

F.P.R.O. B.R.F.P.  
Michael Kirby

EXTERNAL AFFAIRS



AFFAIRES EXTÉRIEURES

FEB 2 1981

F3-1110

TO ALL POSTS  
FROM UNDER-SECRETARY OF STATE  
De FOR EXTERNAL AFFAIRS (FCO)  
REFERENCE OUR TELEGRAM 1970 OF SEPTEMBER 18 AND  
Référence OUR NOTE FCO-2294 OF OCTOBER 29, 1980:  
SUBJECT QUESTIONS AND ANSWERS ON PATRIATION  
Sujet PATRIATION: SUMMARY OF SITUATION

SECURITY FOR OFFICIAL USE ONLY  
Sécurité  
DATE JANUARY 19, 1981  
NUMBER FCO-0105  
Numéro

|         |         |
|---------|---------|
| FILE    | DOSSIER |
| OTTAWA  |         |
| MISSION |         |

ENCLOSURES  
Annexes

X

DISTRIBUTION

DMM  
MDG  
FCP  
FLE  
GEB  
FPROOT/  
Kirby,  
Gibson

Following the September Constitutional Conference, we sent instructions to all Heads of Post (see our reftel) to help them deal with questions in the host country. Many posts have been on the distribution lines of telexes or reports concerning this subject. This report is prepared mainly for the others who have not been kept informed on a regular basis.

In this note, we wish to bring you up to date on the situation in Canada as well as in the United Kingdom in order to assist you in getting a clearer picture of the situation as we perceive it here. This note covers the period down to the tabling of Amendments to the Charter of Rights by the Minister of Justice on January 12.

1. Situation in Canada

After many years of unproductive efforts to arrive at a consensus on patriation of the Constitution accompanied by an amending formula that would meet everyone's requests, the Prime Minister presented the Canadian public, on October 2, 1980, with a plan of action which included patriation of the Constitution and which provided for either finding an amending formula acceptable to all parties within the following two years or else for holding a national referendum within a further two years after the initial two-year period had elapsed without an agreement. In addition, the plan included a Charter of Rights to be entrenched in the Constitution.

Reactions to the government package were soon expressed at both the legislative and judicial levels, not to mention the media.

. . . 2



FOR OFFICIAL USE ONLY  
JANUARY 19, 1981  
FCO-0105  
PAGE 2

A. Legislative Aspects

(i) House of Commons

The House resumed on October 6 and the Government announced the creation of a Special Joint Committee of the House and the Senate to deal with the proposal. Opposition parties became immediately involved in the debate on the substance of the proposed resolution as well as on the means chosen by the Government.

Mr. Clark attacked the proposal, claiming that it would jeopardize the federal nature of the country. He said he was "very much in doubt about the ability of this Government to understand, promote, and unite the diverse factors which make up the federal system". He agreed to patriation of the Constitution without delay accompanied by an amending formula (he preferred the Vancouver one), but he objected to the series of measures announced in the proposal since, according to him, this would introduce substantial changes in the Canadian Constitution and such changes should be made by Canadians, not by Britain.

Mr. Broadbent, for his part, agreed with the latter position. He focused on two points of particular interest that he considered essential: (a) the provincial power to manage and control their resources and in so doing to levy indirect taxes, and (b) the recognition of federal primacy in the field of inter-provincial trade.

In the debate, MP's followed the themes articulated by their leaders, some adding or emphasizing points of particular interest (e.g., Joyal (Lib) on bilingualism, McGrath (PC) on natural resources, and Nystrom (NDP) on western alienation).

Prior to the presentation of the budget, the Government decided to limit the debate, and the last speakers were heard on October 24 before the Special Joint Committee went into action.

. . . 3



FOR OFFICIAL USE ONLY

JANUARY 19, 1981

FCO-0105

PAGE 3

(ii) Special Joint Committee of the House  
and the Senate

This Special Committee was set up to study and analyze the Proposed Resolution respecting the Constitution, article by article, and to suggest modifications as the need arose. At the outset, it was scheduled to meet and present its report for December 9, 1980. It aroused much more public interest than had been expected; and on December 3, it was reported that the Committee "had received 551 written documents, letters, and telegrams, and that at least 279 groups, as well as 136 individuals, had expressed the wish to appear before the Committee". After consulting with the opposition parties, the Government decided to extend the meeting until February 6, 1981. This decision has brought about much speculation from the media as to the feasibility of respecting the July 1 deadline the Government had set for the patriation of the Constitution. No more witnesses were to be heard after January 9, after which time the Committee was to begin studying the Proposed Resolution article by article. As early as January 12, The Honourable Jean Chrétien presented, on behalf of the Government, a series of amendments (copy of which should reach you soon).

