

CANADA





Gouvernement du Québec
Délégation générale
Londres

HOUSE OF COMMONS

HOUSE OF LORDS

THE ROLE OF THE UNITED KINGDOM
PARLIAMENT IN RELATION TO
THE BRITISH NORTH AMERICA ACT

Second Memorandum
by
The Government of Quebec

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INTRODUCTION

1. On December 9th 1981, the Canadian Federal Government officially transmitted a 60 clause Resolution to the British authorities asking Westminster to substantially amend the Canadian Constitution before "patriating" it to Canada. Later in December, that Resolution was incorporated in a schedule to the Canada Bill and read for the first time.
2. This memorandum demonstrates how the Canadian Resolution is still unconstitutional in the conventional sense; why the Government of Quebec has had no choice but to refuse to consent to the Resolution; and what Westminster's position should be towards such a request. It will be the conclusion of this memorandum that Westminster should refuse to enact the Canada Bill until Quebec has consented to it or, at the very least, until the Canadian courts have had the opportunity of giving their judgments on Quebec's constitutional right of veto.

I. "An Intended Suppression of Provincial Legislative Power"

3. Part I of Schedule "B" of the Canada Bill seeks to entrench a Bill of Rights which if validly enacted would substantially cut across the exclusive legislative powers attributed to the provincial Legislatures under the British North America Act 1867. Furthermore, Part V aims to establish a procedure for amending the Constitution of Canada.
4. On September 28th 1981, the Supreme Court of Canada described the Canadian Federal Government's Resolution as an "intended suppression of provincial legislative power". (J1, p.14). The Court unanimously concluded that Federal-provincial relationships and provincial powers, rights and privileges would be affected by the enactment by Westminster of the Canadian Resolution.

5. The November 5th agreement between the Canadian Federal Government and nine other provincial governments has changed nothing in this respect. In spite of this agreement, the Resolution itself remains the mere expression of an intention. It is only the enactment of this Resolution by Westminster that could give effect to the intended suppression of Quebec's legislative powers without its consent.

II. An Unprecedented Request

6. In the same judgment, the Supreme Court stressed the unprecedented nature of the Resolution:

"... no amendment changing provincial legislative powers has been made since Confederation when agreement of a province whose legislative powers would have been changed was withheld.

There are no exceptions."

(J3, p.24; emphasis added)

7. The Supreme Court pointed out that no amendment which would have affected a province has even been proceeded with when the agreement of that province was lacking:

"Finally, in 1971, proposed amendments which included an amending formula were agreed upon by the federal government and eight of the ten provincial governments. Quebec disagreed and Saskatchewan which had a new government did not take a position because it was believed the disagreement of Quebec rendered the question academic. The proposed amendments were not proceeded with": (J3, p.25).

8. In being asked to vote on this Resolution, Westminster is for the first time requested to legislate to suppress the powers of a province, where that province has not only withheld its consent, but is also challenging the constitutionality of that Resolution before the Canadian courts.

III. The Canada Bill: a Constitutional Discontinuity

9. Given the federal nature of Canada, it has never been possible for the Federal government to directly affect the exclusive legislative powers of the provinces as defined by Sections 92 and 93 of the British North America Act 1867. The Judicial Committee of the Privy Council and, subsequently, the Supreme Court of Canada have consistently preserved the exclusiveness of provincial legislative sovereignty.
10. For the future, this exclusiveness would still be preserved under the provisions of the proposed amending formula in the Canada Bill. Moreover, the unanimous consent of the Federal and all the provincial governments would be required for any modification of this amending formula.
11. Consequently Quebec's exclusive legislative sovereignty has been preserved in the past and will be in the future in a similar manner. If validly enacted, the present Canada Bill would create a legal discontinuity which would allow Quebec's legislative powers to be suppressed through the mere device of the intervention of Westminster. This situation cannot be proper in any constitutional sense.

IV. Quebec's Uniqueness in the Canadian Federation

12. Canada was founded as the union of two peoples: one of British origin and the other of French origin. Quebec remains unique within this federation as the homeland of the people of French origin. Today 85% of all French Canadians live in Quebec.

13. The Bill strikes at the very heart of this alliance of the French and English speaking peoples that gave substance to the Canadian Federation of 1867. That explains the government of Quebec's fundamental disagreement with the process followed in Canada and, indeed, with the continued failure to recognise the French speaking population as an equal partner in the Canadian Federation.

14. The unique status of Quebec was recognised by Westminster as early as 1774 by the Quebec Act which re-established Quebec's unique position in civil law, language and religion. At Westminster in 1867, during the debates which led to the adoption of the British North America Act, the Earl of Carnarvon, in introducing the Bill to the House of Lords, explained that:

"Lower Canada, too, is jealous, as she is deservedly proud, of her ancestral customs and traditions; she is wedded to her peculiar institutions, and will enter this Union only upon the distinct understanding that she retains them. The 42nd Article of the Treaty of Capitulation in 1760, when Canada was ceded by the Marquis de Vaudreuil to General Amburst, runs thus:

'Les François et Canadiens continueront d'être gouvernés suivant la Coutume de Paris et les loix et usages établis pour ce pays.'

The Coutume de Paris is still the accepted basis of their Civil Code, and their national institutions have been alike respected by their fellow-subjects and cherished by themselves. **And it is with these feelings and on these terms that Lower Canada now consents to enter this Confederation."**

(Hansard, House of Lords February 19, 1867 p.568; emphasis added)

In fact, in 1867, the provinces of Canada chose a federal system precisely in order to accommodate these cultural differences. This fact was recognised in the British House of Commons by Mr Adderley who, in explaining his government's bill, said: