HOUSE OF COMMONS

First Report from the

FOREIGN AFFAIRS COMMITTEE

Session 1980-81

BRITISH NORTH AMERICA ACTS: THE ROLE OF PARLIAMENT

Together with Appendices thereto; part of the Proceedings of the Committee relating to the Report; and the Minutes of Evidence taken before the Committee on 12 November in the last Session, and on 3 and 10 December, with Appendices.

VOLUME I

Report (together with Appendices thereto)

Ordered by The House of Commons *to be printed*
21 January 1981

LONDON
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£4.60 net

(*for Evidence and Appendices thereto see* Volume II, HC 42 I & II)

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The Foreign Affairs Committee is appointed under SO No 86A to examine the expenditure, administration and policy of the Foreign and Commonwealth Office and of associated public bodies.

The Committee consists of eleven Members, of whom the quorum is three. Unless the House otherwise orders, all Members nominated to the Committee continue to be members of it for the remainder of the Parliament.

The Committee has power:

(a) to send for persons, papers and records, to sit notwithstanding any adjournment of the House, to adjourn from place to place, and to report from time to time:

(b) to appoint persons with technical knowledge either to supply information which is not readily available or to elucidate matters of complexity within the Committee's order of reference.

The Committee has power to appoint one sub-committee and to report from time to time the minutes of evidence taken before it. The sub-committee has power to send for persons , papers and records , to sit notwithstanding any adjournment of the House, and to adjourn from place to place. It has a quorum of three.

The membership of the Committee during this inquiry was as follows:

Sir Anthony Kershaw (Chairman)

Miss Betty Boothroyd	Mr Frank Hooley
Mr Christopher Brocklebank-Fowler	Mr Kevin McNamara
Mr Eric Deakins	Mr Peter Mills
Mr Anthony Grant	Sir Anthony Royle
Mr Eldon Griffiths	Mr Nigel Spearing

NOTE

In the Report, references to Appendices to the Report are indicated by the word "Appendix" followed by the reference letter of the Appendix concerned and a page number in roman numerals; references to the Minutes of Evidence are indicated by the letter "Q" followed by the number of the Question referred to . References to Memoranda included in the Minutes of Evidence are indicated by the word "Minutes" followed by the number of the page referred to. References to Memoranda included in the Appendices to the Minutes of Evidence are indicated by the word "Appendix" followed by the number of the Appendix referred to.

The cost of preparing for publication the Shorthand Minutes of Evidence taken before the Committee was £440.16.

The cost of printing and publishing this Report is estimated by Her Majesty's Stationery Office at £

FIRST REPORT FROM THE FOREIGN AFFAIRS COMMITTEE

FIRST REPORT

The Foreign Affairs Committee have agreed to the following Report:

BRITISH NORTH AMERICA ACTS:
THE ROLE OF PARLIAMENT

Note: Throughout the Report, emphases in quotations have been added by us, except where otherwise indicated.

PART A

Introduction

Terms of reference and procedure

1. Your Committee decided, on 5 November 1980, to inquire into the role of the United Kingdom Parliament in relation to the British North America Acts (BNA Acts), and to report. In a Press Notice on the same day we asked for written evide nce from interested persons and bodies as soon as possible. In a subsequent notice we explained that evidence should relate specifically to the UK Parliament's legal and constitutional responsibilities and to no other matter 1, and that it should be submitted by the end of November at latest. We thank all those who made submissions to us, including the many individuals (mostly from Canada) who took the trouble to write to us 2. We list in Appendix C those who submitted memoranda to us; some of these memoranda , including those from the governments of five Canadian Provinces, are published with this Report 3.

2. We heard oral evidence on three occasions, all of them in public and in amplification of written evidence previously submitted to us 4:

> on November 12 from Mr J R Freeland, CMG, Second Legal Adviser, Foreign and Commonwealth Office (FCO), and other FCO officials;
>
> on December 3 from Dr Geoffrey Marshall, Lecturer in Politics, Oxford University, and Fellow of Queen's College, Oxford;
>
> on December 10 from Professor H W R Wade, QC, Master of Gonville and Caius College, Cambridge, and Professor of English Law, Cambridge University; from Mr E Lauterpacht, QC, Lecturer in Law, Cambridge University, and Fellow of Trinity College, Cambridge; and from the Hon. Nicholas Ridley, MP, Minister of State, FCO, and FCO officials.

3. We are grateful to the witnesses for their assistance; we particularly thank the FCO for the detailed historical and other information that they provided in answer to our requests. We appointed as specialist adviser for this inquiry Dr J M Finnis, Reader in the Laws of the British Commonwealth and the United States, Oxford University, and Fellow of University College, Oxford. We record our gratitude for his invaluable advice and assistance.

The purpose of our inquiry

4. The Canadian Government have been vigorously arguing, since the beginning of October 1980, that

> "the British Parliament or government *may not look behind any federal request* for amendment, including a request for patriation of th e Canadian constitution. Whatever role the Canadian provinces might play in consti?tutional amendments is a matter of no consequence as far as the UK Government and Parliament are concerned" 5.

But the same Canadian Government document, in the preceding sentence, also said: "The British Parliament is bound to act in accordance with a proper request from the federal government ..." 6. So our first question was, and remains: Under what conditions is a request from the Canadian Government a proper request?

5. At the same time, our attention was directed by the FCO to a series of Ministerial statements in the UK Parliament 7. These have, as their common thread, the formula:

> "If a request to effect such a change were to be received from the Parliament of Canada it would be *in accordance with precedent* for the United Kingdom Government to introduce in Paliament, and for Parliament to enact, appropriate legislation in compliance with the request".

So we were led to ask: What are the precedents, in relation to requests from Canada? Is there a significant difference between the UK Ministers' references to requests from the Canadian *Parliament* and the Canadian Government's references to requests from the Canadian *Government*? If there is a significant difference, does it reflect a convention, requiring that requests, to be "proper", must have the support of the Parliament (Senate as well as House of Commons) of Canada? Ifthat is a convention recognised by the UK Government, are there other conventions defining what counts as a proper request from Canada? How and when did such conventions arise? If a convention or principle is created, or becomes recognised, by action and opinion in Canada, is it to be taken into account by the UK Government and Parliament? And, even if it is to be taken into account in the UK, does such a principle of the Canadian constitution *determine* the responsibilities of (or "bind") the UK Parliament?

6. The fundamental question we had to consider is the subject of Chapter VI of this Report: Is the UK Parliament bound, by convention or principle, to act automatically on any request from the Canadian Parliament for amendment or patriation of the BNA Acts? In view of the weight of evidence against an affirmative answer to that question, it became necessary to consider the further question, discussed in Chapter VII : Is it correct to say that the UK Parliament when requested to enact constitutional changes which would directly affect Canadian Federal-Provincial relations, should not accede to the request unless it is concurred m by all the Provinces directly affected?

The nature of the inquiry

7. Our inquiry was, inevitably, an unusual one. It involved an examination of matters of law, custom, convention and practice. And it involved an exam?ination of the constitutional system of Canada, an independent and sovereign state and fellow-Member of the Commonwealth. But some such inquiry is appropnate, because-anachromstic as the law may be considered to be-the UK Parliament retains in law the unchallenged power and duty to enact amendments to fundamental parts of Canada's constitution. Any improper exercise of that power, or evasion of that duty, would amount to a violation both of the constitutional system of Canada and of correct relations between the UK and Canada. Lest it blunder into such a violation, the UK Parliament should take steps to inform itself fully, exactly, and in good time, about the scope and content of its role. That is why the Committee undertook the inquiry.

8. This is not the first time that a parliamentary committee has investigated the conshtutwnal pnnciples and conventions relating to requests for UK legislation made by authori ties in an independent and federal Member of the Commonwealth. In March-May 1935, a Joint Committee of the House of Lords and the House of Commons considered a Petition of the State of Western Australia requesting the enactment by the UK Parliament of a Bill to effect the secession of Western Australia from the Commonwealth of Australia. At that time, as is still the case today, each Australian State had the right (by reason of the UK Parliaments conshtutwnal practice confirmed in the Statute of Westminster 1931, s.9(2)) to request the UK Parliament to legislate on matters within the authority of the State 8. It was therefore necessary for the Joint Committee to investigate the

constitutional propriety of this particular request. The Joint Committee heard argument and evidence, from both the Commonwealth of Australia and the State of Western Australia, about the "*long established and clearly understood principles*" 9 and "*contentions of constitutional practice*" 10 *concerning the exercise of the UK Parltament's nght to legislate for self-governing territories* such as Australia. It also considered the "all-pervading division of powers between the Commonwealth [of Australia], on the one hand, as a separate and integral national authority covering the whole area of Australia, sovereign within the ambit of its powers, and the States, on the other hand, as political entities Within that area, each State sovereign within the ambit of its respective powers" 11. The purpose of these mqumes was to enable the Joint Committee to advise the UK Parliament whether the requested legislation, which was certainly within Parliament's "competence in the strict legal sense", was nevertheless (as the Joint Committee decided) "*outside [Parliament's] competence, if the established constitutional conventions ... are to be observed, as observed they must be*" 12. The Western Australian petition, in the Joint Committee's view, was not in accord with the division of sovereignty within the Australian federation, and therefore could not, constitutionally, be acceded to by the UK Parliament.

9. Your Committee did not seek to arrive at a final conclusion on any disputed question. Unlike the Joint Committee of 1935, therefore, we did not hear counsel or indeed anyone as representing any "party" to a dispute. We do not regard our inquiry or Report as pre-empting any further inquiry the House might wish to make in relation to any Bill that may be brought before it. Our role has been to assemble and analyse evidence, so that we can report to the House some conclusions and a recommendation about its responsibilities in relation to the Canadian constitutional system, together with some account of the proposals 13 which the House may be called upon to consider in the near future.

10. Your Committee decided not to hear any representatives of any parties to the present constitutional discussions in Canada. However, five Canadian Provinces submitted documents written specifically for the Committee; all these documents were helpful and four of them were elaborate and documented . In addition to the Canadian Government's background paper (referred to in para 4 above), which we received in evidence from the FCO, we also secured a copy of the written argument (factum, dated 26 November 1980) submitted by the Attorney-General of Canada to the Manitoba Court of Appeal in the Reference re Amendment of the Constitution of Canada currently before that Court. We print relevant parts of th at document in the Appendices to the Minutes of Evidence 14 . We also made a survey of published writings of constitutional authorities favourable to the position now argued for by the Canadian Government in relation to the role of the UK Parliament in amending the Canadian constitution 15.

11. If the current litigation in Canada 16 is pursued , the arguments on both sides will doubtless be refined and deepened. But we think that the substantial body of material and argument made available to us is sufficient for the purposes of reporting to the House our view of its role.

The structure of our Report

12. The main body of our Report is Part B, consisting of seven Chapters (III-IX). Of these, the first three provide a background for consideration of the two fundamental questions: (i) Is the UK Parliament bound to act automatically on any request from the Canadian Parliament for amendment or patriation of the BNA Acts? (ii) Is there a constitutional requirement that the UK Parliament should not accede to certain requests without the concurrence of all the Provinces?

Chapter III (paras 16-20) briefly outlines relevant facts abo ut the BNA Acts and the formation of Canada, the Statute of Westminster 1931, and the amendments made to the BNA acts by the UK Parliament since 1867.

Chapter IV (paras 21-31) briefly describes the proposals for patriation and constitutional amendment currently under scrutiny in the Canadian Parliament and certain Canadian courts.

Chapter V (paras 32-55) provides an historical introduction to the fundamental discussions in Chapters VI and VII. It deals with the bearing of the federal nature of Canada's constitution on the procedures for constitutional amendment as acknowledged in (i) a recent decision of the Canadian Supreme Court, (ii) certain actions and

statements by the UK authorities, and (iii) a Canadian White Paper concurred in by the Federal Government and all Provincial Governments in 1965.

Chapter VI (paras 56-96) examines the first fundamental question, whether there is a requirement of automatic UK action on Canadian Federal requests relating to the BNA Acts.

Chapter VII (paras 97-115) examines the second fundamental question , whether there is a requirement that the UK Parliament should not accede to certain requests without unanimous Provincial requests . It also identifies the principle that the UK authorities should act on the clearly expressed wishes of Canada as a federally structured whole, and considers how those wishes of the Canadian people can be recognized.

Chapter VIII (paras 116-127) deals with some special problems: (i) Indian, Unuit and other native rights and claims; (ii) the possibilities of unilateral patriation or unilateral amendment of requests; and (iii) the relevance of current court proceedings in Canada concerning some or all of the above matters.

Chapter IX (paras 125-132) summarises some of the main arguments.