The hearings of the Joint Committee enabled the native people--Inuit, Indians, and Metis--to present (for the first time, according to experts) concerted positions and a relatively united front. In essence, they would like to secure the recognition of original treaty rights, the right to self-government, the right to be represented in the political institutions, and the right to participate in constitutional debate in their own areas of interest.

. . . 4



FOR OFFICIAL USE ONLY  
JANUARY 19, 1981  
FCO-0105  
PAGE 4

A few provincial Premiers were heard, amongst them Messrs. McLean (Prince Edward Island), Buchanan (Nova Scotia), Hatfield (New Brunswick), and Blakeney (Saskatchewan). (Alberta made it clear it would not appear before the Joint Committee.) These Premiers declared themselves in favour of patriation and recognized the need for an amending formula, but they were opposed to this being done without the consent of the provinces. They were generally opposed to the entrenchment of a Charter of Rights in the Constitution since they felt this was a means to curtail or reduce powers under their jurisdiction.

Feminist groups, education-related associations, lawyers' associations, the Federal Human Rights Commission and some provincial ones, as well as many other groups took advantage of some article of the Charter of interest to them to present briefs or to be heard as the case may be.

(iii) Quebec Commission on the Constitution

On December 1, the Premier of Quebec announced his government's intention to convene the above-mentioned Commission "in order for Quebec citizens and groups to make known freely their opinions on the unilateral enterprise of the Federal Government and on its consequences for the future of Quebec and Canada". This Commission first met on December 9 and 10 and heard Me. Yves Pratte (former Justice of the Supreme Court of Canada and former head of Air Canada), whose services had been retained by the Quebec Government to present its case before the Quebec courts.

Hearings will resume on February 5 and 6, and it is expected that approximately twenty groups and/or individuals will demand to be heard. For the moment, nothing indicates that any other province will follow suit.

. . . 5



FOR OFFICIAL USE ONLY  
JANUARY 19, 1981  
FCO-0105  
PAGE 5

B. Legal Aspects

Following the publication on October 2, 1980, by the Federal Government of its "Proposed Resolution Respecting the Constitution of Canada", the provincial Premiers decided to meet on October 14, and the following provinces decided to oppose the Resolution by going to courts: Quebec, British Columbia, Alberta, Newfoundland, Manitoba, and Prince Edward Island. Ontario and New Brunswick did not join; and Nova Scotia, even though it supported the contesting provinces, decided not to go to court on the issue.

A few days later, the Attorneys-General of the provinces met, and by Order-in-Council of October 24, 1980, Manitoba asked its Supreme Court for advice on three questions (see Annex A).

Quebec and Newfoundland also decided to go before the Courts in their provinces. Thus, the higher Courts of the Civil Law province as well as those of a Western province and an Eastern province would be seized with the matter.

On December 4, 1980, The Supreme Court of Manitoba heard the attorneys for that province (the other five "contending" provinces being represented by their attorneys) and those of the Federal Government. It is expected that the Court will make its opinion known by the end of January.

On December 9, 1980, Newfoundland presented its request to its Supreme Court of that province. It asked the same three questions as Manitoba, and it added a fourth question concerning territorial integrity and education for the Court to consider (see Annex B). Almost simultaneously, Quebec announced that it intended to seek advice from the Queen's Bench, the Appeal Court of the province. On December 18, it presented an Order-in-Council to the Chief Justice. When appearing before the Joint Committee of the House and the Senate, the Premier of Saskatchewan indicated that if the Federal Government did not introduce certain amendments to its Proposed Resolution, he too would seriously consider going to the courts.

. . . 6



FOR OFFICIAL USE ONLY

JANUARY 19, 1981

FCO-0105

PAGE 6

C. Media

Analyses are piling up and are competing with each other for the best spots. Concerned citizens and intellectuals have been very active in writing commentaries and letters to the editor. Both the electronic and the written media have indulged in some sensationalism on this issue, with many superlatives being used to describe the present constitutional "crisis". Generally, the media find it more newsworthy to focus on provincial objections to unilateral patriation. By comparison, favourable comments on the Government's position are much less noticeable.

