Gouvernement du Québec
Délégation générale
Londres

Canada

19 March 1981

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The Rt Hon Mrs Margaret Thatcher MP
Prime Minister
House of Commons
London
SW1A 0AA

Dear Mrs Thatcher,

Recent statements from the Canadian Federal Government seem to indicate that it no longer believes Canada to be a federation and that, consequently, it has the right to take unilateral action to amend the Canadian Constitution in the unprecedented manner proposed.

The federal nature of Canada lies at the heart of the problem faced by the Canadian Federal Government in imposing its will on the other members of the Canadian federation. This problem will also shortly be imposed on Westminster, if the Federal Government pursues its proposed course of action.

Since unitary, devolved and federal constitutional systems are very different in essence, theory and practice we have prepared the enclosed briefing paper on the Canadian federal principle.

I would be very pleased to discuss with you any questions you may have arising from this paper. Please do not hesitate to contact me.

Yours sincerely,

Gilles Loiselle
Agent-General for Quebec

Encl.

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THE CANADIAN CONSTITUTION

Background Brief No. 5

The Nature of Canadian Federalism

1. Introduction

1.1 In the controversy over the Canadian Federal Government's unilateral proposals to "patriate" and substantially amend the Canadian constitution, a major consideration is the federal nature of Canada itself.

1.2 An appreciation of the nature of federalism in Canada is central to an understanding of the environment in which the federal government's unilateral proposals are being made and of the reasons why eight provincial governments out of ten oppose them in Canada.

1.3 This background briefing paper discusses the basic constitutional principles of a federal system, the federal nature of Canada, the amending process of the constitution and the implications of the federal government's proposed unilateral modification, for the federal principle on which Canada is founded.

2. The Essential Features of a Federal System

2.1 Three essential features are traditionally cited by authorities to characterise the federal nature of a constitution:

- the supremacy of the written constitution;
- distribution of powers between different levels of government;
- the authority of the courts to act as interpreters of the constitution.

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2.2 It is of the essence of a federal state, that there must be a written constitution setting out the fundamental body of laws and principles by which the state is to be governed. This written constitution is supreme since the federal state derives its existence from it. This constitution also has to be resistant to change.

2.3 The second and probably most important feature of a federal system is the distribution of powers:

> "In a federal system sovereignty is divided between two levels of government. The federal government is sovereign in some matters and the provincial governments are sovereign in others. Each within its own sphere exercises its power without control from the other, and neither is subordinate to the other. It is this feature which distinguishes a federal from a unitary constitution."
>
> Par. 502, Royal Commission of the Constitution, Vol. 1, Report, HMSO Cmnd. 5460.

2.4 Finally, in order to assure the supremacy of the constitution, the courts have, in most federal systems, the authority to interpret the constitution.

2.5 A federal system is essentially different from unitary or devolved systems of government where sovereignty is not shared, but resides with the central government and is delegated by it. In a unitary system such as the United Kingdom, the powers allocated to other subordinate authorities are held at the discretion of the central government.

3. The Federal Nature of Canada

3.1 Canada, as it is known today, was established by an Act of the Imperial Parliament; the British North America Act (BNAA) of 1867.

3.2 Under this Act, three existing British colonies agreed to be federated into one nation divided into four provinces: Ontario (formerly Upper Canada); Quebec (formerly Lower Canada); Nova Scotia; and New Brunswick. Provision was made in the Act for the extension of the federation to include other provinces and today Canada consists of

ten provinces. The preamble to the BNAA expessed the federal principle as the 'Desire' of these provinces 'to be federally united into One Dominion under the Crown of the United Kingdom.'

3.3 Under the BNAA, Canada's legislative sovereignty is divided between the federal parliament and provincial legislatures. Neither is subordinate to the other, since each level of government is absolutely sovereign in its own sphere of jurisdiction. Their respective fields of jurisdiction are principally defined in sections 91 and 92 of the BNAA.

3.4 Section 92 of the BNAA gives the provinces exclusive jurisdiction, among other things, in matters of property and civil rights, direct taxation, municipal institutions, the administration of justice and, generally, in all matters of local and private nature in the province. In addition, section 93 gives the provinces jurisidiction over education.

3.5 Section 91 of the BNAA details the legislative competence of the federal parliament: defence, international relations, criminal law, money and banking, the regulation of trade and commerce, navigation, Indians and their lands, among other things.

3.6 Further to those enumerated powers, the federal parliament also possesses: a general spending power by which it can spend its money at its discretion; the power to make laws for the peace, order and good government of Canada - this power has been restrictively interpreted by the courts in order to safeguard the autonomy of the provinces; and a general residuary power by which all the competences not specifically attributed to the provinces are deemed to be of federal jurisdiction.