13. Because our Report is long and detailed, we have stated our Conclusions and Recommendation in the following two paragraphs. In each Conclusion, we have indicated the paragraphs of the Report where it will be found in context. We think that Part B of this Report is necessary for a full understanding of our Conclusions and our reasons for arriving at them. **Part B concludes with a chapter, Chapter IX, summarising very briefly some of those reasons.**

II. CONCLUSIONS AND RECOMMENDATION

Conclusions

14. The primary desire of the UK Government and Parliament is to maintain and enhance the warm and friendly relations with Canada which have subsisted over many decades and through two World Wars. The UK Parliament cannot welcome the prospect of retaining indefinitely a role that might embroil it in disagreements within Canada over matters which, after all, are for the Canadian people to resolve. We are deeply concerned that the present constitutional arrangements in relation to Canada could become a hindrance to good relations between our two countries. Nevertheless, we have felt obliged to consider the legal and constitutional aspects of the UK Parliament's anachronistic but surviving role in relation to Canada. This has involved us, inevitably, in an examination of some past events and statements in Canada and some aspects of proposals currently under discussion in Canada. On the legal and constitutional questions concerning the role of the UK Parliament, our Conclusions are as follows:

> 1. The UK Parliament's exclusive power to amend fundamental parts of Canada's constitution has been retained, since 1931, at the request of Canada. That request was made by the Federal Government and Parliament and expressly recited that the governments of all the Provinces approved of the provision (section 7(1) of the Statute of Westminster 1931) which gives effect to that request [paras 44, 65].
>
> 2. However desirable it may be that this power of the UK Parliament should be terminated, no such termination is constitutionally possible without the request and consent of Canada [para 119].
>
> 3. The UK Parliament's powers in relation to the Canadian constitution can be reconciled with Canada's sovereign independence only if they are excercised in accord with constitutional requirements [para 86].
>
> 4. It would be in accord with the established constitutional position for the UK Government and Parliament to take account of the federal character of Canada's constitutional system, when considering how to respond to a request for amendment or patriation of the Canadian constitution [paras 83, 113].
>
> 5. The precedents leave the UK Government and Parliament constitutionally (not merely legally or technically) free to decide that the making of a particular request is so out of line with the established

constitutional position that the UK Parliament can rightly decline to act on that request [paras 84, 113].

6. It would not be in accord with the established constitutional position for the UK Government and Parliament to accept unconditionally the constitutional propriety of every request coming from the Canadian Parliament [paras 74, 96].

7. There is no rule, principle or convention that the UK Parliament, when requested to enact constitutional amendments directly affecting Canadian Federal-Provincial relations, should accede to that request only if it is concurred in by all the Provinces directly affected [paras 107, 111].

8. The UK Parliament's fundamental role in these matters is to decide whether or not a request conveys the clearly expressed wishes of Canada as a whole, bearing in mind the federal character of the Canadian constitutional system [paras 107, 111].

9. Where a requested amendment or patriation would directly affect the federal structure of Canada, and the opposition of Provincial governments and legislatures is officially represented to the UK Government or Parliament, the UK Parliament is bound to exercise its best judgment in deciding whether the request, in all the circumstances, conveys the clearly expressed wishes of Canada as a federally structured whole [para 114].

10. In those circumstances, it would be proper for the UK Parliament to decide that the request did not convey the clearly expressed wishes of Canada as a federally structured whole because it did not enjoy a sufficient level and distribution of Provincial concurrence. But Parliament would be justified in regarding as sufficient a level and distribution of Provincial concurrence commensurate with that required by the least demanding of the formulae for a post -patriation amendment (similarly affecting that federal structure): which have been put forward by the Canadian authorities: see para 114.

11. Notwithstanding the UK Parliament's undoubted legal powers, it would not be in accord with the established constitutional position for the UK Parliament:

(i) to deliberate about the position of Indians or other indigenous peoples in Canada [para 117];

(ii) to undertake any deliberation about the suitability for the peoples of Canada of a requested constitutional package [paras 113, 118];

(iii) to patriate the Canadian constitution unilaterally, with or without a post-patriation amending formula [paras 119-121];

(iv) to enact a requested constitutional package with amendments not con?sented to by the Canadian Government and Parliament [para 122];

(v) to fail to give a proper request priority in Parliament's timetable [para 57]. In the exercise of its undoubted legal powers, and notwithstanding the above Conclusions, the UK Parliament might reasonably consider setting a term of years beyond which this constitutional position could not be expected to continue.

12. The question how far the UK Parliament's response to a request ought to be affected by the existence of substantial litigation in the Canadian courts is a question best left to be considered in the light of all the circumstances at the time when such request is received in London [paras 123, 127].

Recommendation

15. Your Committee recommend that Her Majesty's Government in the United Kingdom draw to the attention of the Government of Canada this Committee's view that the considerations set out in Chapters V to VIII of this Report support the Conclusions set out above, and that that view, together with the other considerations and conclusions in the Report, has been reported to the House.

PART B

III. CONSTITUTIONAL BACKGROUND

Formation of Canada

16. The British North America Act 1867 (UK) united three British colonies (Canada, Nova Scotia and New Brunswick) into one federal country under the name of Canada. This uniting is traditionally called Confederation 17. The Act divided the former colony of Canada into two Provinces: Ontario (which before 1840 was the Province of Upper Canada) and Quebec (formerly Lower Canada); these two Provinces together with *Nova Scotia* and *New Brunswick* made up the four Provinces of the new federation. Pursuant to section 146 of the BNA Act, to the Rupert's Land Act 1868 (UK), and to the Manitoba Act 1870 (Canada), the Province of *Manitoba* was formed in 1870 out of part of Rupert's Land (formerly administered, like the North-Western Territory: by the Hudson's Bay Company); the remainder of Rupert's Land was united with the North-Western Territory as a territory of the federation to be known as the Northwest Territories. Pursuant to the BNA Act 1867, s. 146, the colonies of British Columbia and Prince Edward Island were admitted to the federation in 1871 and 1873 respectively, becoming the Provinces of *British Columbia* and *Prince Edward Island*. The BNA Act 1871 (UK) authorised the creation of additional Provinces out of the territories between British Columbia and Manitoba. These territories (and all other British territories in North America save Newfoundland) were conceded to Canada by UK Order in Council in 1880. In 1905, by virtue of Acts of the Canadian Parliament, the Provinces of *Alberta* and *Saskatchewan* were created from those territories. By virtue of the BNA Act 1949 (UK), *Newfoundland* became Canada's tenth Province on 31st March 1949.

Basic constitutional structure

17. The BNA 1867 makes basic constitutional provision not only for Canada but also in outline, for the Provinces. In particular, it provides for the appointment of the Lieutenant Governor in each Province by the Canadian Government, and for his salary to be fixed by the Canadian Parliament. It also provides for the legislatures of Ontario and Quebec; but these provisions, and all others as to the constitutions of Provinces (save as to the office of Lieutenant Governor), can be amended by the legislature of the respective Province. This power of a Provincial legislature to amend the constitution of its Province is one of the 16 heads of exclusive Provincial legislative power listed in section 92 of the BNA Act. Sections 91 and 92 of the BNA Act contain the basic distribution of legislative power between the Federal and Provincial legislatures. The interpretation and effect of that distribution have been matters of judicial and political controversy from 1867 to the present day. Until 1949, the final judicial arbiter was the Judicial Committee of the Privy Council, sitting in London; since then, It has been the Supreme Court of Canada. The Government of Canada appoints not only the judges of the Canadian Supreme Court but also the judges of the superior courts in each Province; their salaries are fixed by the Canadian Parliament.

18. Section 91 of the BNA Act 1867 conferred on the Canadian Parliament not only a paramount legislative power in relation to the many classes of subject matter enumerated in that section, but also a general power to make laws for the peace, order and good government of Canada, in relation to all matters not committed by the Act to the Provincial legislatures. That general legislative power has received varying judicial interpretations, sometimes quite restrictive. But it is undisputed that it did not confer any power to amend the BNA Acts themselves; these remained immune from repeal by the Parliament of Canada, above all by reason of the Colonial Laws Validity Act 1865 18.

Statute of Westminster and amendment of BNA Acts

19. The Statute of Westminster was enacted in 1931 to give legal form and effect to the equal, autonomous and independent status of Canada, Australia New Zealand, South Africa, the Irish Free State and Newfoundland. It conferred on all these countries, including Canada and its Provincial legislatures, the power to override UK statutes 19. However, in the case of Canada and at the request of Canada, special provision was made to preserve and except the BNA Acts 1867 to 1930:

"7. - (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts , 1867 to 1930, or any order, rule or regulation made thereunder" 20.

In strict law, section 7(1) no doubt has the further implication that section 4 of the Statute of Westminster does not apply to a UK Act amending or repealing the BNA Acts 1867 to 1930, ie that such an Act could be validly enacted without the request or consent of Canada 21. But any such unrequested enactment would be a gross breach of the conventions recited in, but not created by, the preamble to the Statute of Westminster: see para 119 below. All amendments 22 to the BNA Act by the UK since 1867 have been enacted at the request of Canada.

20. There have been about 23 twenty such amendments, notably in 1868, 1871, 1875, 1886, 1895, 1907, 1915, 1916, 1930, 1931 (the Statute of Westminster), 1940, 1943, 1946, 1949 (twice), 1951 , 1960 and 1964. The subject-matter of these amendments by the UK Parliament is briefly indicated in the Minutes of Evidence, together with an outline of the procedures followed in securing them 24. The BNA (No 2) Act 1949 conferred on the Parliament of Canada the power (now set out in section 91(1) of the BNA Acts) to amend "the Constitution of Canada" except as regards (i) classes of subjects assigned exclusively to the legislatures of the Provinces, (ii) the rights or privileges granted or secured to the legislature or government of a Province, (iii) the rights or privileges granted or secured to any class of persons with respect to schools, (iv) the use of the English or the French language, and (v) requirements that there be a session of the Canadian Parliament at least once a year and that no House of Commons continue for more than five years (save in defined circumstances of emergency). The meaning of s 91(1) was the subject of an important opinion of the Supreme Court of Canada in December 1979. We discuss that opinion (the Senate case) in paras 32-36 below. That opinion, for reasons that are significant for our inquiry, gives to the power of constitutional amendment conferred on the Canadian Parliament in 1949 a more restrictive interpretation than may have been generally anticipated. That is not to say that the present efforts to patriate the BNA Acts arise out of a reaction to that restrictive opinion. It is obvious that, on any view, the five listed exceptions to the Canadian Parliament's amending powers imply that a wide field of potential constitutional reform remains outside the power of that Parliament. There have been strenuous and persistent political efforts in Canada, both before and after 1949, to arrive at an acceptable basis for patriation; see paras 21-22 below.

IV. THE PROPOSED "CANADA ACT" AND "CONSTITUTION ACT, 1980"

"*Patriation*"

21. "Patriation" is a term popularly used nowadays to refer to the process of (i) terminating, by UK Act, the power of the UK Parliament to make laws which extend to Canada as part of Canadian law, together with (ii) the enactment, by that final UK statute, of provisions for "post-patriation" amendment within Canada of all parts of the Canadian constitutional system. The first aspect of that process involves, inter alia, repealing section 7(1) of the Statute of Westminster, so that the Colonial Laws Validity Act ceases for all purposes to apply to Canadian enactments. The second aspect involves some amendment, whether by addition alone or by addition and partial repeal, of the BNA Acts themselves. Analogies to both aspects are to be found, partly expressly and partly by authorisation, in the many Independence Acts enacted by the UK Parliament during the past twenty years. But there can be no question of any Independence Act, as such, for Canada. Canada is already independent. Hence the process for Canada is called patriation. But it should not be supposed that patriation involves transferring the BNA Acts themselves from the UK to Canada; they are already a part, indeed the basic part, of the law of Canada. Patriation involves simply the termination of a power now held by a UK institution, and the creation of an equivalent but defined power to be exercised henceforth by institutions and processes in Canada. The two aspects of the process must be accomplished together; the first without the second would deprive Canada of any legal provision for amending significant parts of the Canadian constitutional system 25.

22. From the outset, in 1927 (in the wake of the Imperial Conference of 1926), political efforts in Canada have concentrated on the second phase, the problem of settling a procedure for post-patriation amendments. It has been universally accepted since 1931 that the UK Parliament would terminate its powers as soon as properly requested to do so by Canada. From 1927 to the mid 1970s, at least, it was generally assumed in Canada that such a request would be made only when all the Provinces were agreed with the Federal Government and Parliament on a post-patriation amending formula. From 1927 down to the mid 1960s, at least, it was also a

feature of all formulae. under serious discussion between governments that certain parts of Canada's constitution would be subject to post-patriation amendment only with unanimous concurrence of all the Provinces. The history of discussions on these proposals is briefly set out in the Canadian Government's 1965 White Paper: Minutes pp 43 to 48. Some important post-1965 proposals, moving away from the requirement of unanimity for post-patriation amendments, are discussed in paras 25, 26, 108 and 109 below. But until 1980, inter-governmental discussions have proceeded on the basis that even a post-patriation formula involving no requirement of unanimity must be unanimously accepted by all Provincial governments before any request be made by the Federal Parliament and Government for enactment of that formula by the UK Parliament.

23. The proposals launched by the present Canadian Government on 2 October 1980 involve a radically new departure: a request to be made to the UK Parliament for patriation (in both its aspects) even without the concurrence of all (or even most) of the Provinces. These proposals also involve, as we shall explain, a further novel feature: a request to be made to the UK for enactment, even without the concurrence of the Provinces, of a Charter of Rights and Freedoms enforceable by the courts against Federal and Provincial governments and legislatures alike 26.

