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OD(81) 3rd Meeting COPY NO 46

CABINET

DEFENCE AND OVERSEA POLICY COMMITTEE

MINUTES of a Meeting held at
10 Downing Street on
MONDAY 23 FEBRUARY 1981 at 4.30 pm

PRESENT

The Rt Hon Margaret Thatcher MP
Prime Minister

The Rt Hon Lord Hailsham
Lord Chancellor

The Rt Hon Lord Carrington
Secretary of State for Foreign and Commonwealth Affairs

The Rt Hon Sir Geoffrey Howe QC MP
Chancellor of the Exchequer

The Rt Hon Francis Pym MP
Chancellor of the Duchy of Lancaster and Paymaster General

The Rt Hon Lord Soames
Lord President of the Council

The Rt Hon John Nott MP
Secretary of State for Defence

The Rt Hon Sir Ian Gilmour MP
Lord Privy Seal

The Rt Hon John Biffen MP
Secretary of State for Trade

THE FOLLOWING WERE ALSO PRESENT

The Rt Hon Sir Michael Havers QC MP
Attorney General

The Rt Hon Michael Jopling MP
Parliamentary Secretary, Treasury

SECRETARIAT

Sir Robert Armstrong
Mr R L Wade-Gery
Mr R M Hastie-Smith

SUBJECT

PATRIATION OF THE CANADIAN CONSTITUTION

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PATRIATION OF THE CANADIAN CONSTITUTION

The Committee considered memoranda by the Lord Privy Seal (OD(81) 12), and by the Attorney General (OD(81) 11) on the legal constitutional, political and parliamentary problems arising from the impending request by the Canadian Federal Government to amend and patriate the Canadian Constitution. They also had before them a letter from the Lord Chancellor to the Prime Minister dated 23 February 1981 about the legal and constitutional issues involved.

THE ATTORNEY GENERAL said that the constitutional position required the British Government to urge the Westminster Parliament to accede to the Canadian request as received, and to Whip to ensure that this was done. In purely legal terms Parliament would be free to accept, reject or amend the Canadian request, or even to act in the absence of such a request. But there was a binding constitutional convention which required Westminster to act only when and as requested by the Canadian Federal Parliament. In his view the convention further required such action to be taken every time such a request was received. But that issue was clearly justiciable in the Canadian Courts; the judges of the Manitoba Court had been unanimous about that, although divided on the substance of the issue. It was therefore arguable, on grounds of policy as well as legal courtesy, that action at Westminster should be delayed until Canadian litigation had ended.

THE LORD PRIVY SEAL said that it was clear that the Canadian Federal Government regarded the issue as political rather than legal. They would be highly resentful if their request, which was likely to be received towards the end of March, were rejected at Westminster or if consideration of it were postponed. A "unilateral declaration of independence" could not be excluded in such circumstances. It was therefore most regrettable that the recent report of the Westminster House of Commons Foreign Affairs Committee, to which he would need to reply within two months, had argued that the British Parliament had a duty to satisfy itself that what was proposed reflected the clearly agreed wishes of Canada as a whole, and to reject it if not so satisfied. This ignored the constitutional convention that acceptance should be automatic, which went back at least to 1931.

THE LORD CHANCELLOR said that the legal position, though clear, provided no answer to the present problem. It was overlaid by constitutional convention which was equally binding. This convention precluded amending the Canadian request. It did not explicitly preclude rejecting the request; but to do so would be a grave blunder and would have the most damaging consequences for Anglo-Canadian relations, for NATO and for the Commonwealth. In constitutional terms there was no precedent either way. Rejection might or might not have been conceivable in the circumstances of 1931 (he personally thought not), but circumstances had greatly altered since then; and it was clear today that only the Federal Government and Parliament could speak for Canada in international law and in the community of nations.

