if the British Parliament were, in spite of constitutional precedent, to decline to act on a request from the Canadian Parliament or Government, HMG would lay themselves open to charges of interference in Canadian domestic politics. To query whether there was adequate internal support in Canada for such a request would be tantamount to questioning the authority of the Canadian Parliament or Government to make it. We cannot set ourselves up as the arbiters of the correct balance of the case presented to us; this must be the responsibility of the Canadian Government alone. The only defensible position is to respond to the request of the Federal authorities, though it is of course open to us to query parts of the proposals which we consider will cause controversy and thus legislative delay in this country.

Recent Events (date order)

7. In July 1979, 300 Chiefs from the National Indian Brotherhood of Canada (led by Chief Starblanket) came to lobby against the patriation of the Canadian Constitution without safeguards for Indian rights. They were received at the FCO at official level and told that HMG

could not interfere in this essentially internal Canadian matter. Considerable Parliamentary interest was aroused, and a short debate took place at the House of Lords at which Lord Trefgarne set out HMG's point of view.

8. In February 1980 the elections resulted in Mr Trudeau's Liberals returning to power with a majority of about 12 seats over the combined opposition (Progressive Conservatives and National Democratic Party). Mr Trudeau made it clear from the start that one of his principal aims was to achieve the patriation of the Constitution, if necessary without unanimous agreement from the provinces.

9. A referendum took place in Quebec in May 1980 which resulted in the rejection of the proposals of the Parti Quebecois (PQ) for 'sovereignty association' for Quebec with the rest of Canada. Mr Trudeau had campaigned for this result and promised that if it was achieved, he would move fast to readjust the relationship between the Federal and Provincial governments.

10. On 25 June Mr Trudeau called on the Prime Minister. Mrs Thatcher told him that whether or not the request for patriation was made with the agreement of all the provinces, such a request would be agreed if it was the wish of the Government of Canada. The Prime Minister also made it clear that HMG did not want to be accused of interfering; they would take the line that it was for Canada to decide her future and not HMG. Mr Trudeau subsequently (18 August) wrote to the Prime Minister, partly about the Economic Summit, and said that, on the constitutional issue, he was "gratified to receive your assurances of support".

11. On 8 July Lord Carrington saw Mr MacGuigan and said that if the Federal Government asked the British Government to introduce legislation, the British Government would do so; but once the request was made there was bound to be a good deal of Canadian lobbying which could lead to a debate in the UK which the Canadians would find unseemly.

12. Over the summer, a series of Federal and Provincial constitutional consultations took place, culminating in a Constitutional Conference in September attended by Mr Trudeau and the ten provincial leaders. The Conference broke up on 13 September without agreement on an amending formula for the BNAA or on how to enlarge the Act to form a new Constitution for Canada.

13. On 26 September talks took place at the Foreign and Commonwealth Office, at the request of the Canadians, between a senior legal Canadian team, the FCO Legal Adviser (Sir Ian Sinclair) and other officials. These were designed to explain and work out the technical and legal modalities of the patriation of the Canadian Constitution. The talks provided the first opportunity to examine the Canadian proposals. This showed that they went beyond the expected resolution for a Joint Address to HM The Queen plus an Act to amend the Constitution of Canada. An amending formula, whereby the Canadians would be enabled to amend the Constitution after patriation was, as expected, included but in double-barrelled shape; the first part provided for the continuance of the present unanimity situation for up to four years, and the second for the application of the Victoria formula, slightly amended, unless another formula had meanwhile been agreed (the Victoria formula broadly stipulates a decision by the majority of the provinces, including Ontario and Quebec and including at least two Atlantic and two Western provinces). In addition, the proposals included a Charter of Rights and Freedoms, a part of which was the controversial provision for educational language rights for minority language groups (eg French in Ontario and English in Quebec). There was also a section laying down principles concerning 'Equalization and Regional Disparities' aimed at the reduction of economic disparities as between provinces and within provinces.

14. At the talks the British side commented that the Canadian proposals were more extensive than expected. The Canadians conceded that they were likely to prove controversial in Canada. The British

told them that the degree of controversy in Canada was likely to be mirrored in this country; MPs might be lobbied and ask why the Canadians wanted, in effect, to pass far-reaching constitutional measures, such as the Charter of Rights and Freedoms, through the British Parliament instead of sorting them out first in Canada and then simply coming to the UK for patriation along with an amending formula. MPs were also liable to table amendments. The British side made it clear that these were preliminary comments at first sight of the Canadian proposals; comments of substance would follow. On timing, they told the Canadians that considerable delays could be expected in Parliament, though much would depend on the degree of controversy in Canada itself.

15. Most recently, the Canadians have warned us of the imminent publication of the Canadian constitutional proposals (the story is carried in British papers today, 3 October); the proposals will be debated in the Canadian Parliament, which is to reconvene (early) on 6 October. The Canadian aim is to get the proposals through Parliament 'by Christmas'. The Canadians told us at the same time of Mr Trudeau's desire to send two emissaries to London to explain his proposals personally to Mrs Thatcher (also to HM The Queen, in her capacity as Queen of Canada; she is seeing them at Balmoral for lunch on Sunday, 5 October).