2. Situation in the United Kingdom

At the beginning of October, the Secretary of State for External Affairs and the Minister of the Environment went to London to discuss the constitutional proposals with Lord Carrington (who is responsible for the question in the United Kingdom) and with other interested British politicians. Since then, numerous Canadian officials have met their counterparts in the United Kingdom to discuss various technical/legal aspects.

A. Legislative Aspects

(i) "Select Committee on Foreign Affairs"

This Standing Committee of the British Parliament decided, at the end of October, to study "the role of the British Parliament in the matter of the British North America Act and to report to the House". The Committee, whose objective is to look into the legal aspects and not to scan the substance or the political consideration of the proposal, requested that Foreign and Commonwealth Office officials, in particular the principal legal advisor, and some well-known academics be heard.

. . . . 7



FOR OFFICIAL USE ONLY

JANUARY 19, 1981

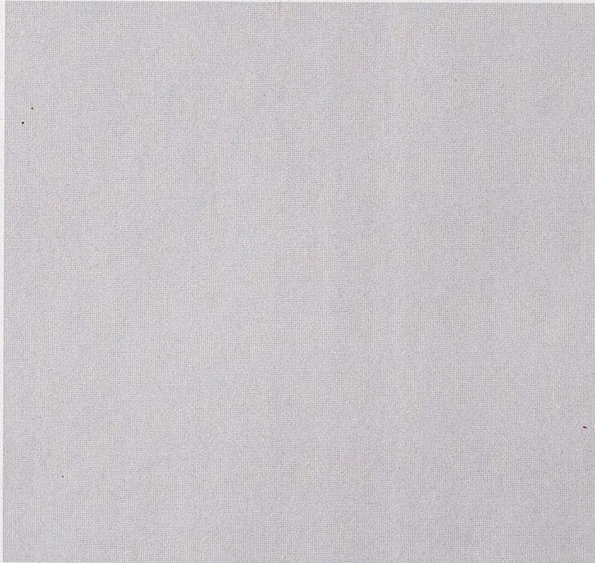
FCO-0105

PAGE 7

So far, the Committee has concentrated its efforts on the study of legal principles, precedents, and conventions relating to the interpretation of the British North America Act and the Statute of Westminster as well as to the responsibility of the British Parliament in the question. The Committee has received numerous briefs, but it decided not to hear any Canadian representatives.

The native people and the Governments of Alberta, Prince Edward Island, Quebec, British Columbia, and Newfoundland have sent briefs to the Committee explaining their objections to unilateral patriation of the Constitution.

(ii) "Ad Hoc" Committee of the House



s.13(1)

s.15(1)

. . . 3



FOR OFFICIAL USE ONLY  
JANUARY 19, 1981  
FCO-0105  
PAGE 8

B. Provincial Activities and Interest Groups

(i) Provinces

The Quebec general delegate in London, Mr. Loisel, has been seen as the most active and most determined to publicize his Government's position to the Lords and MP's. He has, amongst other activities, distributed to Lords and MP's texts of his Government's objections.

At the end of November, the Premier of Newfoundland, Mr. Peckford, was invited to speak before the United Kingdom/Canada Chamber of Commerce. He seized this opportunity to raise some points of constitutional interest and to explain his Government's position to his audience.\*

(ii) Interest Groups

The native people is the one group perceived as the most active in London. At the end of October, they sent two representatives (of the National Indian Brotherhood) to look at the possibilities of opening an office and hiring a public relations firm and a constitutional expert to help them oppose the Canadian Government's proposal on patriation.

(iii) British Press

British press commentaries are picking up and we refer to a note of December 5 prepared by FIA to give you a brief summary of the main areas of interest:

"The British Press, as expected, was interested more than others in the September Constitutional Conference, in the proposed resolution on patriation as well as in the ministerial visits to

\* Messrs. Hatfield (New Brunswick) and McMurtry (Attorney General for Ontario) were also in London last week presenting their cases to concerned parties.



FOR OFFICIAL USE ONLY  
JANUARY 19, 1981  
FCO-0105  
PAGE 9

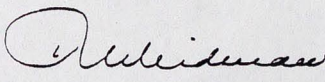
London, etc. This being said, it is difficult to trace an exact picture of reports and editorials given the difference of views expressed by British analysts and those of their colleagues posted in Canada or in the U.S. Generally speaking, the constitutional question does not interest (or very little) the public opinion in Britain.