In discussion it was generally agreed that the primary consideration for Britain must be the preservation of good relations with Canada, that Canada was a sovereign and independent state and that it was the Canadian Federal Parliament alone which was answerable to the Canadian electorate for the merits or demerits of the proposals. The following points were made -

a. Members of the Westminster Parliament did not well understand the strength of the case for their accepting the Canadian request promptly and without amendment. Many of the Government's supporters were strongly in favour of the provincial case, and despite some important individual views to the contrary the official line of the Opposition was likely to be similarly hostile to the Federal Government's wishes.

b. In these circumstances much Parliamentary time would be required at Westminster, and there was a real possibility that the Canadian request would be voted down. The effect on the Government's standing could be very serious. Another strong possibility at Westminster was that a reasoned amendment might be passed at Second Reading which would have the effect of postponing consideration of the issue until the Canadian Supreme Court had reached a decision. The Federal Government would not themselves be willing to seek a verdict from the Supreme Court, and their opponents could only do so by appealing against the decision of a Provincial Court. The matter might therefore not reach the Supreme Court for many months. Nor was it clear how far a favourable verdict by the Supreme Court would improve the present hostile climate at Westminster, though if a reasoned amendment of the kind suggested had

been passed when the Bill first came up for Second Reading, it would be more difficult for the House to reject the Bill if it was re-presented after the Supreme Court of Canada had taken a decision favourable to the Canadian Federal Government.

c. A powerfully argued reply to the conclusions of the Foreign Affairs Committee's report had been delivered by the Canadian Minister for External Affairs, Mr MacGuigan, in a speech to the Edmonton Chamber of Commerce on 6 February 1981. It was important that this case should be put over at Westminster.

d. There might be advantage in having a preliminary debate at Westminster on the basis of the Foreign Affairs Committee's report and the Government's reply to it, after the Canadian request had been finally formulated but before it came formally before the House. Such a debate might clear the air, and enable the Government to gauge the likelihood of the request being subsequently rejected or postponed.

e. Another possibility might be to initiate consideration of the Canadian request in the House of Lords. This would give the Lord Chancellor a convenient opportunity to make an authoritative public statement on the legal and constitutional position.

f. The Canadian Government had shown little consideration for the parliamentary difficulties which their tactics and timing were likely to cause in London. This might be deliberate. Ottawa might not be sorry to be able to rally Canadian opinion by accusing London of interference in Canadian affairs.

g. There appeared to be some difference of view between the authorities in the House of Lords and in the House of Commons on whether amendments to the proposed legislation would be in order at Westminster

THE PRIME MINISTER, summing up the discussion, said that there was general agreement that it would be in the best interests of the United Kingdom to accept the request of the Canadian Government and to pass it through Parliament unamended. The Government's reply to the Foreign Affairs Committee should concentrate on the major arguments relating eg to the constitutional requirement, to Anglo-Canadian relations to the

danger of damaging international repercussions and to the fact that it was the Canadian Federal Parliament which was answerable to the Canadian electorate. Complaints about the Canadian choice of tactics should be avoided. If despite the Government's efforts to put over the strength of their case an amendment were tabled to postpone consideration of the Canadian request until the Canadian Supreme Court had given a verdict, it might be necessary to warn Mr Trudeau at that stage of the danger of the amendment being carried.

The Committee -

1. Agreed that the Government should seek to pass through Parliament as quickly as possible and without amendment, the proposals likely to be received for the Canadian Federal Parliament.

2. Invited the Foreign and Commonwealth Secretary, in consultation with the Lord Chancellor, the Chancellor of the Duchy of Lancaster and the Attorney General, to draft a reply to the report of the Foreign Affairs Committee setting out the main arguments in favour of accepting the Canadian request without amendment.

3. Invited the Chancellor of the Duchy of Lancaster and the Lord President of the Council to consult further with, and if possible to reconcile the views of the authorities of both Houses of Parliament on whether the tabling of amendments to the proposed legislation would be permitted.