Method of patriation proposed by the Canadian Government

24. Patriation would be accomplished by (i) terminating the power of the UK Parliament to legislate for Canada and (ii) enacting provisions for the post-patriation amendment of the Canadian constitution. As to the first aspect, the power of the UK Parliament would be terminated by section 2 of a UK Act to be called the "Canada Act" 27. Section 1 of the "Canada Act" would enact the "Constitution Act, 1980 28.

Methods of post-patriation amendment proposed by Canadian Government

25. As to the second aspect of patriation, Part IV (sections 33-40) of the "Constitution Act, 1980" would provide (a) an interim procedure for amending the Constitution of Canada, applicable until the "general" or permanent procedure, provided for by Part V, came into force; (b) a mechanism whereby the proposed permanent procedure could be amended or replaced before it came into force. The gist of these proposals is as follows. The interim procedure for amendment of constitutional provisions applicable to all Provinces would involve the agreement of the Senate and House of Commons and of the legislative assembly of *every* Province-ie it would require unanimity of legislatures in Canada: see sections 33-36. The mechanism provided by sections 38-40 for replacing the proposed permanent procedure would involve the concurrence of the governments or 29 legislatures of at least eight 30 Provinces representing 80 per cent of the population of Canada (secured within two years of the coming into force of the "Constitution Act, 1980"), and the assent of a majority of voters in a Canada-wide referendum (held within two years thereafter). If such a referendum were to occur, as the result of the request of eight 31 or more Provinces, the Federal Government 32 could put to the voters at that referendum its own proposals, as an alternative both to the Provinces' proposal and to the procedure provided for by Part V; if approved by a majority of voters, that Federal proposal, of whatever content, would then take effect in lieu of Part V. The permanent amending procedure provided for by Part V (sections 41-51) would come into force two years after the rest of the "Constitution Act, 1980" came into force, unless within that time the section 38 mechanism had been triggered by the required eight 32 Provincial governments, in which case the permanent procedure approved by the referendum would come into force within six months of the referendum.

26. The permanent general amendment procedure provided for by Part V would involve (stated broadly) the agreement of the House of Commons of Canada and at least six Provinces including Ontario and Quebec, at least two Atlantic Provinces 33 having a combined majority of the population of all the Atlantic Provinces 34 and at least two Western Provinces 35 having a combined majority of the population of all the Western Provinces: see section 41. This Provincial agreement could be signified either by the legislative assemblies of the requisite number and distribution of Provinces (section 41(1)), or by a majority of voters in those Provinces, voting in a Canada-wide referendum initiated by the Senate and House of Commons (section 42) 36.

Charter of Rights proposed by the Canadian Government

27. Part I of the "Constitution Act, 1980" provides for a Canadian Charter of Rights and Freedoms (sections 1-24). By virtue of sections 25 and 29(1), this Charter would prevail over any inconsistent law, Federal or Provincial 37. The courts of Canada would have power to declare and hold such laws "inoperative and of no force or effect" to the extent of the inconsistency.

Effect of proposals on Provincial powers

28. The Canadian Government have argued 38 that "the proposed United Kingdom legislation in no way upsets the existing equilibrium as between federal and provincial governments or federal and provincial legislatures". They contend that the post-patriation amending formulae would "strengthen the legal position of the provinces" because, after patriation, "the federal government and Parliament will no longer have [the] sole discretion" to request and consent to the amendment of all parts of the Canadian constitution. The formulae "would affect federal-provincial relationships by delineating federal-provincial roles in the amending process, but ... not in a way that would be detrimental to provincial interests". As to the proposed Charter of Rights and Freedoms, it "would not involve any transfer of powers between federal and provincial authorities". "So far as the minority education rights are concerned, these are simply the development and entrenchment of a principle agreed to by all provinces" at Premiers' conferences in 1977 and 1978.

29. Some Provincial governments have argued that the proposed legislation would affect Federal-Provincial relationships in a variety of ways. It is said 39 that the effect of the justiciable Charter of Rights is to modify substantially the system of *parliamentary* government hitherto in force in the Provinces; henceforth it would be courts and not elected members of the legislatures who would decide what rights and limitations on rights are (in the words of section 1 of the Charter) "generally accepted in a free and democratic society with a parliamentary system of government" 40. It is said that section 3 of the Charter would limit the existing power of Provincial legislatures to determine the qualifications of voters for and members of those legislatures. Sections 4 and 5 are said to violate Provincial control over the duration, and frequency of sittings, of Provincial legislative assemblies. Section 6(2)(b) is said to restrict Provincial legislative authority "to legislate as to who may seek employment on a local project within a province and is in conflict with provincial control over professional qualifications" 41 . Section 15 is said to limit the power of Provincial legislatures to authorise discrimination on bases considered reasonable by those legislatures (eg mandatory retiring age). Section 23 is said to impose obligations as to the language of instruction in schools, which at present is a matter for Provincial decision.

30. Some Provincial governments further argue that the proposal (section 44) that constitutional amendments be possible without the approval of the Senate curtails the power of that House in a manner which "affects federal-provincial relationships" as that phrase was understood and used by the Canadian Supreme Court in the 1979 Senate case (see paras 33-37 below). The effect of that decision would be undermined, it is also said, by the proposal in section 48 to confer on the Parliament of Canada the power which, according to the Senate case, it at present lacks, of unilaterally abolishing the Senate. As to the interim mechanism for adopting a modified or new permanent post-patriation amending procedure, it is argued that:

> "the proposed legislation abrogates the rights of provincial legislatures and governments to be involved. By providing that the formula to be adopted is that approved by a majority of persons voting nationally, it is possible for a formula rejected by the people of nine provinces to be adopted by reason of approval by the people of one province by a large majority. Such formula might require no provincial participation in future amendment, and need not have the approval even of Parliament, as the Government of Canada can substitute for the formula contained in section 41(1)(b) of the proposed legislation any alternative, which becomes law if approved in the national referendum. Parliament and the legislatures can be by-passed: majorities in a majority of the provinces can be by-passed. Federal provincial relationships can be drastically altered" 42.

As to the "permanent" general amending formula proposed in Part V, this is said to interfere with the rights of Provincial legislatures and governments, since the decision whether to amend by the referendum procedure, rather than by agreement of the Provincial legislatures, "is to be made at the federal level alone, as is the formulation of rules for the referendum" 43.

31. The Provincial arguments mentioned in paras 29 and 30 seem to us to raise a strong prima facie case for considering that the Canadian Government's proposals of 2nd October 1980 would, if enacted, directly affect the powers of Provincial legislatures to make laws and would thus directly affect Federal-Provincial relationships in the sense, and for the purposes, which we explain in para 54 below. The arguments mentioned in the three preceding paragraphs are currently sub judice in the Court of Appeal for Manitoba, and may well come before other Provincial courts in the near future. They may also be considered by the Canadian Supreme Court, on appeal or otherwise. Nor should it be overlooked that some or all of the proposed provisions referred to may be amended by the Canadian Parliament before being embodied in the form of a request to the UK Parliament 44.

V. THE UK PARLIAMENT AND CANADA'S FEDERAL STRUCTURE

Amendment procedures and the federal principle

32. In his introduction to the important Canadian White Paper of February 1965 (see para 48 below) , at a time when agreement on a formula both for patriation and for post-patriation amendment of the Canadian constitution seemed imminent , the then Prime Minister of Canada, Mr Pearson , wrote:

> "*In any federation*, the two most critical questions are the distribution of powers between the two levels of government and *the manner in which the constitution can be changed*. A federation is necessarily a delicate balance between conflicting considerations and interests. It is to be expected that the most delicate of all questions should be the way in which such a balance might be altered" 45.

In the body of the 1965 White Paper (a document whose origins and importance we discuss in para 48 below), the Canadian Government further acknowledged the important bearing of the federal principle on the problem of constitutional amendment:

> "In a federal state, there are particular considerations. that add to the importance of ... built-in certainty and stability . A federal system is one in which the powers of all legislatures and governments are limited not only by definition but by their relationship to each other. *The very nature of the federation requires that the rights and powers of its constituent units be protected.*" 46.

In considering the existing processes for amendment of the Canadian Constitution, and the UK Parliament's role in those processes, it is essential to bear in mind the federal character of Canada's constitutional system.

The Senate case

33. The importance of the federal character of Canada's constitutional system for an understanding of the amending process in that system was underlined, in December 1979, in a unanimous advisory opinion of the Chief Justice and seven other Judges of the Supreme Court of Canada 47 . This opinion involved an interpretation of the BNA (No 2) Act 1949 in the light partly of the manner in which its enactment was requested by the Canadian Parliament.

34. In response to questions referred to it by the Canadian Government, the Court answered that the Parliament of Canada cannot amend the BNA Acts so as to abolish the Senate or to change the numbers and proportions of members by whom Provinces and Territories of Canada are represented in the Senate, or to substitute a system of direct popular election to the Senate, or to provide that Bills could become law after a certain delay without the Senate's approval. In arriving at these answers, the Supreme Court had to interpret the BNA (No 2) Act 1949. This UK Act conferred on the Canadian Parliament power to amend "the Constitution of Canada" except as regards five classes of matter: see para 20 above. These five exceptions did *not* explicitly include any protection of the Senate. Nevertheless, the Supreme Court's unanimous answers involve a distinct limitation of the Canadian Parliament's powers of amendment. The Court gives the phrase "the Constitution of Canada" a restricted scope, and finds in the specified exceptions an *implied* protection of the Senate. In arriving at this interpretation of the BNA (No 2) Act 1949 the Court referred frequently to two matters of importance to our present inquiry : (a) the consent or absence of consent of the Provinces to proposed constitutional amendments;

(b) the federal nature of the system created by the BNA Act 1867. In the following two para?graphs we give examples of the Court's references to these two matters.

35. The Court explains the significance of "the federal system created by the Act" of 1867 by referring first to the pream ble to that Act:

> "Whereas the Provinces of Canada, Nova Scotia and New Brunswick, have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom ... ".

Secondly, the Supreme Court quotes from speeches in 1865 by two of the Founders of Confederation. These speeches point out that the Upper House is for the "protection of sectional interests" on the grounds that (as one of the speeches puts it) "the very essence of our compact is that the union shall be federal . . . ". Thirdly, the Court discusses the division of legislative powers which was necessarily involved in "the creation of a federal system in Canada". That division of powers is effected by sections 91 and 92 of the BNA Act 1867. The Court, "bearing in mind the historical background in which the creation of the Senate as part of the federal legislative process was conceived", describes as "apt" and quotes the statement of the Lord Chancellor, Lord Sankey, in a Privy Council decision of 1932:

> "Inasmuch as the Act embodies *a compromise under which the original Provinces agreed to federate*, it is important to keep in mind that preservation of the rights of minorities was the condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the *original contract upon which the federation was founded*, nor is it legitimate that any judicial construction of the provisions of sections 91 and 92 should impose a new and different contract upon the federating bodies" 49.

36. We do not assume that either the Privy Council in 1932 or the Supreme Court of Canada in 1979 were endorsing that particular version of the "compact theory of Confederation" according to which no amendment of the BNA Acts can rightly be made without the consent of all the "parties" to the original contract (as if that contract were simply an ordinary treaty, not the formation of a federation). On the contrary, the Supreme Court plainly recognises that some amendments to the BNA Acts can properly be made without the consent of any of the Provinces. We understand the judicial references to the original contract of federation as peculiarly forceful expressions of the truly federal nature of the Canadian Constitution. Thus the Supreme Court sees the "fundamental features or essential characteristics" of the Senate as "means of ensuring regional and provincial representation in the federal legislative process" ("in order to meet the requirement of the proposed [in 1867] federal system") and therefore as immune from "unilateral action by the Parliament of Canada". The Court pointed out that the BNA (No 2) Act 1949 had been enacted by the UK Parliament "without the consent of the Provinces", and was unwilling to interpret it as conferring on the Federal Parliament the power of "unihiteral action" for which the Canadian Government unsuccessfully contended in the Attorney General's argument before the Court 50.

37. The Supreme Court's insistence on the federal character of Canada' s constitutional system is all the more striking because it led the Court to attribute to the BNA (No 2) Act 1949 a meaning distinctly narrower than had been supposed by the Canadian Government which sponsored that Act in 1949 51. It is not for your Committee to comment on that interpretation. We simply draw

attention to the bases on which the most authoritative exponent of the Canadian constitution approaches the interpretation of that constitution at the present day.

Have the UK authorities taken account of the federal nature of Canada's constitution?

A. The events and statements of 1907

38. The UK Government have from time to time indicated an awareness that the federal nature of Canada's constitutional system may have a bearing on the manner in which the UK Parliament exercises its powers of amending the BNA Acts. For example, in seeking leave of the House to introduce the BNA Bill 1907, the Under-Secretary of State for the Colonies, Mr Churchill, stated that the Government of British Columbia were not satisfied with the Bill's scheme of subsidies from the Federal to the Provincial governments and that the Provincial legislature had:

> "passed a resolution protesting against the settlement being regarded as final and irrevocable. They also laid before His Majesty a petition asking that, in any legislation to give effect to the Ottawa resolutions [of a Federal-Provincial Conference of 1906], the arrangement should not be taken as of a final and irrevocable character. *He did not pretend to go into the merits of the difference on a constitutional question between British Columbia and the Federal Government. We on this side did not know enough to decide upon the merits of the claim. On the other hand , he would be very sorry if it were thought that the action which His Majesty's Government had decided to take meant that they had decided to establish as a precedent that whenever there was a difference on a constitutional question between the Federal Government and one of the provinces , the Imperial Government would always be prepared to accept the Federal point ofview as against the provincial. In deference to the representations of British Columbia* the words 'final and unalterable' applying to the revised scale had been omitted from the Bill" 52.

