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CABINET  
DEFENCE AND OVERSEA POLICY COMMITTEE

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PATRIATION OF CANADIAN CONSTITUTION

Memorandum by the Attorney-General

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I have been asked for an assessment of "the legal position" relating to the proposed patriation of the Canadian Constitution (coupled with various other amendments to it, including a Charter of Rights). The "legal position" on this problem embraces a number of disparate problems - e.g. of Canadian constitutional practice and UK Parliamentary procedure - and cannot be described in a short compass or with any certainty. It depends partly on questions of strict law, on which there is probably little dispute, and partly on questions of the existence, scope and binding nature of certain alleged constitutional conventions which are in turn largely based on the effect of practice and precedent - and on this there is a great deal of dispute which, in the nature of things, cannot be authoritatively resolved by objective tests or by any purely legal process.

In the Annex to this memorandum I set out in more detail, but still in a condensed form and without the important qualifications and refinements that I should want to include in any Joint Opinion, the main aspects of the problem and my own assessment of the legal and quasi-legal considerations which may affect the decisions which my colleagues will have to take. (I have assumed that the historical and factual background is sufficiently well-known for me not to need to rehearse it here: it is adequately summarised in the Foreign Affairs Committee's Report.) For convenience, I summarise my main conclusions as follows (though I would ask my colleagues

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not to treat this summary as dispensing with the need to consult the fuller exposition in the Annex):

- (a) In strict law - i.e. in terms of Parliamentary supremacy and disregarding the convention referred to in (b) below - we are free to patriate or otherwise amend the Canadian Constitution as requested or to refuse to do so - and in both cases irrespective of the propriety of the request - or even to make other provision than has been requested. Our decision could not be effectively challenged either in the courts of this country or (though I am less certain of this) in the Canadian courts.
- (b) But there is a constitutional convention, which we should regard as binding on us, that we ought not to legislate otherwise than upon a Federal request or otherwise than exactly as requested.
- (c) There is no certainty about whether there is a comparable constitutional convention requiring us to comply with every such request. The Canadian Government maintains that there is. Even those who oppose that view accept that we should normally do so. But they argue that we are free to decline a request - indeed, that we have a duty to decline it - when the proposed amendment would directly affect Federal/Provincial relationships and is opposed by at any rate a substantial part of the Provinces (both of which tests are, in my view, clearly satisfied in the present case.)
- (d) It is impossible to say authoritatively which of these two views is correct. My inclination is to say that the latter probably accords more closely with the constitutional history of Canada up to the immediate post-war period but that the former view is probably more consonant with the current position.
- (e) Whatever position the UK Government may take, there can be no obligation on individual members of Parliament to support the Bill or to refrain from moving amendments. But the scope for amendment could be limited, at least in the Commons, by the way in which the Bill was drafted.
- (f) The current Canadian litigation turns primarily on the propriety of the Federal request rather than the propriety of the UK Government's response to it. But the issues overlap and our proceeding with the legislation while the litigation was still pending could not only reasonably be criticised as disrespectful to the Canadian courts but also prove every embarrassing to us subsequently if the Canadian Supreme Court then held that the request by the Federal Government had been made in breach of a Canadian constitutional convention because the consent of the Provinces had not been obtained. But there is no technical bar (e.g. under the sub judice rule) to our doing so.

Law Officers' Department  
18 February, 1981

M.H.

ANNEX

Principal elements of legal position

1. In strict law - at least UK law and probably Canadian law also - the power of the UK Parliament to amend the Canadian Constitution, as to make any other law, is unlimited. It does not depend on, and is not governed by the terms of, a request from the Canadian Parliament.
2. Neither the exercise of this power vested in the UK Parliament nor our refusal to exercise it could therefore be effectively challenged in the UK courts or, I think, in the Canadian courts - and this irrespective of whether the Canadian courts had determined that the request made by the Canadian authorities was not one which should have been made in terms of Canadian law or constitutional convention. (But see paragraph 10 below.)
3. Nevertheless, there is a constitutional convention which we should regard as binding on us - at least in all circumstances foreseeable for the immediate future - that the UK Parliament should not amend the Canadian Constitution except at the request of, and exactly as requested by, the Canadian authorities. This rules out patriating the Constitution with a different amending procedure from that requested or without the Charter of Rights (if that is requested).
4. The convention described in paragraph 3 above does not have the corollary, either in law or in logic, that we should always comply with every request made by the Canadian authorities. But there may be a separate convention to that effect and the Canadian Government maintain that there is.
5. The principal argument for maintaining that such a convention exists is that the UK Parliament is a "bare trustee" of the relevant legislative power and must exercise it in accordance with

a request made by "Canada"; that the Canadian Government and Parliament must be accepted, in 1981, as the authentic voice of "Canada"; and that it would be improper for the UK Parliament to assert any right to look behind their request and adjudicate on whether it does reflect the wishes of the Canadian people. The principal argument against the existence of the convention is that it would enable the Canadian Government to take to themselves at any time, and in a way that could totally undermine the federal structure of the Canadian Constitution, all those powers that were deliberately left, in 1931, in the custody of the United Kingdom until such time as all parties could agree on other arrangements.