4. Invited the Chancellor of the Duchy of Lancaster and the Lord President of the Council to give further consideration to the arrangements to be made for consideration at Westminster of the request of the Canadian Federal Parliament and to report back.

Cabinet Office

25 February 1981

FROM:

THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.

HOUSE OF LORDS,
SW1A 0PW

CONFIDENTIAL

23rd February, 1981

The Right Honourable
The Prime Minister

Dear Margaret

Patriation of the Canadian Constitution

In any constitutional question, and in this in particular, there are at least four separate questions to answer and in the following order.

1. The strict legal position. This is as the Attorney General says. But it is entirely barren, since, as often, the strict legal position is over laid by convention as binding as law.

2. The position under established constitutional convention. This is expressly recognised, as the Attorney General points out, by the third paragraph of the preamble to the Statute of Westminster Act 1931. It is relevant to the present discussion because, at least in my opinion, it completely prohibits either (a) Plain "patriation" or (b) amendment except in accordance with a "request and consent" of the relevant Commonwealth Member.

3. Constitutional propriety. By this phrase I mean something which is not governed by an established convention, but action which will be treated as a precedent establishing a convention if it is correctly answered and lead to a shambles if the action taken is a mistake (e.g. the House of Lords' rejection of the Budget in 1909). I agree with the Attorney General that though convention completely governs and inhibits simple "patriation" or amendment, it is not yet expressly established by convention that Parliament may not refuse to accept a "request and consent". It is at this stage that the case becomes arguable.

In their report the FAC argue that it would in this sense be constitutionally proper to reject a Bill. I am sure they are wrong. They found their belief on the supposition that s.7 of the Statute of Westminster Act constitutes the U.K. Parliament a guardian, arbiter or trustee, or, in a sense the guarantor of the rights of the provinces under the BNA 1867 as amended. Historically I do not believe that this is correct. S.7 is there because Canadians in 1931 were not prepared to say what should take the place of the legal status quo. Even if I were wrong about this I would agree with the Attorney General and the Lord Privy Seal that it is perverse to believe that, in 1981, the constitutional proprieties remain unchanged from 1931. In the 50 years which have supervened the standing of Canada has completely altered. Her Government is the only entity which in international law, in the community of nations, can represent her people and the machinery

/Contd.

by which Canada can consent and request is the machinery established by custom of Parliamentary approval in Ottawa, initiated by the Government in Ottawa responsible to that Parliament. It may be true that by the Canadian proprieties that Government has blundered in its treatment of the provinces. I am prepared to assume in favour of the FAC that this is correct, without necessarily thinking that this is so. But we are not concerned with the Canadian proprieties. It would be a constitutional impropriety on our part, at least in my view, quoad Canada even more so than quoad Australia, where the case is not the same, but even quoad Australia for the U.K. Parliament to reject a request from the Parliament passed in accordance with existing machinery. I would be prepared to accept that there might be a case for delay out of respect for the Canadian judiciary, but, speaking personally I cannot conceive what justiciable issue can exist for the Canadian Courts to decide. I therefore basically agree with the conclusion of the Lord Privy Seal.

4. There remains the fourth question which may be the most important. In the last resort a British Government and a British Parliament are bound to act in the interests of the U.K. What is that interest here? I cannot conceive any advantage accruing to the U.K. by disregarding a "request and consent" properly passed by the established machinery in Ottawa which could possibly compensate for the infinite damage which would accrue to the U.K. interests in Canada, to our relations with Canada, bilaterally, in the Commonwealth, in NATO, in the UNO were we to disregard a "request and consent", if we were to purport to act in the interests of the Provinces - or rather the Provincial Governments and legislatures - against the expressed opinion of the Ottawa Parliament and Government in the present instance. Such action would, I believe, be a blunder only equalled by the action of the House of Lords in 1909.

I am copying this to the other members of OD, the Attorney General, the Parliamentary Secretary, Treasury and Sir Robert Armstrong.

Yrs:
Q.H