Your Committee are aware of the various interpretations which have been put upon the events of 1907 and Mr Churchill's speech in particular 53. Here we record it simply as eviden ce of a recognition that th e federal character of Canada's constitution might affect the responsibility and the actions of the UK authorities in relation to that constitution.

39. On 5 June 1907, the Colonial Office had writte n to the Premier of British Columbia:

> "I am directed by the Earl of Elgin [Secretary of State for the Colonies] to inform you that His Lordship has given the most careful consideration to the documents which you presented to him and to the views advanced against the proposed amendment of the British North America Act fixing the scale of payments to be made by the Dominion of Canada to the several Provinces.

2. Lord Elgin fully appreciates the force of the opinion expressed that the British North America Act was the result of *terms of union agreed upon by the contracting Provinces and that its terms cannot be altered merely at the wish of the Dominion Government.*

3. But, in this case, besides the unanimous approval of the Dominion Parliament in which British Columbia is of course represented to the proposed amendment of section 118 of the British North America Act, his Lordship is bound to take into account the fact that at the Conference of 1906 the representatives of all the other Provinces of Canada have concurred ...

4. His Lordship feels therefore that *in view of the unanimity of the Dominion Parliament and of all the Provincial Governments save that of British Columbia*, he would not in the interests of Canada be justified in any effort to override the decision of the Dominion Parliament.

5. I am to add that no mention will be made in the Imperial Act of the settlement being 'final and unalterable', such terms being obviously inappropriate in a legislative enactment ..." 54.

We discuss the significance of the 1907 incident further in paras 55 and 58-60 below.

B. The events and statements of 1929-31

40. The 1907 incident concerned the making of grants at levels to which the Provinces had no constitutionally established prior claim. It occurred 'at a time when the "self-governing Dominions" (as they were described at the Colonial Conference of April-May 1907) 55, although enjoying "powers of self-government and complete

control of domestic affairs . . . as autonomous nations of an Imperial Commonwealth" 56, were not yet completely recognised as fully equal, in constitutional status, to the United Kingdom itself. That full recognition came at the Imperial Conference in October 1926, which defined the position and mutual relation of Great Britain and the Dominions thus:

> "They are autonomous Communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs ...." 57 ?

This declaration necessitated an examination of ways in which the legislative supremacy of the UK Parliament, which was formally embodied in the Colonial Laws Validity Act 1865, could be brought into line with the newly declared equality of status.

41. This examination was carried out by the Conference on the Operation of Dominion Legislation (ODL Conference) from October to December 1929. This Conference settled the main lines of what became the Statute of Westminster 1931. It recommended that the Colonial Laws Validity Act 1865 should cease to apply to any law made by the Parliament of a Dominion , so that a Dominion Parliament could repeal any UK Act extending to that Dominion. But it recog?nised the special problems created by federal constitutions:

> "The federal character of the Constitutions of Canada and Australia ... gives rise to questions which we have not found it possible to leave out of account, inasmuch as they concern self-government in those Dominions" 58.

That was said by way of introduction to the question whether Provincial legislation should continue to be subject to the legislative supremacy of the UK Parliament: that "will be a matter for the *proper authorities in Canada* and in Australia to consider ... " 59. But the Conference also gave attention to "the effect of the acquisition of full legislative powers by the Parliaments of the Dominions possessing federal Constitutions" 60.

42. The ODL Conference Report continued, in the next sentence, as follows:

> "Canada alone among the Dominions has at present no power to amend its Constitution Act without legislation by the Parliament of the United Kingdom . . . . It was pointed out that the question of alternative methods of amendment was a matter for future consideration by the *appropriate Canadian authorities* and that it was desirable therefore to make it clear that the proposed [Statute of Westminster] would effect no change in this respect" 61

The phrase "appropriate Canadian authorities", like the phrase "proper authorities in Canada", seems to us to have been used by the Conference to express its recognition that the federal nature of Canada's constitutional system might properly be regarded as entailing the involvement of the Provincial authorities in Canada in the process of "consideration" leading up to the Statute of Westminster.

43. The Report of the ODL Conference of 1929 was approved by the Imperial Conference of October-November 1930. The relevant section of the Imperial Conference's Report was stated to be based largely on the work of a committee chaired by the Lord Chancellor, Lord Sankey. It recommended the enactment of the Statute of Westminster, and "that with a view to the realisation of this arrangement, Resolutions passed by *both Houses of the Dominion Parliaments* should be forwarded to the United Kingdom", and that "the Statute should contain such further provisions as to its application to any particular Dominion as are requested by *that Dominion*" 62. However, notwithstanding the breadth of the recommendation last quoted, the Conference felt it "necessary" to make further specific provisions for Canada, in relation to the preliminaries to the enactment of the Statute. We will consider the background to this later in our Report (see para 99 below). At the moment, it is sufficient to quote the Conference's conclusions as to Canada:

> "Accordingly, it appeared necessary to provide for two things. In the first place, it was necessary to provide an opportunity for His Majesty's Government in Canada to take such action as might be appropriate to enable the Provinces to present their views. In the second place, it was necessary to provide for the extension of the sections of the proposed Statute to Canada or *for the exclusion of*

> *Canada from this operation after the Provinces had been consulted*. To this end, it seemed desirable to place on record the view that the sections of the Statute relating to the Colonial Laws Validity Act should be so drafted as *not to extend to Canada unless the Statute was enacted in response to such requests as are appropriate to an amendment of the British North America Act*. It also seemed desirable to place on record the view that the sections should *not subsequently be extended to Canada except by an Act of the Parliament of the United Kingdom enacted in response to such requests as are appropriate to an amendment of the British North America Act*" 63

And later, in relation to amendment of Dominion constitutions:

> "It is intended that a section dealing exclusively with the Canadian position will be inserted after the representations of the Provinces have been considered" 64

We do not understand these conclusions of the Imperial Conference of 1930 as establishing or presupposing any rule, principle or convention that the BNA Acts, or any parts of them, could not be altered without the consent of the Provinces. But in our opinion the carefully and cautiously drafted reference to Canada must be understood as intended to leave entirely open the question whether "such requests as are appropriate to an amendment of the BNA Act" mean requests by "the Dominion" or "both Houses of the Dominion Parliament" or, rather, requests by both Houses of the Dominion Parliament with the concurrence of the Provinces. By distinguishing, very deliberately, between the first and the other two phrases quoted in the preceding sentence, the Conference drew attention to the special situation of Canada as a federally structured community.

44. If there had been, in and before 1930, an accepted convention that the Canadian Parliament with or without Provincial concurrence or even consultation could properly request amendment of any and every part of the Canadian constitution and that the UK Parliament should quasi-automatically enact every such requested amendment, there would have been no reason for the Imperial Conference to draw the distinctions which it did so carefully, indeed ponderously, draw. And these distinctions were not merely verbal. The Conference seems to have been envisaging that, *even though the Canadian Houses of Parliament would* (like the other Dominion Parliaments) *request and approve the enactment of the Statute of Westminster*, the Statute might nevertheless be drafted so that those of its provisions which could affect either the power to amend the BNA Acts or the Provincial legislative powers would not extend to Canada unless and until a subsequent Act of the UK Parliament extended those provisions to Canada in response to "such requests as are appropriate to an amendment of the BNA Act".

45. In the event, no such subsequent UK statute for extending the Statute of Westminster to Canada was required. Before the Statute of Westminster was enacted, *a Federal-Provincial Conference in Canada, in April 1931, unanimously agreed that the Statute of Westminster should contain a newly drafted provision* not envisaged by the Imperial Conference of 1930. That provision is now section 7(1) of the Statute. On this basis, the Canadian Houses of Parliament recited, in their joint Address forwarded to the UK to request enactment of the Statute, as follows:

> "We, Your Majesty's most dutiful and loyal subjects, the Senate and House of Commons of Canada, in parliament assembled, humbly approach Your Majesty praying that you may graciously be pleased to cause a measure to be laid before the parli ament of the United Kingdom, pursuant to certain declarations and resolutions [at the Imperial Conferences of 1926 and 1930], *and pursuant to certain other resolutions made by the delegates of your Majesty's government in Canada and of the governments of all the provinces of Canada, at a dominion-provincial conference* held at Ottawa on [7 and 8 April 1931], the said act to contain the following . . . ".

The resolutions of each House amplified that by the following further recital:

> "And whereas consideration has been given *by the proper authorities in Canada* as to whether and to what extent the principles embodied in the proposed act of the parliament of the United Kingdom should be applied to provincial legislation; and, at a dominion-provincial conference, held at Ottawa on [7 and 8 April 1931], *a clause was approved by* the delegates of His Majesty's government in

> Canada and of *the governments of all the provinces of Canada*, for insertion in the proposed act for the purpose of providing that the provisions of the proposed act relating to the Colonial Laws Validity Act should extend to laws made by the provinces of Canada and to the powers of the legislatures of the provinces; and also *for the purpose of providing that nothing in the proposed act should be deemed to apply to the repeal, amendment or alteration of the British North America Acts of 1867 to 1930*, or any order, rule or regulation made thereunder ... " 65.

The Federal-Provincial Conference of 1931 "was called to give the Provinces an opportunity to express their views with regard to the Statute of Westminster" as a whole, as well as to "the proposed Section, numbered 7, which will be inserted to deal exclusively with the Canadian position". The "Brief Summary" in the Report of the Conference continues: "No objection was made to the principle of the proposed legislation "and "the Canadian Section (7) was drafted and found satisfactory by all the Provinces . . . " 66

C. A recent statement

46. To conclude this review of the ways in which the UK authorities have acknowledged the relevance of the federal character of Canada's constitution to the question of the proper processes for amending it, we note the statement made by UK Ministers in the House of Commons and the House of Lords on the occasion of the 1960 amendment of the BNA Acts:

> "The only reason why the present procedure is still being followed is because no Canadian Government have found it possible to devise a procedure acceptable to the Provinces for enabling the Constitution to be amended in Canada itself in cases where the rights of the Provinces are affected. The procedure is in fact one which arises from the particular federal character of the Canadian Constitution, and has no bearing upon the constitutional relations between Canada and the United Kingdom, nor does it in any way detract from or affect the complete independence of Canada within the Commonwealth" 67.

We return, later in this Report (paras 75-80 below), to discuss the significance of other statements made by UK Ministers on the occasion of amendments to the BNA Acts since 1931.

Preconditions for UK action: the principles recognised in Canada

47. Just as there are conventions regulating constitutional practice within the UK constitutional system, and conventions regulating the UK Parliament's powers within other constitutional systems, so there are conventions or recognised principles which concern the preconditions for the operation of the UK Parliament within, or in relation to, Canada's federally structured constitutional system.

48. In identifying these Canadian conventions we can, fortunately, refer to the important White Paper of 1965 (see para 32 above). First, we should say something about the status of that unique document. The present Government of Canada, in their written submission dated 26 November 1980 to the Manitoba Court of Appeal, refer to it as "the booklet, *Amendment of the Constitution of Canada*, published under the name of the Honourable Guy Favreau, Minister of Justice, in 1965", "the 1965 booklet", "the Favreau publication", "a pamphlet . . ." 68. The White Paper incorporates the text of a proposed "Act to provide for the amendment in Canada of the Constitution of Canada", together with an explanation of the existing constitution of Canada, the history of constitutional amendment in Canada and of efforts to find a post-patriation amending formula, and an explanation and appraisal of the amending formula embodied in the proposed Act. That amending formula had been agreed to buy all governments in Canada at the Federal-Provincial Conference of October 1964. On 5 January 1965, the Prime Minister of Canada sent to all Provincial Premiers a draft copy of the White Paper and invited their comments on it 69. Copies of his letters and of their replies were tabled in the House of Commons of Canada on 22 February 1965. When the White Paper itself was tabled in that House by the Minister of Justice, on 2 March 1965, copies of it were made available to Provincial governments for distribution to members of their own legislatures, all of which in due course approved the proposed Act save for the legislature of Quebec. As the Canadian Prime Minister stated in writing to the Prime Minister of Quebec on 26 January

1966: "the White Paper which *the federal government* published on the subject in March 1965 *had been endorsed without qualification by the ten provincial governments*" 70.

49. The Supreme Court of Canada, in its unanimous opinion of December 1979 in the Senate case (see paras 33-37 above), devoted several pages to reproducing both the White Paper's resume of amendments to the BNA Acts and, above all, the White Paper's statement of "four general principles" that "emerge in the foregoing resume". The Court seems to have regarded these four general principles as of significant assistance in arriving at an interpretation of the scope of the BNA (No. 2) Act 1949. The Court evidently considered that, given that that Act had been enacted "without the consent of the provinces", it should if possible be interpreted so that it would not, "to quote the White Paper, 'affect [ ] federal-provincial relationships' " 71.