3.7 Given the specific way powers are distributed, it is clear that Canada, both in theory and in practice, is a federal state. However, certain extraordinary powers were allocated to the federal government by the BNAA. These include the power of the Governor General to disallow any provincial statute (ss 54, 55, 56, 57 and 90 BNAA) and the power of the federal government to appoint judges of

the provincial superior courts (s 96 BNAA) and the Lieutenant Governors of each province (ss 58 and 92 (1) BNAA).

3.8 Although widely used in the early years of the Canadian federation, the power of disallowance by the Governor General has not been used since 1943. That this power is obsolete in practice is acknowledged by many authorities including The Hon P-E Trudeau:

> "Personally I would be prepared to argue that they (the federal right to disallow and to reserve provincial laws) are obsolete in any case."
>
> Federalism and the French Canadians, P.149.

3.9 The federal right to appoint provincial superior court judges and the Queen's representative in the provinces (Lieutenant Governor) was originally intended to guard against local political influences. It was never intended, and indeed the practice has never been, that the appointees would be biased in favour of either the federal or the provincial authorities. This power is, therefore, in practice of very little consequence.

3.10 It has been argued that these powers prevented Canada from being considered a truly federal system. In this context, K C Wheare called Canada a "quasi-federal" state.

3.11 Despite these minor encroachments on the strict theory of federalism, in practice the Canadian constitution is truly federal, and nearer to true federalism than the Australian :

> "In Canada on the other hand the Constitution, though in law quasi-federal, is in practice nearer to federalism than the Australian."
>
> K C Wheare, Modern Constitutions, P.21.

3.12 There is hardly an example of a federal system in which the parties to the federation are not to a degree subject to interference from the centre. In the United States, for instance, Article 4:4 and 1:(10) (3) and the 13th 14th and 15th amendments manifestly allow the federal authorities to interfere within the state's exclusive jurisdiction. Yet, it would be impossible to argue that the United States does not have a federal system.

3.13 It must therefore be concluded that the federal principle forms the very basis on which the Canadian constitution lies. This federal principle is reflected in each and every aspect of the Canadian system of constitutional law. The following example plainly illustrates the sovereignty of the provinces' legislative powers in Canada.

3.14 Canada, as a fully independent and sovereign country, possesses an unchallengeable power to enter into treaties and other international obligations binding in international law. However, in the Labour Conventions case (1937), the Privy Council firmly decided that federal government can only legislate to implement a treaty in matters within its own jurisdiction (as defined in s 91 of the BNAA). When the subject-matter of the treaty falls within provincial competence, the federal government can only bring the treaty to the attention of the provinces.

4. The Amendment of the Canadian Constitution

4.1 It is the essence of all constitutions, whether written or unwritten, that they should be resistant to change. The rules for amendment to constitutional instruments are generally designed to make such changes difficult.

4.2 In a federal state these factors are even more important, since the powers of the various levels of government are defined in the written constitution.

4.3 In the United States, for instance, constitutional amendments have to be initiated by a two-thirds majority in both Houses of Congress, and must be subsequently ratified by the legislatures or by convention in three-fourths of the states. Since 1789, more than 5,000 proposals have been introduced before the Houses of Congress; of these, only 26 have received sufficient support at the federal level and have been ratified by the necessary number of state legislatures.

4.4 The amendment procedure for Australia was designed to be more flexible than that in the United States. Under Section 128 of the Australian constution each amendment must be adopted by an absolute

majority of each House of Commonwealth (federal) Parliament and must be subsequently approved, in a referendum, by a majority of electors voting in a majority of states and also by a total majority of the electors voting. Since 1900, only five amendments have obtained the required consent.

4.5 The scope of the amendment process for the Canadian constitution set out in the BNAA is very limited. The BNAA, from the outset, granted the provinces the power to amend their own provincial constitutions (s 92 (1), BNAA). Originally, the federal parliament possessed no equivalent amending power. In 1949, it acquired the power to modify exclusively its own internal constitution (now s 91 (1) BNAA).

4.6 It has been recognised as recently as December 1979, by the Supreme Court of Canada in the Senate Reference case, that the federal parliament does not have the power to "alter in any way the provisions of ss 91 and 92 governing the exercise of legislative authority by the Parliament of Canada and the legislatures of the provinces."

4.7 In 1931 with the Statute of Westminster, the Parliament of the United Kingdom was asked by Canada to retain the exclusive competence to amend the Canadian constitution relating to the distribution of powers between the federal parliament and the provincial legislatures. Since 1867, there have been fourteen amendments to the Canadian constitution.

