

July 5th, 1971.

MEMORANDUM TO FILE

Patriation of the Constitution:
Ministerial Discussion in London,
May 26th, 1971.

A meeting was held at Lancaster House, London, on the morning of Wednesday, May 26th. Those present on behalf of the British government were The Right Honourable Sir Peter Rawlinson, Attorney General; Sir John Fiddes, Chief Parliamentary Counsel; Messrs. C. Lush and A. Rushford from the Foreign and Commonwealth Office; and Mr. A. de Winton of the Attorney General's office. Those present on behalf of the Government of Canada were the Honourable John Turner, Minister of Justice; Mr. R.G. Robertson, Mr. G.V. La Forest, and Mr. B.L. Strayer.

Mr. Turner outlined the background of our proposals on patriation. He said that we wished by this process to ensure beyond a doubt the legitimacy of the revised Constitution, but we wished to do it as inconspicuously as possible. We recognized the interests of the United Kingdom in the proposed statute, in that it would limit the formal law-making power of the United Kingdom Parliament. The Government of Canada felt that it could unilaterally request such U.K. legislation on the basis of a joint address of the two Houses of the Parliament of Canada. However, for various reasons of policy we were seeking the unanimous agreement of the provinces for such a move. It is conceivable however that we would not be able to get unanimity and under some circumstances the Government of Canada might have to decide to ask unilaterally for legislation by the U.K. Thus we were not waiving the right of the Parliament or the Government of Canada to act alone in requesting legislation by the United Kingdom. Mr. Turner also reviewed briefly the question of the sequence of events as planned and emphasized that we would prefer that the United Kingdom legislation follow the passage of resolutions of approval of the Charter in the Parliament and legislatures in Canada. It was hoped, however, that once the necessary resolutions were passed in Canada, the United Kingdom could act fairly

soon in passing the necessary legislation. We would therefore request that the United Kingdom government reserve, as inconspicuously as possible, a place in their legislative timetable for the passage of such legislation.

Sir Peter Rawlinson said that they would do all they could to assist. He said that they were proceeding on the assumption that the governments and legislatures of all provinces as well as the Government and Parliament of Canada would agree to the Charter and to the consequential processes of patriation. Their consideration of the matter to date had been on this basis. If unanimity were not possible and if the Government of Canada still wished to proceed, no doubt we would be back to discuss with the British government proceeding on some other basis.

Mr. Robertson said that we had avoided at all times suggesting to the provinces that unanimity would be required in order to proceed.

Mr. Turner said that he thought that any draft which we might work out here should be regarded as a working draft only, in case changes were required later. He would also wish to retain for the Government of Canada the option as to whether the draft would be shown to the provinces now or at some later date.

Sir Peter Rawlinson said that if the draft were to be shown to anyone, the Government of Canada should explain that it was a draft only. It had not yet been seen by his colleagues, who would wish to consider it; moreover, it could not be automatically assumed that the House of Commons would find it acceptable. Therefore, any draft which emerged now should not be presented as a fait accompli. It should not be implied that the House of Commons at Westminster would be a rubber stamp only. Nor could he assure that when a bill is presented to Parliament it would be treated simply as a routine matter. It would probably be free of controversy and probably would attain easy passage but he could not say that the bill would not receive publicity and attention in the United Kingdom. There might well be many in Parliament who would wish to comment on this significant legislative step with respect to Canada.

Mr. Turner said that he felt he should take the position with the provinces that at present he could not show them the draft because it had not yet been considered by the United Kingdom government as a whole. He also felt that this would be the appropriate position as long as it was uncertain whether the Government of Canada might have to exercise its right to proceed unilaterally to request such legislation. Sir Peter Rawlinson said that he would rely on Mr. Turner's discretion not to treat the draft as a fait accompli.

(At this point the draft statute as prepared by Sir John Pennes and attached to his letter to me of May 24th was examined. Several points were considered tentatively and it was agreed that officials should resume the discussion on the details after lunch.)