50. The 1965 White Paper describes the status of the four principles in the following way:

> " ... [the BNA Act] left Canada without any clearly defined *procedure for securing constitutional amendments from the British Parliament*. As a result, procedures have varied from time to time, with recurring controversies and doubts over the conditions under which various provisions of the Constitution should be amended.
>
> Certain *rules and principles* relating to amending procedures have nevertheless developed over the years. They have emerged from the practices and procedures employed in securing various amendments to the British North America Act since 1867. *Though not constitutionally binding in any strict sense, they have come to be recognised and accepted in practice as part of the amendment process in Canada . . .*
>
> ... Not all the amendments are included in this review, but only those that have contributed to the development of *accepted constitutional rules and principles*" 72.

After reviewing fourteen amendments to the BNA Acts, the White Paper states:

> "*The first general principle* that emerges in the foregoing resume is that although an enactment by the United Kingdom is necessary to amend the British North America Act, such action is taken only upon formal request from Canada. No Act of the United Kingdom parliament affecting Canada is therefore passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted.
>
> *The second general principle* is that the sanction of Parliament is required for a request to the British Parliament for an amendment to the British North America Act. This principle was established early in the history of Canada's constitutional amendments, and has not been violated since 1895. The procedure invariably is to seek amendments by a joint Address of the Canadian House of Commons and Senate to the Crown.
>
> *The third general principle* is that no amendment to Canada's Constitution will be made by the British Parliament merely upon the request of a Canadian provioce. A number of attempts to secure such amendments have been made, but none has been successful. The British Government refused in all cases to act on provincial government representations on the grounds that it should not intervene in the affairs of Canada except at the request of the federal government representing all of Canada.
>
> *The fourth general principle* is that *the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces*. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition 73.

51. It will be noted that the fourth principle is expressed as a principle regulating, or applicable to, the Canadian Parliament, not the UK Parliament. This might be used to support an argument that the "proper usage or practice regarding provincial involvement in the amending process [is] strictly a matter of internal concern to Canada ... of no concern to either the UK government or the UK Parliament" 74. We consider and reject that argument later in this Report (see paras 83-96 below). For the moment, it is sufficient to observe that the White Paper states its *second* principle, like its *fourth*, in terms of the conditions within Canada for a request, rather than in terms of conditions directly and immediately related to the UK Parliament itself. Yet the second principle, though created by political action and practice within Canada, is consistently acknowledged in the statements of UK Ministers in the UK Parliament since 1930. To maintain that the second principle is of no concern to the UK Parliament would be tantamount to contending that the UK Parliament would be bound to enact a request *made by the Canadian Government alone* (without the concurrence of one or both of the Canadian Houses of Parliament) for the abolition of the Senate and the Provinces. We regard such a contention as quite untenable.

52. The fact that a principle of the Canadian constitutional system has developed by way of recognition and practice within Canada does not make that principle of no concern to the UK Parliament when that body is exercising its power and responsibility of enacting amendments to the Canadian constitution. We attribute no decisive significance to the fact that the White Paper's formulation of the fourth principle, like the second, has as its subject the Canadian, not the UK Parliament. It seems to us that each of those two principles rests, ultimately, not so much on practice within Canada as on principles of responsible parliamentary self-government which the UK Parliament has recognised and applied in all its dealings with the former Empire and Commonwealth, and on the special operation of those principles in a federation created by UK statute.

53. The 1965 White Paper says that its fourth principle "did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance". We have already referred briefly, and will refer again, to incidents in 1907 and 1930-31 which the White Paper may have had in mind. But we think it important to observe that in fact, so far as we can see, the fourth principle has never been violated since 1867.

54. In saying that the fourth principle has never been violated, we are necessarily employing an interpretation of that principle's key phrase: "an amendment directly affecting federal-provincial relationships". The 1965 White paper provides, in effect, its own interpretation of that phrase, when it states its post-patriation amending formula:

> "No law . .. affecting any provision of the Constitution of Canada relating to:
>
> (a) the powers of the legislature of a province to make laws,
>
> (b) the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province,
>
> (c) the assets or property of a province, or
>
> (d) the use of the English or French language,
>
> shall come into force unless it is concurred in by the legislatures of all the provinces."

The 1965 White Paper adds this comment on that clause:

> "Paragraphs (a) to (d), and especially (a) and (d), could be said to represent essential conditions on which the original provinces united to form the Canadian Confederation, and on which other provinces subsequently joined the union. Changes in these basic conditions -such as in the powers allocated to provincial legislatures -could alter their status in relation to Parliament, thus changing the conditions on which the provinces entered Confederation." 75

The term "affecting" or "directly affecting" has a margin of uncertainty or disputable application. But there are some constitutional amendments which would clearly and indisputably affect, indeed directly affect, the

legislative powers of the provinces and thus the distribution of powers which is "basic to the Canadian federation" 76 - ie the essence of the "federal-provincial relations" referred to in the White Paper's fourth general principle.

55. We now return to the point we made at the end of para 53. We think it is correct to say that there have been no amendments to the BNA Acts which clearly and directly affected Federal-Provincial relations, without the concurrence (including acquiescence) of the responsible executive governments of the Provinces concerned. In saying this, we are using the phrase "directly affected Federal-Provincial relations" in the way in which, as we showed in para 54, it was used in the 1965 White Paper. It is, of course, possible to point to amendments 77 which in a looser and more general sense could be said to have affected Federal-Provincial relations, and which were not concurred in by the Provinces.

The amendment of 1907, so far as it affected British Columbia , is perhaps an instance of the latter sort. The grants secured to the Provinces by section 118 of the BNA Act 1867 could be described as "privileges . . . secured by the Constitution . . . to the legislature of the government of a province" (cf. sub-clause (b) in the proposed patriation formula quoted in para 54 above). But in complaining about the size and duration of the additional grant proposed in the BNA Bill 1907, British Columbia could not be said to be complammg that its secured privileges were being "affected" against its will. In any event, the essential feature of Federal-Provincial relations is the distribution of legislative powers, and as to this the position is succinctly stated by the 1965 White Paper:

> "In fact, in the 97 years that have elapsed since Confederation, no aJ?end?ment has altered the powers of the provincial legislatures under sectwn 92 of the British North America Act without the consent of all the provinces. This clearly reflects a basic and historic fact in Canadian constitutional affairs . . . " 78.

VI. IS THERE A REQUIREMENT OF AUTOMATIC ACTION?

A requirement of automatic action?

56. In this Chapter, we consider the question whether there is a rule, principle or convention that the UK Parliament, when requested by the Canadian Government and Parliament to amend (or patriate) the BNA Acts, should accede to the request "automatically", ie regardless of the way that amendment would affect Federal-Provincial relations and of the concurrence or lack of concurrence of the Provinces in an amendment directly affecting the powers or rights of the Provincial legislatures or governments 79.

Proper requests should be enacted without delay

57. There can be no doubt that if a request by the Canadian Government and Parliament is a proper request, it is the responsibility of the UK Government and Parliament to secure the enactment of the request with all the urgency or priority which the Canadian Government may reasonably desire. That, indeed, is the practice of the UK Parliament 80, and it should be adhered to. But it is one thing to treat all proper requests as matters of priority, and quite another to consider oneself bound to regard all requests as proper requests.

When did the supposed requirement of automatic action arise?

58. If there is a requirement of automatic action (in the sense explained in para 56 above), it must have arisen or become recognised at some identifiable period of time. It seems to us clear that no such requirement was recognised in 1907. The statements of Lord Elgin and Mr Churchill in 1907, whatever the precise limits of their meaning, seem to us quite inconsistent with any such requirement; we quoted those statements in paras 38-39 above. Moreover, the action ofthe UK Government in deleting from the Bill the contentious clause "final and unalterable" is inconsistent with the supposed requirement of automatic action. That clause had been extensively discussed in the Canadian Parliament 81 and was persistently requested by the Canadian Government, for serious political reasons, even after the UK Government had disclosed their decision to delete it 82. Only when the UK Government made plain that they would insist upon their own judgement that the clause was

inappropriate did the Canadian Government reluctantly agree to the enactment of the Bill without the clause 83. It is not necessary to decide whether the UK Government's refusal to include the clause was motivated (as Mr Churchill told Parliament) by "deference to the representations of British Columbia" or (as seems more likely on the other evidence 84) by a parliamentary draftsman's view that it was technically inappropriate. In either case, what was said and done can hardly be reconciled with the view that, at that date, there existed any requirement of automatic action.

59. In 1907, as in 1980, both the UK Government and the UK Parliament were "wholly averse" to "interference in the domestic affairs of Canada" 85. They declined to consider the merits of the political and financial settlement embodied in the Canadian Parliament's request. But they also declined to accept the Canadian Parliament and Government's view of what could with constitutional propriety be included in an Act of the UK Parliament. Moreover, the UK Government, while not committing themselves to the view that the terms of the BNA Acts "cannot be altered merely at the wish of the Dominion Government", in no way repudiated that view. Indeed the Secretary of State said that he "fully appreciates the force" of that view 86. In refusing British Columbia's appeal to him to override the request of the Canadian Parliament on matters of substance (size and duration of grant), he based his decision on his opinion about what action by the UK Government would be "in the interests of Canada" in view of the fact of "the unanimity of the Dominion Government and of all the Provincial Governments, save that of British Columbia" 87

60. The view expressed in 1912 by AB Keith, a British constitutionalist who was then in the Colonial Office and involved in an official capacity with Imperial-Dominion relations, appears to us to be fair:

> "Very different principles apply to the alteration of a constitution which is the result of a federal compact from those which apply to the alteration of an ordinary constitution. *As was recognised in an ample manner in 1907*, on the occasion of the amendment of the British North America Act in accordance with the wishes of the Federal and Provincial Governments in the matter of the fina ncial subsidies to the provinces, the Act is a formal instrument of constitution which can be amended by the Imperial Parliament, and will be so amended, but only *in accordance with the wishes of the people of the Dominion as a whole, not at either federal or provincial bidding*" 88.

Even if the last proposition is arguably too definite in stating a rule, it seems to be much closer to the established constitutional position, as reflected in the 1907 incident, than any rule of automatic action.

61. If the requirement of automatic action did not exist in 1907, did it come into existence between 1907 and the Statute of Westminster 1931? We know of no evidence showing that it did.

62. In June 1920, the Canadian Houses of Parliament unanimously adopted a joint address requesting the UK Parliament to amend the BNA Acts so as to confer extra-territorial legislative power on the Canadian Parliament. This request was received by the UK Government but was not given effect to until the Statute of Westminster 11 years later. The reasons for delay related not to the federal structure of Canada but principally to Imperial concern with the legal implications for, and possible views of, the other Dominions 89 Nonetheless, the delay indicates the considerable residue of discretion that was accepted, before the Statute of Westminster, as remaining with the UK Parliament even in relation to requests from the Parliament of a Dominion. It is in this environment that any requirement of automatic action, on amendments "internal" to Canada, would have had to develop. We do not think it did develop 90.

63. None of the seven learned and experienced witnesses who in 1935 addressed the Special Committee of the Canadian House of Commons on amendment of the BNA Acts contended that, before the Imperial Conference of 1926 and/or the Statute of Westminster 1931, there had been a requirement of automatic action. One of them, Professor Rogers, stated rather hesitantly that he was "not satisfied as to what the position is since 1926, and particularly since the passage of the Statute of Westminster. The conventional position would appear to be that *henceforth* the British Government would not intervene as between the Dominion and the Provinces" 91. But even Professor Rogers considered that "it was at least arguable before the Imperial Conference of 1926 that it was open to a province of this country to object to the Imperial Government if it was dissatisfied with the terms of an amendment proposed by the Dominion Parliament" 92, because it was "very plain" that the Provinces in

confederating "were, so to speak, putting their faith in the arbitrament of the Imperial Government" 93. Dr. Beauchesne KC, Clerk of the Canadian House of Commons, testified in more forceful terms: the BNA Acts "may be compared to the charter of a society in which the Dominion and the provinces are members and none of them should be listened to by th e British Parliament if it tried to alter that charter without the consent of the others", at least in respect of the legislative powers distributed between Dominion and Provi nces by section 91 and 92 of the Acts 94.

64. Did a requirement of automatic action arise in the course, or as a result, of the events of 1926 to 1931, and the Statute of Westminster? We see no reason, either of practice or of principle, to think so. As will be seen (para 66 below), the supposed requirement was clearly denied by both those Canadians who, as Federal Ministers of Justice, were most closely involved in those events.

65. We consider first the evidence as to practice and contemporary opinion; in paras 82-85 we consider the evidence as to constitutional principle. In paras 41-43 above we set out the statements of the ODL Conference of 1929 and the Imperial Conference of 1930, statements carefully and circuitously drafted so as to avoid any implication that the Canadian Houses of Parliament were the sole "appropriate authorities in Canada" conce rn ed in the making of a request for the amendment of the BNA Acts. In his opening sta teme nt to the Dominion-Provincial Conference of 7-8 April 1931, the Prime Minister of Canada, Mr Bennett, said:

> "The position remained that nothing in the future could be done to amend the British North America Act except as the result of appropriate action taken in Canada and London. In the past such appropriate action had been an address by both Houses of the Canadian Parliament to the Parliament of Westminster. It was recognised, however, that this might result in *a radical change in our constitution taken at the request of a bare majority of the Members of the Canadian House of Commons and Senate*. The original draft of the Statute appeared, in the opinion of some provincial authorities, to sanction such a procedure, *but in the draft before the conference this was clearly not the case*" 95.

