

Patriation of the Constitution

Introduction

The Conclusions of the Working Session of the Constitutional Conference on February 8-9 stated as follows:

"Patriation of the Constitution

2. The Constitutional Conference agreed on a procedure to be undertaken in Canada at a very early date in order to bring home the Constitution and to transfer to the people of Canada, through their elected representatives, the exclusive power to amend and to enact constitutional provisions affecting Canada. This procedure would involve:

- (a) Agreement among the governments as to changes and procedure.
- (b) Approval of a resolution in the usual way, by legislatures plus the two Houses of Parliament, authorizing the issuance of a proclamation by the Governor General to contain the amendment formula and whatever changes are agreed upon.
- (c) Recommendation that the British Parliament legislate to:
 - (i) recognize the legal validity of the Canadian proclamation and its provisions;
 - (ii) provide that no future British law should have application to Canada; and
 - (iii) make any consequential repeal or amendment of British statutes affecting the Canadian Constitution.
- (d) Issuance of the proclamation by the Governor General on a date to coincide with the effective date of the British law."

Thus, once the Constitutional Conference agrees on the texts of specific constitutional changes, there will be three major steps to be taken to achieve patriation: approval of the changes by legislatures of the provinces and by the Houses of the federal Parliament; legislation by the United Kingdom Parliament; and the issue of a Proclamation by the Governor General.

Resolutions of Approval

It is desirable that the main content and operative words of the resolutions submitted to the provincial and federal legislatures should be as uniform as possible. If

questions as to whether there had in fact been consent to the same effect by the various legislative bodies. To avoid this difficulty, it would seem preferable that prior agreement be reached (at the Victoria meeting if possible) on an appropriate general form which first ministers could use in submitting the resolutions to their legislative bodies for approval. Essentially, the resolutions should approve the issuance of a Proclamation to bring into effect the Canadian Constitutional Charter as part of our Constitution. Perhaps a wording such as the following would be appropriate:

"... that this House [Assembly, etc.] approve the issuance of a Proclamation by the Governor General, proclaiming the following provisions respecting the Constitution of Canada to come into force on a date to be fixed by that Proclamation."

This would not of course preclude the inclusion of such other material in the resolutions, not inconsistent with this approval, as is appropriate for each legislative body. Because of certain procedural requirements the resolutions submitted to the Senate and House of Commons should probably contain the text of the Proclamation itself as well as the Charter.

The United Kingdom Enactment

After resolutions of approval have been adopted by legislative bodies in Canada, the British Parliament would be requested to pass appropriate legislation. The British enactment would refer to the approval expressed by legislative bodies in Canada for such constitutional changes, and would specifically recognize the validity of the Proclamation (containing the Canadian Constitutional Charter) to be issued subsequently by the Governor General. This recognition of validity is essential to remove any possibility of challenge in some court of law at some time concerning the legal and constitutional basis for the new provisions. The U.K. legislation would also terminate all remaining formal legislative authority which the British Parliament now has with respect to Canada.

Discussions will be held with the British government before the Victoria Conference to be sure that there are no legal or procedural problems that could cause difficulty and to ensure that preparations for this aspect of patriation may be effected as smoothly as possible.

Achievement of patriation will also involve the repeal of parts of the Statute of Westminster, 1931 as it applies to Canada. The provisions requiring repeal are section 4 as it applies to Canada, section 7 (1), and the references to Newfoundland as a separate Dominion in sections 1 and 10 (3). These changes in the Statute of Westminster, 1931 have been provided for in the text relating to Modernization of the Constitution (already distributed) which will form part of the Canadian Constitutional Charter to be given effect by the Governor General's Proclamation.

The Proclamation of the Governor General

As agreed in February, the final stage would be the Proclamation of the Governor General, issued in his name and under the Great Seal of Canada.

The Proclamation, after making appropriate reference to the changes as having been effected by the representatives of the Canadian people, would proclaim the Canadian Constitutional Charter which would form an Annex to it. The Charter and the United Kingdom statute would be designed to come into force at the same time.

Result

From the day of the coming into force of these instruments the Constitution of Canada (as modified thereby) will continue as before, but it will be fully amendable in Canada by the new amending procedure and there will no longer be any formal authority of the United Kingdom Parliament to alter it in any respect.

Depending on agreement on the proposals to be made on this subject, a final stage, which would require some time to accomplish, would be the consolidation of the various constitutional documents into a single, comprehensive statement of the legal provisions that constitute the "Constitution of Canada".