Legal Position on Patriation -
Questions and Answers

Q. Is the Government of Canada satisfied that it can legally proceed, as proposed, with a patriation measure, an amendment formula, and a Charter, without approval of all the provinces?

A. Yes. As we see it, the position is as follows.

(1) The two Houses of Parliament are perfectly entitled to pass a resolution on this or any other subject. There are no legal limitations on adopting resolutions.

(2) The British Parliament retains full legal sovereignty over the entrenched parts of our Constitution. That sovereignty was preserved by the Statute of Westminster, 1931.

(3) The well-established British convention is that if the two Houses of the Parliament of Canada request an amendment to our constitution, the British Parliament will enact it. They do not act on the request or advice of the provinces.

(4) There is no convention in Canada that says that the federal Parliament should not request patriation, etc. without full provincial agreement. There is no precedent for this situation. Past practice has varied a great deal concerning amendments affecting the provinces. The provinces may argue that there is such a convention and that it is "illegal" to act without unanimous provincial agreement. Even if they attempt to show that there is such a convention, conventions are rules of political conduct, not rules of law.

Moreover, we have tried to get agreement with the provinces for 53 years - ever since the Balfour Declaration of 1926 said that we are sovereign in fact - and agreement has been impossible. Federal-provincial discussions on patriation and an amendment formula have been held unsuccessfully

- in 10 different attempts to resolve the problem including
  - 13 first ministers meetings
  - 17 ministerial meetings
  - numerous meetings of officials
- under 6 Prime Ministers (2 Conservative, 4 Liberal).

Even constitutional conventions have to change with circumstances when they are shown to be unworkable!

Q. Does the federal government intend to refer to the Supreme Court the question of the validity of its unilateral patriation action? If not, why not?

/see p.3 for possible question about a reference at the request of the provinces/

A. No.

(1) You only refer questions where there is serious doubt about the validity of action proposed.

(2) This would be a very difficult issue for the Court to deal with. The main argument the provinces appear to be making is that such action is contrary to Canadian constitutional conventions, but those are rules of political practice, not rules of law. The Court would have to try to say what the political practice is or what it should be.

(3) Such a reference would be unnecessary and could delay the whole process. The people of Canada want action now. If anybody thinks they have some case to make in Court against it, they can certainly try to do so. But you don't hold up legislation or government action every time somebody, somewhere, thinks he can make some legal argument against it.

(4) We have said that we are prepared to consider changes in the resolution as a result of its study in the Joint Committee and the debates in Parliament. It would not make sense for the Court to be considering the legality of something which is subject to change.

Q. If the provinces request the federal government to refer the validity of its patriation action to the Supreme Court, what will the government do?

A. We did not think it necessary to take a reference, ourselves. As I understand the decision of the 5 premiers in Toronto on October 14, they do not intend to ask us to take such a reference, but plan to initiate some action on their own.

Q. What will the government do if the provinces take one or more references to provincial courts? Will you hold up further proceedings with the Joint Address until these references are over? Will the federal government take part in proceedings before the provincial courts?

A. I don't foresee us holding up action in Parliament just because some province thinks it needs to consult its court. At that rate we could wait for years until every province had had one or more references on this question. If we held up action in Parliament every time some province wanted to take a reference to its courts about something we are considering here, Parliament could be effectively obstructed by one or more provinces from doing anything. It is also premature for the provinces to refer the resolution to their courts because it is subject to change here in Parliament. They may be asking completely hypothetical questions.

As for federal participation, we would have to consider all the circumstances, including the nature of the questions and whether they really raise any legal issue.

Q. Do you think the British government and Parliament will refuse to proceed with patriation if the provinces are challenging the legal validity in Canada?

A. I am confident the British government will act in Canadian matters on the advice of the Government of Canada, on legal issues as well as on other matters. It is the way in which relations have been carried on in the past concerning our constitutional affairs.

Q. Has the Supreme Court not already decided in the Senate Reference (December, 1979) that the Parliament of Canada cannot amend the entrenched parts of the Constitution without the consent of the provinces?

A. (1) The Supreme Court dealt in that case with the legislative authority of the Parliament of Canada. The Court said that this Parliament did not have the power under s.91/1/ of the B.N.A. Act to make such amendments - only the British Parliament has such jurisdiction. What is involved now is a proposal for an amendment by the British Parliament which, as the Supreme Court has confirmed, has the sole jurisdiction to enact it.

(2) The Supreme Court did not decide the question of what amendments the two Houses of the Parliament of Canada can request from Westminster. It only dealt with what the Parliament of Canada can enact under the authority of s.91/1/ of the B.N.A. Act.

Q. What position will the government take in the Manuel case in B.C. where some B.C. Indian chiefs are suing the government in the Federal Court for a declaration that patriation should not proceed unless native peoples agree?

A. As that is a matter already before the court I should not say much. However, as I understand it, the concern of the plaintiffs in that case is about a possible change in the role of the Queen. The action was started before our proposed resolution was made public. The proposed resolution does not in any way affect the role of the Queen. It only affects the role of the British Parliament.

Q. What about Newfoundland's argument that it joined Confederation by agreement and the agreement can't be changed unilaterally?

A. By the Terms of Union Newfoundland became a province like all the others, subject to certain special terms that are not affected by our proposals.

Newfoundland can hardly insist that constitutional change is impossible without unanimous agreement. It was brought into Confederation without the agreement of any other province. Yet Quebec's border with Labrador was confirmed by the Terms of Union, and the interests of all provinces were affected by changes such as the addition of Senators and M.P.'s.

It is true that s.146 of the B.N.A. Act contemplated admission of Newfoundland by Imperial Order in Council at the request only of its legislature and of the Parliament of Canada. But that was no longer relevant in 1949 as Newfoundland was under British trusteeship because of its financial difficulties and ithad no legislature to make such a request. Also, by 1949 the "conventions" that the provinces now argue for should have required the consent of other provinces to the B.N.A. Act, 1949 that admitted Newfoundland.