These last sentences seem to us to contain a significant assurance to the Provinces, even if it is hard to see how the draft clause being considered on 7 April had the effect ascribed to it by the Prime Minister. The representatives of Quebec doubted whether it had that effect, and "to meet the above difficulty" suggested instead the clause which, in the form considered by the Conference on 8 April and unanimously approved, became the present section 7(1) of the Statute. The Canadian Minister of Justice and the Canadian Secretary of State each assured the Conference that the purpose of the clause was to maintain the status quo in relation to alteration of the BNA Act. The press statement drafted by Federal and Provincial Ministers stated as the first item agreed by the Conference: "1. That the status quo should be maintained in so far as the question of repealing, altering or amending the British North America Act was concerned . . . " 96 And on 30 June 1931, the Prime Minister repeated his assurance of 7 April, when he explained to the Canadian House of Commons what had been

> "the basis of the difficulty of the provincial premiers and their governments. It is provided by the [ODL] conference of 1929 that the British North America Act could be amended, as a result of the practice theretofore prevailing, by a bald majority of this house and the senate, which amendment might interfere with or lessen the powers of the provinces. It was to overcome that difficulty that the conference [of April 1931] was held and the words mentioned [now section 7(1)] agreed upon *as making it beyond question that there could be no such interference as would lessen, restrict or even amplify the powers possessed by the provinces under their respective constitutions*" 97

66. We see in the statements recorded in the Report of the Conference no clear support for the view that there was in 1931 an accepted convention of Provincial concurrence in requests (or even in some classes of requests) for amendment of the BNA Acts. But we also see there no support for the view that a rule, principle or convention of automatic UK action on such request was being created by the Statute of Westminster or had been created by the status of independence given recognition by that Statute. Both Mr E Lapointe, who as (Liberal) Minister of Justice attended the Conferences of 1926 and 1929, and Mr H Guthrie, who as (Conservative) Minister of Justice attended the Conferences of 1930 and 1931, stated in the Canadian House of Commons (in

1931 and 1935 respectively) that the UK Parliament could, and probably would, reject a Canadian request affecting Provincial rights if made without Provincial concurrence 98. Neither Mr Lapointe nor Mr Guthrie suggested that such rejection would in any way be improper, and neither drew any distinction between the pre-1926 (or pre-1931) position and the post-1926 (or post-1931) position.

67. We know of nothing in constitutional practice in Canada since the Statute of Westminster that provides any solid support for the view that a rule of auto?matic action by the UK Parliament has developed since 1931. As the 1965 White Paper says, the whole tendency of Canadian constitutional thinking since 1930 has been towards the more explicit recognition of a right of the Provinces to be consulted about certain sorts of proposed amendment, and of a duty not to forward to the UK Parliament a request for any amendment of those sorts without provincial assent, perhaps even unanimous provincial assent 99. The Canadian Government's refusal, in July 1943, to forward to the UK Government the protests of the Leader of the Opposition in Quebec, against the request for enactment of the BNA Bill 1943, appears to us to be firmly based on the Canadian Government's view that the Bill did not directly affect Federal-Provincial relations (in the sense subsequently employed by the 1965 White Paper). The Canadian Prime Minister's statement, m his letter to the Quebec politician, that amendments are to be made by the UK Parliament "automatically and without question on the request of the appropriate representatives of the Canadian people", is to be understood in that context 100. There is no reason to question the Canadian Prime Minister's implication that, *for an amendment such as that enacted by the BNA Act 1943*, the "appropriate representatives of the Canadian people" would be, exclusively, the Federal Parliament and Government.

UK practice since 1931

68. There is nothing in UK practice (as distinct from Ministerial statements, which we consider in paras 75-80 below) that should be regarded as creating a convention of automatic action in the sense specified in para 56 above. For the Canadian Government and Parliament, from 1931 to this day, have been careful not to make any request for UK action, in any matter clearly and "directly affecting federal-provincial relations" in the sense of the "fourth general principle" set out and explained by the 1965 White Paper (see paras 50 and 54 above), except with the concurrence of all the Provinces. The amendments of 1940, 1951, 1960 and 1964 directly affected the powers or rights of Provincial authorities as such. All these were requested only with the agreement of all Provinces. The amendments of 1943, 1946 and 1949 (twice), which were requested without Provincial concurrence, did not affect the powers or rights of Provincial authorities as such.

69. We have looked at Dominions Office papers concerning the first three amendments after the Statute of Westminster, ie those of 1940, 1943 and 1946. We do not think that official minutes create constitutional conventions. But if there were a conventional requirement of automatic action of the sort we are considering (see para 56 above), we should expect to see clear evidence of it in the official minutes, memoranda and correspondence preliminary to the UK Government's action in these cases. We have not found such evidence. In each case, the UK Government were pressed by the Canadian Government to secure the enactment of the legislation within a few weeks at most. In 1940, the UK Government complied without demur. In that case there had been no significant opposition in Canada; all the Provinces had assented 101. In 1943, the amendment provided for the postponement of redistribution of seats in the Canadian House of Commons until after the war. *It involved no question of the powers or rights of the Provincial legislatures or governments*. But there was opposition to the request, particularly in Quebec. The existence of opposition by a Provincial government and legislature was not conveyed to the UK Government until after the BNA Bill 1943 had received the Royal Assent. The Canadian request had not been conveyed to the UK Government until 17 July 1940; it was accompanied by a request that the legislative processes in Westminster be completed before 24 July. It was introduced and passed in the House of Lords on 21 July. On the morning of that day, the Dominions Office received from the UK High Com?missioner in Canada a telegram stating:

> "Mr St Laurent, the Minister of Justice, told me the following informally today. Some citizens in Ottawa and elsewhere are preparing representations which they wish to make against the passage through Parliament at Westminster of the Bill amending the British North America Act. Mr St Laurent . . . remarked that it will be convenient if the representations referred to above arrived after the Bill had already become law . . . 102".

70. The Bill was passed in the House of Commons on 22 July and received the Royal Assent. On 23 July, the UK Government heard for the first time that the opposition from "some citizens in Ottawa and elsewhere" was in fact the opposition of the Premier of Quebec with the unanimous approval of the members of the Quebec legislature. A Dominions Office internal minute, dated 23 July 1943, states that the relevant telegram from a Canadian MP "very fortunately reached us after the Bill had passed both Houses . . . . We had not heard previously of the [Quebec Government's opposition]". The minute continues:

> "It is doubtful whether any reply to the telegram is desirable. It is not proper that an individual Canadian MP should communicate direct with the United Kingdom Government in a matter of this kind. The position might be different if the Premier or Government of Quebec had addressed us on the subject 103 though, even in that case, it should be noted that the established principle is that the United Kingdom Government have no direct dealings with Canadian Provincial Governments and communicate with them only through the Canadian Government . . . As was mentioned in the debate yesterday, it is anomalous that the United Kingdom Parliament should be called upon to deal with such questions, seeing that these must imply some measure of responsibility on the part of Parliament here in what is purely a Canadian matter . . . " 104

71. Accordingly, on 22 September 1943, the UK High Commissioner in Canada sent to the Canadian Under-Secretary of State for External Affairs an "informal note" expressing the UK Government's disquiet at the events of July. The main paragraph of the note is as follows:

> "Generally, it seems unreasonable that at this stage of constitutional development the United Kingdom Parliament should afford the sole means of amending the Canadian Constitution, since it is clear that it *cannot effectively discuss the merits of the case*. The suggestion has been made that the United Kingdom authorities should represent to the Canadian Government that the procedure adopted on this occasion was derogatory to the United Kingdom Parliament and might indeed be the cause of serious friction in the future. But the position is that express provision to maintain the existing practice in this respect was made in the Statute of Westminster in a special clause, the form of which was drawn *by Canadian authorities as the result of a formal conference between the Federal and Provincial Governments*. Accordingly, the United Kingdom do not wish to make anything like a formal approach on the subject as to the unsuitability of the present position. At the same time they hope that the Canadian authorities will realise that *inappropriateness and possible risks involved*" [sic] "*in the present position*. They take the view that the present practice has become increasingly anomalous and *likely to lead to friction* and they feel that, at any rate as soon as the war is over, the Canadian authorities may wish to find some method of amending the Canadian Constitution by action taken in Canada" 105.

72. But in July 1946, the Canadian Government again requested the enactment of an amendment within two weeks. The amendment concerned the redistribution of seats in the Canadian House of Commons; the Address requesting it was adopted in that House by a majority of 107 to 22. On this occasion the UK Government were well informed in advance (by the UK High Commissioner in Canada) of the nature and extent of the opposition expressed in the Canadian House of Commons on the basis of "Provincial rights", and of the possibility that the Premier of Quebec might bring his opposition to London. But in the event no Provincial opposition was conveyed to the UK Government or their representatives themselves 106.

73. In his evidence to us, Professor H W R Wade QC said that "the UK Parliament should be *assured* that the Canadian conventions for the protection of the Provinces have been duly observed. If the UK Parliament *failed to satisfy itself* of this, it would be acting as an automaton and failing in its function of constitutional guardian" 107. If that were to be understood as asserting that the UK Government or Parliament have a duty to inquire into the existence or extent of Provincial concurrence, in every case of request for amendment, we think it would go too far. *The UK Government and Parliament are certainly entitled to act on the assumption or presumption that requests coming to them from the Canadian Parliament are in conformity with constitutional principle*. It would indeed be inappropriate to seek assurances of that conformity; this we understand to be the correct import of Lord Trefgarne's statement to the House of Lords on 25 July 1979:

> "Even to query whether there was internal support in Canada for a request to patriate the constitution would be tantamount to questioning the authority of the Canadian Parliament or Government to make it" 108.

74. But if the UK Government or Parliament received official representations giving reasonable cause to believe that there might be some constitutional impropriety in the requesting of an amendment, they would theri, and only then, have the responsibility of making some inquiry. For the Canadian Government and Parliament do not, in our view, have an *unconditional* authority to request amendment or patriation of the BNA Acts. But no such occasion for inquiry has arisen since 1931, or indeed since 1907. For on no occasion since 1907 has a Province conveyed to the UK Governme nt its dissent from a requested amend?ment before that amendment was enacted by the UK Parliament 109.

Have UK Ministerial statements created or recognised a requirement of automatic action?

75. In his evidence to your Committee, Dr Marshall said that "British Ministers have said in the past on a number of occasions in the House of Commons that there is a practice of automatic action at the request of the federal authorities", and that these statements provide "a very good reason" for the present Canadian Government to take the view they do (viz. that "the British Parliament or Government may not look behind any federal request for amendment" and that "whatever role the Canadian provinces might play in constitu?tional amendments is of no consequence as far as the UK Government and Parliament are concerned") 110.

76. We think that none of the statements of UK Ministers, in Parliament, since 1931 (or indeed at any time) need be interpreted as going so far. We think the Minister of State at the Foreign and Commonwealth Office, Mr Ridley, was right when he said to us that the statements "were statements made to Parliament in their own particular contexts and, in my own view and in the Foreign Office view, they are to be understood in the light of those contexts alone" 111. In no case before October 1980 did the contexts of those statements involve a request directly affecting Federal-Provincial relations (in the strict sense of the 1965 White Paper) without the concurrence of every Province. In no case before 1980 was a statement made in a context in which it had been officially represented to the UK Government that a Province (let alone several or a majority of Provinces) dissented from a request (let alone a request directly affecting federal-provincial relations in the relevant sense).

77. We asked the FCO whether any of the public statements of UK Ministers since 1931 should be construed as undertakings to Canada. The Minister of State replied that the statements "were not expressed as undertakings to Canada" 112 and that no such public statement since 1931 "is more capable of being regarded as an undertaking to Canada" than the statements made in the House of Commons on 10 June 1976 (col 719), 27 July 1979 (col 500) and 20 October 1980 (col 706), and in the House of Lords on 25 July 1979 and 27 October 1980 113. The common element that recurs in those statements is the formula:

> "If a request to effect such a change were to be received from the Parliament of Canada it would be in accordance with precedent for the Government to introduce in Parliament, and for Parliament to enact, appropriate legislation in compliance with the request".

We welcome the FCO's recognition that none of the earlier Ministerial statements -including the often-mentioned statement114 of the Solicitor-General, Sir William Jowitt, in the course of debate on the BNA Bill 1940-goes further than the above formula in the direction of an undertaking to act automatically on any and every request from the Canadian Parliament. For we think that the formula, as used from 1976 down to (and since) the date when the present Canadian Government publicly proposed a "unilateral" request, in no way committed the UK Government (let alone the UK Parliament) to automatic action in response to any and every such request.

78. The formula is little more than a truism; in the words of Mr Ridley in his evidence to us:

> "In every case in the past, where a request has been received from the Parliament of Canada for a change to be made to the British North America Acts, the United Kingdom Government has introduced in Parliament, and Parliament has enacted, appropriate legislation in compliance with the

> request. This is the precedent to which Ministers have referred in their public statements, and those statements ... are to be *understood against this factual background. The previous cases have not included one where the request reduces Provincial powers and is opposed by all the Provinces*" 115.

