

THE CANADIAN CONSTITUTION

It is hoped that the following will be useful for the Second Reading of the Canada Bill on Wednesday, 17th February 1982.

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The Canadian Constitution

1) Introduction

The Canadian Constitution is contained in the British North America Acts 1867-1964 (BNAA). In certain important respects (e.g. regarding the balance of federal and provincial powers) it can be amended only by Act of the United Kingdom Parliament. This applies to 'patriation' of the Constitution to Canada.

All parties are agreed that the situation whereby Britain holds vestigial constitutional power is both anomalous and anachronistic. However, since the Statute of Westminster was enacted in 1931, the convention has become firmly established that the United Kingdom Government may amend the Canadian Constitution if and only if a request is received from the Canadian Government. Such a request has now been received, and the proposed Canada Bill embodies, in Schedules A and B, legislation to patriate the Constitution which was debated in the Canadian Parliament and passed by an overwhelming majority in both Houses in December 1981.

2) Historical Background

- 1867-1964 Passage in the British Parliament of legislation collectively known as British North America Acts.
- 1926 Balfour Declaration recognised independence of the Dominions.
- 1931 Statute of Westminster gave legal expression to the Balfour Declaration. By recognising Canada's independence the Statute preserved the status quo, i.e. no new powers were given to Britain. However Britain was left with a residual power to sanction amendments to the Canadian Constitution since no amending formula existed within the Canadian Constitution (the BNAAs were not included in the ambit of the statute).
- 1980 February The search for an amending formula for the Constitution continued through various attempts over 50 years. The final impetus was given following the Liberal Party election victory in 1980, when Prime Minister Trudeau declared his principal aim of patriating the Constitution.
- October The Canadian Parliament first considered the constitutional proposals. These contained:-
- a) procedures for patriation;
 - b) amending procedures;
 - c) a charter of rights and freedoms;
 - d) a provision regarding equalisation and regional disparities.
- Six provincial premiers (later eight) objected to the proposals, as did the Opposition Conservative Party.
- 1981 The premiers engaged in three provincial court appeals, and subsequently took a consolidated appeal to the Supreme Court.

.../September

- September The Supreme Court found that on technical grounds the Federal Government could go ahead with their package, but that to do so would violate the constitutional convention that provincial agreement was required since the proposals did affect federal/provincial relationships and the powers, rights and privileges enjoyed by the Provinces.
- January Meanwhile the Foreign Affairs Select Committee of the British House of Commons (the Kershaw Committee) published its first report, suggesting that in the event of a request for patriation of the Constitution being received from the Canadian Government, it would not be proper for the UK Parliament to pass the Canadian measures unless they enjoyed a greater degree of support than they did at that time.
- November After further talks an agreement was signed between the Federal Government and nine of the ten provincial premiers, with Quebec maintaining its objections.
- December The Canadian Parliament passed a resolution calling on the British Parliament to patriate the Constitution.

3) The Constitution

All parties are agreed that the Constitution should be patriated, i.e. that the British Government should terminate its residual responsibilities in connection with the BNAA.

4) The Amending Formula

Patriation of the Constitution without provision for amending it would however render it unworkable, and an amending formula is therefore an essential addition. This is incorporated as Part V of the Constitution Act (Schedule B of the Canada Act).

5) The Charter of Rights

The Canadian Government attaches importance to the Charter of Rights which forms Part I together with Parts II, III and IV of the Canada Bill. Nine of the ten provinces consider that their interests are safeguarded in it, and it was approved in the Canadian Parliament in December.

6) Amendments to the Bill

It is a matter of legal debate whether the Statute of Westminster restricted Britain from making amendments to the BNAA without a prior request from Canada. But in any case that convention has always been adhered to. The BNAA have been amended on Canadian request fourteen times, and the British Parliament has made technical amendments to proposed Canadian amendments. There is no precedent for the British Parliament questioning Canadian requests for amendment.

The Speaker has however said that the Bill is capable of amendment and that amendments can be tabled.

.../Quebec

Quebec

Quebec objections to the proposed bill relate to its claim to have a veto over constitutional changes with which it does not agree; to fiscal compensation for opting out of constitutional amendments; to the provision relating to minority language educational rights; and to mobility rights.

The Quebec Government will test the question of the veto before the Quebec Court of Appeal in March. The Canadian Government and the other nine provinces together with the Liberal Party in Quebec consider that the other objections have been met in the revised provisions of the bill now before Parliament. The British Government takes the view that these are internal Canadian matters which should not hold up debate on the bill in the British Parliament, particularly as the Quebec legal challenge does not allege responsibility on the part of the British Government or Parliament.

8) Aboriginal Peoples' Rights

The aboriginal peoples are made up of Indians, Inuits and Métis, whose interests vary widely. The objections to the provisions concerning aboriginal peoples' rights (clauses 35 and 37) come mainly from the Treaty or Status Indians (315,000 people out of an estimated 1.3 million native population), and cover various points. The Alberta Indians tested their case before Lord Denning and Lord Justices Kerr and May sitting in the Court of Appeal in December 1981. The Court ruled two to one that responsibilities for Indian rights were Canadian obligations at the latest with (Kerr and May) the BNA of 1867 or (Denning) the Statute of Westminster 1931. The Court concluded unanimously that any remedies in relation to these obligations which were now Canada's must be sought in the Canadian Courts. Lord Denning also found that Indian rights were in fact safeguarded in the Canada Bill.

Notwithstanding this judgement, the Alberta Indians have announced their intention of appealing to the House of Lords. The Indians of British Columbia, Manitoba and Ontario are meanwhile seeking a Court ruling that their consent was needed to any request for patriation of the Constitution.

The Government's view on this question is that any treaty or other responsibilities so far as they still subsisted became the responsibility of Canada at the latest with the Statute of Westminster, and are now owed to the Indians by the Crown in right of Canada and not of the United Kingdom.

9) The Importance of good relations between Britain and Canada

The Balfour Declaration of 1926 established the Dominions and the United Kingdom as "autonomous communities... equal in status, in no way subordinate one to another in any aspect of their domestic or internal affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

In view of this equality of status any tampering by Britain with a Canadian request would undoubtedly do lasting harm to relations between the two countries. As well as ties of kinship, friendship and common language, Canada and Britain share membership of the Commonwealth, NATO,

OECD, and many other international organisations. Canada is one of Britain's "top twenty" export markets. Repercussions resulting from a rift between the two countries over this issue would have effects on relations with other countries and would weaken the Western Alliance. And it is likely that the Canadian Government would persist in reintroducing the proposal. The result could be a souring of relations between the two countries for many years to come.

10) Conclusion

The Kershaw Committee in its third Report on the BNAA said:

"The Federal/Provincial agreement of 5th November 1981 made in the wake of the Supreme Court judgement and accepted by nine of the ten Provinces appears to us to amount to a determination by the political actors in Canada that the concurrence of the nine Provinces is constitutionally sufficient, albeit the dissenting Province be Quebec.

In this situation what we said in our first Report seems applicable. "The UK Parliament is bound to exercise its best judgement in deciding whether the request in all the circumstances conveys the clearly expressed wishes of Canada as a federally structured whole." (January 1982, paragraphs 6/7)

The Leader of the Opposition, Mr. Foot, has told the Parliamentary Labour Party that the Bill should be supported.

The Leader of the House of Commons, Mr. Pym, said on 11th February 1982:

"Having considered the whole matter, the Government have come to the conclusion that it is right and appropriate to proceed."

(Hansard, 11th February 1982, Col. 1118)

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