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Ref. A03533

PRIME MINISTER

The Canadian Constitution

(C(80) 69)

BACKGROUND

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This paper by the Foreign and Commonwealth Secretary has been circulated for discussion by the Cabinet in accordance with the conclusions of your meeting on Monday, 3rd November. You will recall that at that meeting the Lord Chancellor said that the only real question for the British Government was whether the request of the Canadian Federal Government should be accepted or rejected as a whole. In terms of constitutional propriety acceptance appears to be the only course. The British Government has a relationship with the Federal Government of Canada, not with the Provincial Governments, and Her Majesty's Government should not place itself in the position of trying to judge the merits of an argument between the Canadian Federal and Provincial Governments. Unfortunately it is precisely this area which has been reserved to the Westminster Parliament, and some of the Provincial Governments will argue and lobby for the view that the Westminster Parliament has a trustee function in relation to the Canadian Provincial Governments which has got to be taken seriously. Probably the most realistic way of approaching the problem is the one in paragraph 7 of Annex A to the Foreign and Commonwealth Secretary's paper, which quotes Lord Altrincham on the proposition that the reservation of an amending power by the Statute of Westminster has become an anachronism. Canada has been fully independent since the Statute of Westminster, and British relations with Canada is in international law no different from that with any non-Commonwealth independent sovereign state. The sole representative in international law of a Federal State is the Federal Government. To look behind a request from the Federal Government and enquire into the basis on which it was put forward would rightly be regarded as an unwarranted interference in the internal affairs of an independent friendly state. This appears to be Mr. Trudeau's own view.

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2. At the conclusion of your meeting on 3rd November, you decided that this issue ought to be discussed by the Cabinet because of its importance. In the light of the Cabinet's decision the Foreign and Commonwealth Secretary, accompanied by his Legal Adviser, will give evidence to the Select Committee on Foreign Affairs to explain the reasons for the position which the Government is taking up. It is important for the Cabinet to be clear and in agreement on these reasons. The six Provinces who are in disagreement with the Canadian Federal Government are likely to be active in lobbying their cause over the next few months and the Government should respond with a single voice.

3. This problem could give rise to political embarrassment in several different ways. It seems likely that, if the Bill is drafted to give effect to "a request from the Canadian Legislature" it will not be possible to move substantive amendments to the Bill in the House of Commons. But there remains the risk of substantive discussion and perhaps defeat for the Government in the House of Lords.

4. There is also a problem over the legal action which is being taken in Canada. At your meeting on 3rd November it was suggested that the challenge in the Canadian courts to the Federal Government's legislation would probably be exhausted by Christmas. The report of the Chancellor of the Duchy's recent conversations with the Canadian Foreign Minister casts some doubt over that; and on 6th November The Times suggested that there would be a strong strategic advantage in having the United Kingdom legislation enacted before a Canadian court had occasion to pronounce on the validity of the measure. It is clear that this could happen. A thoroughly awkward situation could arise if after the British legislation had been passed, a Canadian court ruled that it was invalid. The only comfort in this situation would be that the main embarrassment would be to the Canadians.

HANDLING

5. You will wish to ask the Foreign and Commonwealth Secretary to introduce his paper. The points to establish in subsequent discussion are:-

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- (a) Can the Bill be drafted in a way that will make it impossible to move substantive amendments in the House of Commons? You will wish to ask the Chancellor of the Duchy of Lancaster for his views on this point. You will wish to ask the Lord President and the Foreign and Commonwealth Secretary to what extent the House of Lords are likely to indulge in substantive discussion and amendment.
- (b) To what extent is the Government's legislative programme likely to be seriously threatened by this issue? You may care to seek the views of the Chief Whip on the extent to which many of the Government's supporters in the House are likely to be aroused on this issue.
- (c) Is there anything to be said for introducing this legislation and leaving it to a free vote by the House? Is it possible that this course of action would cause more trouble and confusion in Parliament than putting the Government's full weight behind the legislation, as well as being likely to give offence to Mr. Trudeau?
- (d) What parts of the proposed legislation are most likely to give rise to difficulties during the passage of the Bill? It seems likely that these may be clauses 16-22 dealing with the recognition of French as well as English as the official language of Canada (even in those Provinces where the French are in a small ethnic minority) and above all clauses 23-24 dealing with minority language educational rights. Is there any risk that these parts of the Bill may be used as a basis for a claim by the Welsh language protagonists?
- (e) It is not yet clear when the Canadians will deliver their Bill to the Westminster Parliament; but if at that stage it is still being considered by the Canadian courts, does the Attorney General consider this to be an adequate reason for postponing action on the Canadian request? What does the Foreign and Commonwealth Secretary think? Annex B of his paper deals with this issue but in inconclusive terms.
- (f) Does the Lord Chancellor consider that the Government really has any freedom of action in this matter? You will recall that at your meeting on 3rd November he expressed in forcible terms the view that the

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Government really had no choice other than to do what the Canadian Federal Government asked. As a weapon of last resort it would be open to the Westminster Parliament proprio motu to patriate the Canadian Constitution by means of a one clause act which would simply transfer the powers now rested in Westminster to the Canadian Federal Parliament, even without their consent. You may like to get him to repeat this authoritative view, together with the warning that such a course of action might lead to Canadian retaliation.

CONCLUSION

6. In the light of discussion on these points the Cabinet might be guided to agree that the Government should respond to the probable request of the Canadian Federal Government when this is received. But you will wish to decide in the light of the discussion whether this conclusion should be qualified if the issue has not yet been resolved in the Canadian courts.

(Robert Armstrong)

12th November, 1980