6. Even those who dispute the existence of such an all-embracing convention accept that it is only in very rare circumstances that the UK authorities ought to decline a ~~Canadian~~ request. The criteria which they assert to be applicable - that the amendment would directly affect Federal/Provincial relationships and that it is opposed by at any rate a substantial part of the Provinces - could require the UK authorities to make a very subjective judgment on matters which are essentially Canadian internal affairs. (The formula suggested by the Foreign Affairs Committee, i.e. that the UK Parliament should decide "whether the request, in all the circumstances, conveys the clearly expressed wishes of Canada as a federally structured whole", seems to me to go to the very extreme of subjectivity and is unsupported by authority.) But on any reasonable view the two criteria suggested are satisfied in the present case.

7. The principal argument for the view described in paragraph 6 above is that it probably does reflect what would have been the expectation of the framers of the Statute of Westminster if they had contemplated the present situation, i.e. that in default of agreement in Canada the UK Parliament would remain the guardian of the Canadian federal structure and would retain the right (and indeed the duty) to prevent the balance being altered at the request

of one side and without the consent of the other. The principal argument against that view is that it necessarily involves the UK authorities claiming that their own assessment of the wishes of the Canadian people should prevail over the assessment of the Canadian Government - which is difficult to reconcile with the facts of international life in 1981.

8. It is impossible to advise authoritatively on which of these two conflicting views is the correct one. My personal inclination is to say that the view expressed by the Foreign Affairs Committee reflects the earlier history of Canadian constitutional evolution and would have been the more acceptable one in the years immediately after the Statute of Westminster but that the passing of the years has now tilted the balance in favour of the view contended for by the Canadian Government. Either view could be respectably maintained and defended; neither view could effectively be challenged in legal proceedings or otherwise demonstrated to be wrong.

9. If the UK Government accepted the view of the Canadian Government, our obligation would be (but could not be more than) to use our best endeavours to get the requested measure through the UK Parliament: this would no doubt include urging on Parliament the view that it ought, as a matter of constitutional convention, to pass it without amendment. But there is no legal impediment to individual members voting against the measure. In the Commons the scope for amendments could probably be severely limited, if not excluded, if the Bill, especially the long title, were suitably drafted: I do not think that amendments can be excluded in this way in the Lords.

10. The current litigation in Canada bears primarily on the propriety of the Federal authorities making this request rather than on the propriety of the UK authorities complying with it if it is made. If the litigation is allowed to pursue its present course, it could well be the end of this year before the judgments given by the various Provincial courts found their way to the Federal Supreme Court. There is, however, an outside chance that the Supreme Court will take and decide the Manitoba appeal in the next few months and that this will effectively dispose of the other cases also. The Federal

Government could accelerate the procedure by making a reference direct to the Supreme Court but there is no sign that they at present contemplate doing this. Whatever the eventual outcome of the litigation, I doubt whether even the Canadian courts would (and I am sure that the UK courts would not) question the validity and effectiveness of our legislation if we had gone ahead and enacted it without waiting. But two of the Judges in the Manitoba court (they were in the minority) have suggested that our legislation might be held ultra vires in Canadian law and have even questioned the propriety of Her Majesty assenting to it on the advice of Her UK Ministers but against the advice of Her Canadian Provincial Ministers. It would be very embarrassing if, after we had legislated, the Supreme Court ruled that these suggestions were well-founded. In any event, to go ahead with the legislation might be thought to imply an endorsement by the UK Government of the propriety of the Canadian request, the very question at issue in the litigation. And to pre-empt the Canadian courts in this way (whether unchallengably or not) could well be criticised as showing a disrespect for the judicial process. But these are all considerations of propriety: there is no technical bar (e.g. under the sub judice rule) to Parliaments proceeding with the legislation even while the litigation is still pending.

11. I think that if, in describing our attitude to a Canadian request, we continue to use the formula that "it would be in accordance with precedent for the Government and Parliament to comply with it", we should be careful not to give the impression of implying that precedent constrains us to do so. The Foreign Affairs Committee has demonstrated - convincingly, in my view - that there is no relevant precedent, i.e. a precedent for our putting through an amendment of the kind now likely to be requested in the teeth of Provincial opposition of the kind now being exhibited - opposition which has been taken as far as litigation by a number of Provinces but is certain to end up in the Supreme Court.