And in his opening statement to us, the Minister of State said that the FCO "will study with great interest" all the materials put before the Committee which "have a direct or indirect bearing on the central question of *whether* and *in what circumstances it would be proper* for HMG to recommend to Parliament that it should accede to a request from the Canadian Parliament for patriation of the Constitution" 116

79. Insofar as this FCO evidence implies that the questions considered in our Report have not been definitely settled, for all relevant purposes, by earlier public statements of UK Ministers, we agree with it and welcome it. No statement before October 1980 envisaged the case of a request for amendments directly affecting Provincial powers against the dissent of Provinces, officially represented to the UK Government. No statement since the beginning of October 1980 has explicitly envisaged such a case. No UK Ministerial statement at any time (leaving out of account all statements made since the beginning of October 1980) is known to us that, when carefully interpreted in its context and against the factual background, goes beyond what we have said in para 73: it is in accord with established constitutional principle that the UK Government and Parliament should *presume* that requests for amendment or patriation are in conformity with constitutional principle, and should proceed to act on that presumption. But that is not to say that the presumption is irrebuttable or conclusive. Nor is it to say that the presumption must prevail even if the established constitutional position (or "precedent") were to be departed from by the requesting Government and Parliament.

80. If we have interpreted past Ministerial statements too narrowly in the preceding paragraphs , we should feel obliged to agree with the broad lines of Dr Marshall's statement that any UK Ministerial belief in a requirement of automatic action

> "was formed without any full consideration or debate and has simply hardened into an article of faith repeated without question in all the Parliamentary statements (in 1940, 1943, 1976, 1979 and 1980) that are now quoted in its support. Naturally, therefore, it has provided the basis of the advice given to, and assurances given by; successive Ministers, who have themselves, understandably enough, not devoted much independent thought to the British North America Act or the nature of federal government . . . Some at least of the . . . ministerial warnings against the impropriety of questioning at Westminster any federal proposal seem to overlook the distinction between questioning Canada's sovereignty as a state and taking into account the limited legislative sovereignty of its federal Parliament. No one doubts that the Federal Government represents and speaks for Canada in its external relations and foreign policy. But in the matter of constitutional legislation there is a limitation placed on the plenitude of its authority to act, placed on it not by the United Kingdom but by the people and constitution of Canada" 117.

And in relation to the references by UK Ministers since 1976 to what would be "in accordance with precedent", we should wish to accept what Dr Marshall says:

> "There is no series of precedents and no single precedent to found a convention for acting automatically upon a Federal request for an amendment that clearly affects the Federal-Provincial balance of powers (let alone the whole basis of the Constitution) and that is opposed by a substantial number of provinces (let alone a majority of provinces). Nor has there been any previous occasion when a statute has been enacted on the request and consent of Canada when a majority of the provinces of Canada were attempting to establish their rights to object to it in the Canadian courts" 118.

Dr Marshall thus concludes (supposing a request of the sort just mentioned):

> "The series of ministerial statements in the British Parliament (each based upon its predecessors) cannot therefore properly be regarded as providing a clear convention for action in the present *case and the decision required must be based upon a consideration of principle*" 119.

Before we consider that issue of principle, in paras 82-85, we wish to devote a paragraph to a brief survey of the opinions of UK writers on constitutional law and convention, published before the present controversies.

Opinions of UK constitutionalists before 1980

81. In the published works of UK writers familiar with the law and practice of Commonwealth constitutions, we found little support for the view that there is a rule, principle or convention of automatic action. Writing in 1937, R T E Latham, Fellow of All Souls College, Oxford, stated:

> "A typical convention of the second type is that which obliges the Imperial Parliament to make any amendment of the British North America Act which is requested by the Dominion of Canada and all the Provinces" 120.

Writing in 1953, S A de Smith (later Professor of English Law, Cambridge University) stated in the third edition of *Halsbury's Laws of England* 121:

> "Prior consultation with the Provinces has customarily taken place if [an amendment's] subject-matter directly affects provincial rights or privileges, and their unanimous consent is probably required by convention if the amendment alters the distribution of legislative powers. The United Kingdom has considered itself obliged to carry out a request coming from the federal authorities, and has made only minor drafting amendments to proposed measures. It is unlikely that it would investigate whether provincial concurrence had been obtained within Canada."

Writing in 1947 and 1963, Sir Kenneth Wheare, the eminent authority on both federalism and the Statute of Westminster, surveyed the practice and concluded:

> "But there is no clear convention on the subject. . . There is clearly a danger, therefore, that if the United Kingdom Parliament became content to look no further than the request of the Dominion Parliament and to pass every amendment which the Dominion Parliament requested, the principle of federalism might become endangered in Canada . . . . It is recognised by Canadians that they must devise some method of making amendments which will be in conformity with federalism, since they wish to preserve the federal elements in their constitution, and that meanwhile *the United Kingdom Parliament should be careful not to permit itself to become the agent of the Dominion alone or of the Provinces alone*" 122.

These quotations seem to us representative and significant.

The central issue of principle: Canada's federal character

82. Canada's constitutional system is federal. This federal character is stressed again and again in the authoritative Canadian judicial and political pronouncements which we analysed in paras 32-37 and 47-55 above. Those pronouncements have all underlined the way in which the federal nature of Canada's constitutional system affects the law, convention and practice relating to amendment of that system.

83. All the evidence and advice which we received from UK constitutional lawyers and UK academic authorities learned in Commonwealth constitutions was to the same effect: *it would be in accord with the established constitutional position for the UK Government and Parliament* - particularly Parliament - *to take account of the federal nature of Canada's constitutional system*, when considering how to respond to a request by the Canadian Government and Parliament for amendment and/or patriation of the BNA Acts. For when it acts or declines to act, on such a request, the UK Parliament is exercising its powers and responsibilities as (in the words of the FCO) 123 "part of the process of Canadian constitutional amendment". It would *not* be in accord with the established constitutional position for the UK Parliament to regard itself as in any way the subject of a rule, principle or convention that it should accede to such requests automatically, ie regardless of whether the request was made in a manner contrary to the principles of Canada's federal system and/or to the conventions regulating the making of such requests. If the UK Parliament were to proceed on the basis that it ought to accede to such

requests automatically (subject only to the requirements of correct legislative form), it would be treating itself as for all relevant purposes the agent of the Canadian Government and Parliament. It would thus be treating the Canadian Government and Parliament as having, in constitutional reality, a substantially unilateral power of amending or abolishing Canada's federal system. For any one Government and Parliament to have such a unilateral power is inconsistent with the federal character of that system; nor is it in accord with the "rules and principles relating to amendment procedures" which have "emerged from the practices and procedures employed in securing various amendments to the British North American Act since 1867". 124

84. Such is the gist of all the evidence and advice from UK experts (leaving aside the FCO's evidence). We accept it as an accurate delineation of the role and responsibility of the UK Parliament in relation to the amendment and/or patriation of the BNA Acts. The precedents, consisting of actions by the UK Government and Parliament and statements in Parliament by UK Ministers, seem to us not to involve any acknowledgement of a requirement of automatic action. Those precedents all relate to requests made by the Canadian Govern?ment and Parliament in apparent conformity with the established Canadian constitutional position regarding the making of requests. They leave the UK Government and Parliament *constitutionally (not merely legally or technically) free to decide that the making of a request is so out of line with the established constitutional position that the UK Government can rightly decline to act on that request*. There is *no precedent* for the UK Government and Parliament receiving and acting upon a request, the making of which was clearly and substantially not in accord with the established Canadian constitutional position.

Canada's independence

85. Nothing in our Report casts any doubt on Canada's full independence as a sovereign state in the international legal and political order. In 1931, when Canada was becoming a sovereign and independent state, the governments of Canada and its Provinces agreed that the power to amend the BNA Acts should remain with the UK Parliament. The Government and Parliament of Canada, with the concurrence of the Provinces, requested the UK Parliament to enact a special provision of the Statute of Westminster (s.7(1)). The whole point of this special provision was to remove the BNA Acts from the scope of the power then being conferred (by sections 2 and 7(2)) on the Canadian Parliament and the Provincial legislatures, viz the power to override UK statutes. Thus responsibility for amending the BNA Acts was retained by the UK Parliament at the express and explicit wish of all the appropriate Canadian authorities. That responsibility has been exercised since then on nine occasions. There was in 1931 no suggestion that the responsibility was to be retained on condition that it be exercised in any manner other than *the manner in which it had been exercised prior to 1931*.

86. Your Committee see no reason to doubt the view expressed to them by the FCO that there is no basis on which Canada could unilaterally institute proceedings under international law against the United Kingdom in the event of a refusal by the UK Parliament to enact a requested amendment or patriation of the BNA Acts125. Nor do we see any reason to doubt the evidence on the wider position in international law, put to us by Mr Lauterpacht. This was to the effect that, in terms of international law, the role of the UK Parliament in the functioning of the Canadian constitution involves a relationship between the UK and Canada which is a relationship either of "a quasi-treaty character" or of "customary international law as it has specially evolved between the two states" 126 Action by the UK Parliament which conforms to the rules of that quasi-treaty or special customary international law cannot be said to amount to an improper or unlawful interference by the UK in Canadian domestic affairs or "domestic jurisdiction". Nor does such action involve a diminution of Canadian sovereignty. Canada has accepted, indeed invited, the constitutional role of the UK Parliament, just as the UK has accepted the activities in relation to the UK of the European Commission on Human Rights or the European Court of Human Rights 127.

87. In short, we are confident that international law and such related matters as Canada's and the UK's membership of the United Nations as sovereign, independent and equal states, are in no way inconsistent with the conclusions of this Report 128.

The Canadian Government as the government of a sovereign state

88. Would an attempt by the UK Government or Parliament to question the adequacy or propriety of a request by the Canadian Government (but not both Houses of the Canadian Parliament) for UK legislation involve a violation of correct relations between sovereign states? We think not. The same sort of question could arise in relation to Australia, which is just as much an independent, sovereign and equal state as Canada. In the case of Australia, section 9(3) of the Statute of Westminster provides that the request and consent required for UK legislation extending to the Commonwealth of Australia is the request of the Australian Government and Parliament. Suppose that the Australian Government, but not both Houses of Australia's Parliament, requested UK legislation. If the UK Government and Parliament refused (as they should refuse) that request, for non-compliance with section 9(3), it could not reasonably be said that this refusal amounted to an Improper interference in Australia's internal affairs, even though that refusal would affect Australia's internal affairs and be, politically, a severe snub to its government. There is, of course, nothing in the Statute of Westminster's provisions concerning Canada which is equivalent to section 9(3). But doubtless there is a convention to like effect: see the 1965 White Paper's second general principle and para 51 above.

89. It is obvious that any future attempt by the UK Government or Parliament to examine a request from the Canadian Government (or the Canadian Government and one or both Houses of the Canadian Parliament), in order to determine whether or not the making of that request was in accord with the established constitutional position, might well result in *grave embarrassment for the UK Government and Parliament and grave embarrassment also of Canadian-UK relations*. But that does not settle the matter. Indeed, there is good reason to think that UK statesmen had the possibility of such embarrassment clearly in mind during the preliminaries to the Statute of Westminster and nevertheless accepted (though reluctantly) *the role and thus the potential embarrassment* 129.

90. Indeed, we think this reluctance is quite strong evidence against the view that there is a requirement of automatic action. For if there were such a requirement, no possibility of serious embarrassment or difficult decisions could arise; the Provinces could come to London to protest but would be met with simple and straightforward denials of responsibility, such as the UK Government without embarrassment or equivocation, issued in 1979 and 1980 in relation to petitions from India's and other native peoples in Canada. But that is precisely not the situation in relation to suggested amendments directly affecting Federal-Provincial relations. Instead, UK Governments have felt obliged to take refuge in a manifestly ambiguous formula and to refuse all other comment "on the central question of whether and in what circumstances it would be proper for HM Government to recommend to Parliament that it should accede to a request from the Canadian Parliament", for fear that anything they might say "bearing on the substance of the matter would be interpreted in many quarters there [in Canada] as interference in an internal matter" 130. The situation that seems to be developing since October 1980 is just the sort of situation which *in the absence of a requirement of automatic action*, the UK authorities of 1929-31 (as in September 1943) foresaw. But it is a situation which, at Canada's request and in the interests of Canada (as then seen by the Canadian authorities), the UK authorities prospectively *accepted* by enacting section 7(1) of the Statute of Westmmster.

The Canadian Parliament as a democratic legislature

91. The statement that the Canadian Federal Parliament is a freely-elected, democratic and national legislature is true, but does not settle the questions considered in this Report. To treat it as settling those questions would be tantamount to treating Canada as if it were a unitary state. It would ignore the federal nature of Canada's constitutional system. It would treat as meaningless both section 7(1) of the Statute of Westminster and the events leading to the insertion of that subsection in the Statute. In a federal system, there are many freely-elected democratic legislatures and responstble governments, the system is federal precisely because, although only one is national, each has a sphere of jurisdiction which none of the others can invade.