4.8 With its current proposals, the Canadian Federal Government is attempting to do indirectly through Westminster what it cannot do directly in Canada; that is use the old colonial machinery in order to diminish the sovereignty of the provinces without their consent and despite their opposition. Were the federal government to have this important power of unilateral amendment without provincial consent, it would surely be explicitly granted by the BNAA. It is not.

4.9 This proposed action by the federal government threatens the very federal nature of the Canadian constitution.

5. The Federal Principle and the Federal Government's Proposals

5.1 In order to establish whether the current federal government proposals affect the "federal principle" on which the Canadian constitution is based, the effects of these proposals on the provinces' legislative sovereignty have to be examined.

5.2 The federal government's current proposals include an extensive, entrenched Charter of Rights and Freedoms, "equalization" provisions and a procedure to amend the Canadian constitution in the future.

5.3 Any constitutionally entrenched Bill of Rights, by definition, restricts the legislative sovereignty of a parliament. In a federal system it is indeed implicit that both levels of government will be equally affected by the provisions of such a charter.

5.4 The Federal Goverment's proposals would fundamentally change one very important principle of our constitution: the supremacy of the authority of parliament and the legislatures. Under the current proposals, it would be the court's role to decide the extent to which the legislative sovereignty of parliament and the legislatures can be exercised.

5.5 One of the principal motivations for the provincial governments' opposition is that the sovereignty of the provincial legislatures would be directly diminished as a result of the proposed Charter of Rights being imposed on the provinces without their consent.

5.6 It must be explained that the Government of Quebec does not oppose the principle of an entrenched Bill of Rights, as such. It does, however, oppose the <u>imposition</u> of such measures by the federal parliament in fields of exclusive provincial competence.

5.7 It is the basic contention of the Government of Quebec that the federal principle on which the whole Canadian constitution lies, legally, constitutionally and politically prevents the federal government, under the pretext of the international sovereignty of Canada, from unilaterally restricting or altering the legislative authority of the provinces, as defined in the BNAA, either directly or through the medium of the UK Parliament.

5.8 To conclude otherwise would in fact mean that the federal parliament could modify unilaterally any part of the Canadian constitution and even abolish Canada as a federation.

5.9 The history of constitutional amendments in Canada confirms this contention. It shows that the BNAA has never been modified in the past so as to affect the legislative authority or to affect the status of the provinces without their consent. Furthermore, this was recognised by the federal government and all the provincial governments and regarded as a binding constitutional convention:

> "The Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces."
>
> Canadian Federal Government White Paper, 1965.

5.10 The fact that governments in Canada have not been able to agree on patriation and amendment of the BNAA does not legally or constitutionally empower the federal parliament to modify the Canadian constitution at will.

6. The Role of Westminster

6.1 The Select Committee on Foreign Affairs of the House of Commons recently noted that:

> "The federal character of Canada's constitutional system affects the processes for amending that system. For it would be inconsistent with that federal character to treat the Canadian Federal Government or Parliament as having the power to secure the amendment of all parts of that system on its own initiative, regardless of the will of provincial governments and legislatures affected by those amendments."
>
> par. 129.

6.2 This supreme power of amendment was from the outset reserved to the UK Parliament. In 1931, section 7 of the Statute of Westminster was included at the specific request of all Canadian authorities and full responsibility for proper amendment of the Canadian constitution was accepted by the UK Parliament, together with the potential embarrassment that might result.

6.3 The Select Committee concluded:

> "In such circumstances, it would be in accord with the role accepted by the UK authorities in 1931 for those authorities to satisfy themselves that the request conveyed the clearly expressed wishes of the Canadian people as a whole."
>
> par. 134.

6.4 The Government of Quebec respectfully submits that the right and proper thing for the United Kingdom Parliament to do is to decline any request that may be made for enactment of the Canadian government proposals, since they deny the federal principle which lies at the very heart of the Canadian constitution.

7. Conclusion

7.1 In any federal state it is vital that the parties to the federation consent to any changes to the constitution of that federation.

7.2 Agreement in principle between all the provinces on an amending formula, was reached at the Provincial First Ministers Conference in September 1980. But the federal government was not prepared to allow further discussion on this formula, since they had already committed themselves to a unilateral course of action.

7.3 In recent weeks the provincial governments have yet again expressed their willingness to negotiate an agreed patriation package. But the federal government has repeatedly refused to negotiate again.

7.4 This unilateral action is opposed by eight of the ten provincial governments, as well as the vast majority of the Canadian people.

7.5 The federal government's capricious action has precipitated the present constitutional crisis. Given that the federal government has no mandate for its present action and that it is opposed both by a majority of the Canadian people and the Canadian provinces, it must be hoped that good sense will prevail even at this late stage and the present proposals will be dropped.