The Constitutional Conference gave rise to a number of commentaries and the visit of Messrs. MacGuigan and Roberts, in the beginning of October, has increased the interest of the British press. Patriation is becoming a major news item and some preoccupation is expressed. At about the same time, reporters and free lancers began to show some pessimism and negativism. Headlines are sticking to facts and to ministerial statements: Times, Financial Times, The Observer, and The Guardian are usually positive and favourable."

### 3. Conclusion

This note has been prepared for your use and internal information. We take this opportunity to confirm our instructions set out in the telex referred to above.

We hope that you will find it of some use; and we would appreciate receiving comments, questions, or suggestions, if any.

*for the*   
Under-Secretary of State  
for External Affairs



ANNEXE A

1. On October 24, 1980, the Executive Council of the Province of Manitoba issued Order in Council 1020/80 referring the following questions to the Manitoba Court of Appeal:
  - (1) If the amendments to the Constitution of Canada sought in the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada", or any of them, were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and if so, in what respect or respects?
  - (2) Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?
  - (3) Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?

... 2



ANNEXE B

MINISTERIAL STATEMENT

As Members are aware, the Government of Newfoundland has taken a number of steps to protest and make known its opposition to the unilateral and unconstitutional proposals of the Federal Government with respect to the Constitution of Canada. I wish today to table in the House of Assembly copies of the questions to be referred to the Court of Appeal of Newfoundland with respect to the Resolution and proposed amendments to the Constitution of Canada presently before the Federal Parliament and a copy of the Brief that was submitted to the Foreign Affairs Committee of the House of Commons of the United Kingdom.

The first three questions to be referred to our Court of Appeal are in the same terms as those presently before the Court of Appeal of Manitoba. These questions ask the Court to give their opinion on the potential effects of the proposed revision to the Constitution with respect to federal-provincial relationships and the present powers of the Legislatures of the Provinces. In addition, they ask the Court to give its advice on the constitutional conventions with respect to the amendment of the Constitution of Canada.

In addition to these three basic questions, the Lieutenant-Governor in Council has referred an additional question with respect to the potential effect of the proposed amending formula upon the Terms of Union, specifically upon Terms 2 and 17, which relate to the territorial integrity of the Province and the denominational education system. As well, the question also asks the Court what the effect of the proposed amending formula will be upon Section 3 of the British North America Act, 1871. Section 3 provides for the amendment of the boundaries of a Province by Parliament with the consent of the Province affected.

The Attorney General of Newfoundland will argue affirmatively with respect to the four questions.



- 2 -

The Brief submitted to the Foreign Affairs Committee of the House of Commons of the United Kingdom was submitted at the invitation of that Committee. It is important to note that the Committee restricted written evidence to "The Role of the United Kingdom Parliament in Relation to the British North America Act". The Government submitted this Brief to the Committee on December 3rd.

The Brief outlines the history of the current controversy and points out that at the end of the First Ministers' Conference a significant degree of consensus was arrived at with respect to most of the matters on the Constitutional Agenda. Included in this area of consensus was general agreement among the Provinces, Quebec reserving, with respect to the broad outlines of a domestic amending formula entitled the "Vancouver Consensus". The Brief points out the very significant fact that at no time did the Federal Government advance any proposals with respect to an amending formula and, indeed, intimated during the summer-long discussions that a proposal susceptible to a provincial consensus would receive a favourable response from the Federal authorities.

The Brief further notes that one of the four fundamental aspects of the constitutional position of the Government of Newfoundland was that a new Constitution could only be arrived at by the process of consensus. Indeed, our White Paper stated:

"Flowing from the commitment to these principles is the Government's conviction that a new Constitution, reflecting the realities of today, can only evolve from the process of consensus.

The Government of Newfoundland believes that unilateral

.../3



- 3 -

action by any one of the partners in the federation is totally unacceptable. To succumb to the temptation of unilateral action would have the effect of creating greater divisions within the Nation than now exists and of frustrating the aspirations of all Canadians who look to the process of constitutional reform as a means of strengthening and unifying the Nation."

The Brief points out that the unilateral and unconstitutional action of the Federal Government has been challenged by six of the Provinces containing a majority of the population of the country and that the matter is now before the Court of Appeal in Manitoba and will be placed before the Courts of Appeal of Newfoundland and Quebec.

We advised the Committee that it should recognize Canadian constitutional conventions, specifically the fourth constitutional convention contained in a paper entitled "The Amendment of the Constitution of Canada" published by the Federal Government in 1965 under the name of the Honourable Guy Favreau, Minister of Justice:

"The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the Provinces. This principle did not emerge as early as others but since 1967, and particularly since 1930, has gained increasing recognition and acceptance. The nature and degree of provincial participation in the amending process, however, have not lent themselves to easy definition."