Follow-up Discussion by Officials

Subsequently Sir John Pennes and Mr. Rushford continued the discussion with Messrs. Robertson, La Forest and Strayer. Sir John's draft of May 24th was considered in detail and a number of changes were agreed upon. The most important of these was the insertion in section 1 of the concept of "recognition" and "as well in the United Kingdom as in Canada" (both expressions having reference to the recognition of the force of law of the Canadian Constitutional Charter). There was a lengthy discussion about the short title for the statute. In the previous discussions which I had with officials of the Foreign and Commonwealth Office the short title "the Canada Act, 1972" had emerged and had been included in the draft. When this was considered again on May 26th there were some misgivings about the title but no good alternative was found. The main considerations were that on the one hand a title which was too pedestrian or low-key could be regarded in the British Parliament as inaccurate and misleading, while a title which unduly emphasized the importance and effect of the Act could offend sensitivities in Canada, particularly of those who feel any action by the United Kingdom in this matter is unnecessary and an affront to Canadian sovereignty. Having regard to these considerations, the title "the Canada Act, 1972" seemed to represent about as good a balance as any. However, it was recognized that this and all other points in the draft statute would have to be subject to further consideration by the British and Canadian Cabinets, and that further revisions might also be made necessary by future events.

(Sir John Finnes subsequently revised the draft in the light of the foregoing discussions and his revised draft, together with alternative preamble, was forwarded to me in a letter of May 26th. This letter, together with the draft is attached hereto.)

ORIGINAL MONED BY
S. L. STRAYER

S. L. Strayer

Attachs.

HL:ml

CONFIDENTIAL

D R A F T

O F A

B I L L

With respect to the Constitution of Canada.

Whereas the Canadian Constitutional Charter embodies provisions with respect to the Constitution of Canada and to the means whereby it may be hereafter amended;

And whereas the people of Canada through resolutions of the Senate and House of Commons of Canada and legislative assemblies of the Provinces of Canada have approved both the provisions of the Charter and its promulgation by Proclamation of the Governor General of Canada;

[And whereas hitherto certain amendments to the Constitution of Canada have been made by the Parliament of the United Kingdom at the request and with the consent of Canada;]

And whereas it is fitting that recognition should be given to the Charter;

And whereas Canada has requested, and consented to, the enactment of an Act of the Parliament of the United Kingdom to make appropriate provision in connection with the matters aforesaid:

Be it therefore enacted etc.,

Constitutional law of Canada.

1. The Canadian Constitutional Charter, when promulgated by Proclamation of the Governor General of Canada, shall as well in the United Kingdom as in Canada be recognised as having by virtue of the Proclamation the force of law as from such date as may be specified in the Proclamation; and -

- (a) no Act of the Parliament of the United Kingdom passed after that date shall extend, or be deemed to extend, to Canada or to any province or territory of Canada as part of its law; and
- (b) as from that date the enactments mentioned in the Schedule to this Act shall, to the extent specified in column 3 of the Schedule, cease to have effect and are hereby repealed as enactments of the Parliament of the United Kingdom, but without prejudice to any operation which any of those enactments and any law, order, rule or regulation made thereunder may continue to have by virtue of the Charter.

Short
title.

2. This Act may be cited as the Canada Act 1972.

Canada Bill

Alternative form of recitals

Whereas the Canadian Constitutional Charter embodies provisions with respect to the Constitution of Canada and to the means whereby it may be hereafter amended;

And whereas the Canadian people through resolutions of the Senate and House of Commons of Canada and legislative assemblies of the Provinces of Canada have approved both the provisions of the Charter and its promulgation by Proclamation of the Governor General of Canada, and it is fitting that recognition should be given to the Charter;

And whereas [hitherto certain amendments to the Constitution of Canada have been made by the Parliament of the United Kingdom at the request and with the consent of Canada, and] Canada has requested, and consented to the enactment of an Act of the Parliament of the United Kingdom to make appropriate provision in connection with the matters above recited:

Be it therefore enacted etc.,