16. At the Legislative Committee of the Cabinet on 2 October the Home Secretary indicated that although the FCO had secured a contingency slot for the Canadian legislation to go through Parliament, there might not be time for it during the coming session. Although the Canadians have been warned of delays, and have of course not yet formally requested patriation, they will be upset if the legislation is delayed for over a year from now. It may be necessary to ask the Legislative Committee to consider again whether time cannot be found; but it is important meanwhile that the Canadians should be told that we cannot, at this stage, give any firm promises on timing.

17. At the same Legislative Committee the Lord Chancellor indicated that he would be unhappy to see the British Parliament being asked to enact a measure including the Charter of Rights and Freedoms. He thought it preferable for the British legislation to confine itself to patriating the Constitution. The Home Secretary has since minuted the Prime Minister recording the misgivings of the Legislative Committee and suggesting that a Bill incorporating a Charter of Rights and Freedoms would be complex and highly controversial and would take up a good deal of the time of both Houses. Although officials similarly warned the Canadian team of the potential difficulties of a wide-ranging request, there is little doubt that the Federal Government would greatly resent a refusal by HMG to enact legislation which contained this element and had been approved by the Federal Government. The Canadian proposals in their present form will need further careful consideration.

Canadian Opposition to Mr Trudeau's Proposals

18. The Canadian legal team admitted that some of the individual Canadian proposals - particularly perhaps the Charter of Rights and Freedoms with its language provisions - might prove contentious in Canada. Even the concept of patriation itself at this time could be controversial. 'Unilateral' patriation by Ottawa without provincial agreement would encounter considerable opposition. Most of the provinces have particular axes to grind, eg control of natural resources (affecting Alberta and Newfoundland). There are also groups (especially the Red Indians) who want their problems sorted out before patriation takes place. In general, the provinces have been heavily critical of Mr Trudeau's desire to push patriation through so fast.

19. According to the Canadian press, after the break up of the Constitutional Conference seven premiers considered that there was no need to incorporate citizens' rights into a new Constitution,

as they were already firmly established in law; in particular, there was opposition to creating new linguistic rights. Our High Commissioner has, however, commented that the Federal Government's present proposals should strike fair-minded people as reasonable; but the Canadian Government has so far shown no signs of seeking the agreement of many of those most closely concerned; they appear to have consulted neither the Progressive Conservatives, nor the National Democratic Party, nor do they seem to have attempted to win over the Provincial Premiers. Two of the Premiers (Lougheed of Alberta and Levesque of Quebec) have indicated that they are already lobbying in the UK against Mr Trudeau's proposals and will step up their campaign. The High Commissioner believes that Newfoundland and British Columbia, at least, can be expected to follow suit. The Indians also seem likely to renew their campaign in this country.

20. As the Canadian proposals in their present form have only just been published, it is too early to say how much opposition they will arouse in Canada. Preliminary indications are that provincial opposition will be considerable and, on some parts of the proposals, perhaps unanimous. The Quebec Agent-General has just written, on instructions, to the Prime Minister to say that his Government will oppose unilateral patriation with every means at their command.

The Two Ministers

21. Personality notes are attached. Mr Roberts is the senior Minister.

THE HON JOHN ROBERTS, PC MP

Minister of State for Science and Technology and Minister of the Environment.

Born in Hamilton, Ontario, in 1933.

Educated at Oakwood College, Toronto, the University of Toronto and Trinity College, Oxford, where he received D Phil and later a graduate of the Ecole Nationale d'administration, Paris.

A former DEA officer who was Executive Assistant to the Ministry of Forestry and Rural Development 1966 - 68. First elected to the House of Commons as Liberal member for St Paul's (a Toronto riding) in 1968. Parliamentary Secretary to the Minister of Regional and Economic Expansion 1979 - 72. Defeated in the 1972 general election but re-elected in 1974. Secretary of State 1976 - 79.

An articulate and polished member of the Cabinet. Divorced and re-married.

THE HON MARK R MacGUIGAN, PC MP

Secretary of State for External Affairs

Born 1931. A native of Prince Edward Island where he took his first degree at St Dunstan's University. Went on to study at the University of Toronto, Osgoode Hall and Columbia University. Dean of the Faculty of Law at the University of Windsor 1967 - 68.

Awarded Honorary Degree of doctor of Laws by the University of Prince Edward Island in 1971. First elected to the House of Commons in 1968, after defeats in federal and provincial elections. 1972 - 74 Parliamentary Secretary to Minister of Manpower and Immigration and to the Minister of Labour, 1974 - 75.

Little experience of foreign affairs before taking up his current appointment. Although he gives a weak first impression in his new role, his performance has improved and he should not be dismissed as a nonentity. Much respected by the Canadian High Commissioner in London, Mrs Wadds, whose appointment (made under the Conservatives) he has confirmed.

Married to an American professor of philosophy. Three children.