.../3



- 4 -

The Government of Newfoundland has advised the Committee that in its opinion that the failure by the Parliament of Canada to observe this important constitutional convention is fatal to any request by it to the Parliament of the United Kingdom. We are, of course, pleased that recent evidence given to the Committee by Dr. Geoffrey Marshall of Oxford has supported this proposition. We have further advised the Committee that as a result the United Kingdom should decline to act upon this unconstitutional request, because if it did so it would be seen to acquiesce in the performance of an unconstitutional act and would be intruding into the most fundamental aspect of the Constitution of Canada, the federal system itself.

We also advanced the proposition that while this matter is before the highest Courts in the Province that the United Kingdom Parliament should decline to act.

We have also advised the Committee that the authority it holds over the British North America Act is an authority which it holds in trust, not only for the Federal Government of Canada, but rather for the federal system of Government established by the Fathers of Confederation, as strengthened over the years. The Brief points out that the entrance of Newfoundland into Confederation was predicated on the continuation of the federal system.

I have every confidence that the Parliament of the United Kingdom will act properly with respect to this matter and will view its role as a trustee for the federal system of Canada as we understand it to be. It is, of course, unfortunate that the Government of Newfoundland has to

.../5



- 5 -

present its objections to the Parliament of the United Kingdom and has found it necessary to pursue this matter through the Courts. However, we feel that we are left with little choice as the proposed amendments undermine the basic nature of Canada and have the potential of affecting the most fundamental aspects and institutions of Newfoundland. I believe that we will be successful in defeating these proposals and we anticipate that once the Federal Government recognizes that this is the case that it will then proceed to negotiate constitutional change in an honest and forthright manner.



IN THE MATTER of Section 6 of The Judicature  
Act, Chapter 137 of The Revised Statutes of Newfoundland,  
1970, as amended.

AND IN THE MATTER of a Reference by the Lieutenant-  
Governor in Council of certain questions to the Court of  
Appeal of the Supreme Court of Newfoundland for hearing and  
consideration.

WHEREAS, it is desirable that the opinion of the  
Court of Appeal of the Supreme Court of Newfoundland be  
obtained in relation to the questions hereinafter set forth;

NOW THEREFORE BE His Honour the Lieutenant-Governor in  
Council, under and by virtue of the authority conferred by  
Section 6(1) of The Judicature Act, Chapter 137 of The Revised  
Statutes of Newfoundland, 1970, as amended by Section 4(a) of  
The Judicature (Amendment) Act, 1974, the Act No. 57 of 1974,  
moved to refer and he doth hereby refer the following:

1. If the amendments to the Constitution of Canada  
sought in the 'Proposed Resolution for a Joint  
Address to Her Majesty the Queen respecting the  
Constitution of Canada', or any of them were  
enacted, would federal-provincial relationships  
or the powers, rights or privileges granted or  
secured by the Constitution of Canada to the  
provinces, their legislatures or governments be  
affected and, if so, in what respect or respects?
2. Is it constitutional convention that the  
House of Commons and Senate of Canada will not  
request Her Majesty the Queen to lay before the  
Parliament of the United Kingdom of Great Britain  
and Northern Ireland a measure to amend the Constitution  
of Canada affecting federal-provincial relationships



or the powers, rights or privileges granted or secured  
by the Constitution of Canada to the provinces, their  
legislatures or governments without first obtaining the  
agreement of the provinces?

3. Is the agreement of the provinces of Canada constitutionally  
required for amendment to the Constitution of Canada where  
such amendment affects federal-provincial relationships or  
alters the powers, rights or privileges granted or secured  
by the Constitution of Canada to the provinces, their  
legislatures or governments?

4. If Part V of the proposed resolution referred to in question  
1 is enacted and proclaimed into force could

(a) the Terms of Union, including terms 2 and  
17 thereof contained in the Schedule to the  
British North America Act 1949 (12 - 13 George  
VI, c. 22 (U.K.)), or

(b) section 3 of the British North America Act,  
1871 (14-15 Victoria, c. 28 (U.K.))

be amended directly or indirectly pursuant to Part V  
without the consent of the Government, Legislature or  
a majority of the people of the Province of Newfoundland  
voting in a referendum held pursuant to Part V?