92. Even since the declaration in 1926 of the full autonomy and equality of the UK and the Dominions such as Canada and Australia, the UK Government and Parliament have assumed the right and responsibility of rejecting a request for legislation, addressed to them by the democratic national legislature of a Dominion, on a matter concerning the internal affairs of that Dominion 131. For in the case of Australia, the UK Government rejected a resolution of both Houses of the Australian Parliament, in July 1931, whtch requested the insertion of a clause in the provisions of the Statute of Westminster dealing with Australia 132. The UK Government considered the

clause inappropriate and/or superfluous and suggested a markedly and substantially different alternative; this alternative was accepted by the Australian Parliament in October 1931 and was enacted in s 9 of the Statute in December. There was at that time no suggestion that this course of events was an improper interference in Australia's internal affairs or a violation of correct relations between friendly states and their sister-Parliaments.

93. Moreover, the clause requested in July 1931, and rejected, was rejected on the basis that, since it dealt with something unthinkable or at least wholly unconstitutional, it was superfluous. For the requested clause dealt wtth the contingency that the Australian Parliament and Government might, *after* the adoption of the Statute of Westminster, request UK legislation on matters within the exclusive authority of the Australian States, without the concurrence of the States. It was accepted by the Australian Parliament and Government m 1931, and in 1935 (in the argument of counsel for Australia before the Joint Select Committee of Lords and Commons) 133, and in 1942 (on the occasion of the adoption by Australia of sections 2-6 of the Statute of Westminster) 134, that it would be unconstitutional for the Commonwealth Government and Parliament to make such a request and proper for the UK Government and Parliament to refuse to comply with such a request. But Australia has never regarded itself as less sovereign than Canada, or had cause to regard its Federal legislature as less representative than Canada's.

94. In reply to our questions, the FCO stated 135 that the position, so far as Australia is concerned, is broadly as follows: the UK authorities would be unlikely to question a validly made request for UK legislation from the Australian Government and Parliament *on any matter which affected only the Commonwealth of Australia*. Should the States be involved, however, the position is covered in the reply" by the FCO to an earlier question; that earlier reply 136 stated that constitutional issues in dispute in Australia would be "essentially matters for resolution by Australians in Australia", and that "the UK Government for their part would not stand in the way of any changes *that command the agreement of all concerned* in Australia".

95. Your Committee welcome the FCO's statement that:

> "the FCO would not regard accession by the United Kingdom Government and Parliament to a request by the Canadian Government and Parliament for amending legislation as constituting a precedent for future accession to requests by the Australian Government and Parliament, given the differences between the Canadian and Australian constitutional positions". 137

We set out some of these significant differences in paras 104-106 below. Your Committee have referred at this point to the well-established constitutional relationship between the UK and Australia only in order to show that it is unsound, both in principle and as a matter of practical politics, to regard the independence of Canada, or the exclusive responsibility of the Canadian Government for foreign affairs, or the democratic and representative national character of the Canadian Parliament, as providing sufficient reason for acceding automatically to any and every request by the Canadian Government and Parliament.

Conclusion

96. The conclusion of our long discussion, in this Chapter, of the supposed reqmrement of automatic action is that the established constitutional position is not correctly stated in the Canadian Department of External Affairs background paper "Patriation of the British North America Act", of 2 October 1980 138. Nor, therefore, was it correctly stated by the Lord Privy Seal, in the House on 19 December 1980, when he used almost the precise words of that Canadian document's principal conclusions 139. The convention that the Provinces have no right to *propose* constitutional amendments to the UK *on their own* 139 does not adequately support the claim that the Provinces have no right to oppose constitutional amendments proposed to the UK by the Federal Government and Parliament on *their* own when those proposals would clearly and directly affect the Federal-Provincial balance of Canada's constitution. For the UK Government or Parliament to pay heed to Provincial views on amendments or patriation as proposed by the Parliament of Cananda would no necessarily violate any convention or constitute an "interference" in Canadian internal affairs. The Canadian Parliament is not "absolutely soveriegn" 140 but is (by the will of the Canadian community confirmed in 1931) subject to the constraints of a *federal* constitution. It would no be in accord with the established constitutional. position for the

UK Government and Parliament to consider themselves constitutionally bound to accept unconditionally the constitutional validity of every request coming from the Canadian Parliament.

VII. IS THERE A REQUIREMENT OF UNANIMOUS CONSENT?

A requirement of unanimous Provincial consent, applicable to the UK Parliament?

97. In this Chapter, we consider the question whether there is any rule, principle or convention that the UK Parliament, when requested to enact constitutional amendments directly affecting Canadian Federal-Provincial relations, should not accede to the request unless it is concurred in by all the Provinces directly affected.

98 We do not wish to express any settled view on the question whether there is a convention or principle that the *Canadian* Government and Parliament should not make such a request without unanimous Provincial concurrence. That very question is currently the subject of legal proceedings seeking the advisory opinion of various Courts of Appeal in Canada. We have set out, in Chapters IV and V (paras 33-36, 49-50, 53-54, 81 above), some of the evidence for the view that there is such a convention or principle applicable to the Canadian Government and Houses of Parliament. We think that the UK Parliament would be properly exercising its responsibility if it took into account the evidence for such a principle or convention, and if it took full notice of the existence and outcome of the relevant Canadian litigation: see further paras 123-127 below. But we do not think that that principle, if it exists, *determines* the responsibilities of the UK Parliament. When we speak hereafter of a "requirement of unanimous consent", we use that pgrase as explained in para 97 above, referring to a rule determining the responsibilities of *UK Parliament*.

99 Some of the events of 1930 and 1931, leading up to the enactment of section 7(1) of the Statute of Westminister, have been discussed above, in paras 41-45 and 65-66. We have argued that those events tell against any supposed rule of automatic action at Federal behest. But we also think that those events tell against any supposed rule of unanimous Provincial consent, as a rule applicable to the UK Parliment. A principal resaon for the 1930 Imperial Conference's decision to suspend consideration of the Candian clause in the Statute of Westminster, and for the 1931 Federal-Provincial Conference, seems to have been the contention of the Premier of Ontario that the Canadian clause drafted by the ODL Conference in 1929 was vague and inconclusive, and that "no restatement of the procedure for amending the Constitution of Canada can be accepted by the province of Ontario that does not fully and frankly acknowledge the right of all the provinces to be consulted, and to become parties to the decision arrived at" 142. But neither section 7(1), as finally settled, not the Federal-Provincial Conference that accepted that subsection, expressed any "full and frank acknowledgement of the right of all the Provinces to become parties to" decisions to amend Canada's constitution. Instead the decision was simply to maintain the status quo in relation to constitutional amendments. We cannot see in that status quo - ie the constitutional practice, particularly of the UK Parliament, from 1867 to 1930 - any evidence of a requirement (in the sense of para 97) of unanimous consent.

100. The events and statements of 1907, which we have set out in paras 38-39, 55 and 58-60 above, seem to us to tell against any such requirement of unanimous consent, just as much as they tell against the supposed requirement of automatic action. And we know of no statements or actions of the UK authorities at any later time, down to today, which should be construed as acknowledging a requirement of unanimous consent.

101. It seems to us that in 1931 the Canadian governments decided to leave the UK Parliament in the role that it had always occupied. That role involves no assessment of the "merits" of proposed amendments, but it might well involve an assessment of the question whether in all the circumstances it was constitutionally proper to enact the proposed amendment. In exercising that role, the UK Parliament should take account of the constitutional principles applicable to the making of requests by Canada, and to the signifying of those requests by the Canadian Government and Parliament. But it is not bound, even conventionally, by those principles.

102. Mr Lauterpacht, QC, argued forcefully before us that "there is a single constitutional system that operates in relation to Canada, the Canadian constitutional system, within which there is a role for the British Parliament", and that therefore any convention which grows up in the system (such as the convention or principle stated in the 1965 White Paper's fourth principle) "controls the activities of all parties" in the system 143. We agree that there

is, in a relevant sense, a single Canadian constitutional system within which the UK Parliament plays a responsible role. But we are not persuaded that that unique role is altogether determined by the conventions and principles applicable to other "parties" to the system, such as the Canadian Government or Parliament.

"Provincial rights": a UK duty to the Provinces?

103. Professor Wade, QC, argued that the UK Parliament has "political responsibility for upholding the federal constitution of Canada and acting as guardian of the rights of the Provinces" 144. We do not understand Professor Wade to be arguing that the UK Government and Parliament have duties owed to the Provinces as such. In our opinion, if the UK authorities must be said to have a duty to someone, it would be a duty or responsibility to the Canadian people or community as a federally structured community which has left its ultimate legal constituent powers in the hands of the UK legislature. In that federal structure, the Provinces certainly have the rights assigned to them by the BNA Acts. But those statutory rights do not include rights in relation to amendment of the BNA Acts themselves. It may well be that, by convention, the Provinces have acquired a right that the Canadian Parliament shall not request certain sorts of amendments without their unanimous consent. *But it does not follow that the Provinces have also acquired a right that the UK Parliament should not enact those amendments without their consent*. It seems to us that all Canadians (and thus the governments of the Provinces too) have, and have always had, a right to expect the UK Parliament to exercise its amending powers in a manner consistent with the federal nature of the Canadian constitutional system, and not to act as an automaton or mere agent or tool of any one government or legislature within that system. But we think that, even if there is a convention of unanimous consent binding the Canadian Government and Parliament, and the UK authorities are confronted with a request made in violation of that convention, the UK authorities are not *bound* to reject that request. This is not to say that the UK authorities, in such circumstances, would have a discretion to act as they please. Rather they should act on the constitutional prmciple which seems to us to be the guiding thread through this labyrinth of history and politics. We state that principle in paragraph 106 below.

104. But first we wish to explain a little further why we do not consider that the UK Government and Parliament are guardians or trustees of the rights of the Provinces precisely as Provinces. The position of the Canadian Provinces in relation to the UK Government and Parliament is sigmficantly different from that of the Australian States. The differences have been noted by the UK authorities on a number of occasions and in various contexts. We may mention: (i) As the Secretary of State for the Colonies wrote in 1908 to the Governor of South Australia:

> "When the Canadian Dominion was established, it was provided in the British North America Act that the federating provinces should be under Lieutenant-Governors appointed by the Governor-General in Council, and with salaries fixed and paid by the Dominion Parliament. But under the Commonwealth [of Australia Constitution] Act *the States of Australia retain a more independent position and larger powers than the Canadwn provinces*, and the Governors are appointed, as before, by the Crown" 145.

By "the Crown" the Secretary of State here meant the Crown acting on the advice of UK Ministers. This continuing responsibility of UK Mimsters is, no doubt one of the several constitutional features implicitly referred to by the FCO's statement to us that the Australian States "remain self-governing dependencies of the British Crown" 146. Such a statement, having such implications of UK responsibihty, could not be made in relation to the Canadian Provinces. (ii) Section 9(2) of the Statute of Westminster explicitly preserves for the Australian States certain rights, in accordance with the constitutional practice existing before 1931, of requestmg UK legislation *without the concurrence* of the Federal Parliament or Government. Neither law nor practice has ever accorded such a right to the Canadian Provinces. (iii) The 1935 Joint Committee of Lords and Commons affirmed that "in respect of matters appertaining to the sphere of State powers it [the UK Parliament] could not so legislate without the request of the State authorities", and that the Parliament of the Commonwealth of Australia would have no *locus standi* in asking for an amendment of the constitution of an Australian State 147. We know of no similar declarations by UK authorities in relation to the Canadian Provinces. (iv) On 6 January 1932, the Secretary of State for the Dominions wrote to each Australian State to assure them that in introducing the Statute of Westminster Bill, the UK Government had "had in view, throughout, the desirability of ensuring that the Statute should not affect the existing constitutional relations between the Parliament of the United

Kingdom and the Legislatures of the States" 148. But the FCO informed us that they were "unabie to trace any communications from the UK Government concerning the effect of the Statute of Westminster on the constitutional position (a) of the Provmces or (b) relatmg to amendments of the BNA Acts, or any communication analogous to that of 6 January 1932 to the Governments of the Australian States" 149.

105. These are all reasons for agreeing with the FCO's present view that amendment or patriation of the BNA Acts without the concurrence of the Provinces would not constitute a precedent for acceding, in the future, to requests by the Australian Government and Parliament for legislation without the concurrence of all Australian States affected by such legislation 150. The residual powers and responsibilities of the UK Government and Parliament in relation to Australian include responsibilities that are specifically to the States as such; the residual constitutional links with their representative legislatures and responsible governments are direct. That cannot be said in relation to the Canadian Provinces.

The UK role: to act on the clearly expressed wishes of Canada as a federal whole

106. The FCO pointed out to us the significance, in their view, of the fact that the Constitution of the Commonwealth of Australia embodies "a procedure for amendment which enables the Australian Constitution to be remodelled in Australia" without involving the Westminster Pariiament 151. This fact may be thought of as significant because it means that the UK authorities can insist (see para 94 above) on unammous governmental concurrence in requests from Australia which affect any constitutional interest beyond the interests of the government or legislature making the request; and this insistence on unanimity will not result in constitutional paralysis of the Australian community. This often-stated requirement of unanimity will not frustrate what the Joint Committee of 1935 called the "clearly expressed wish of the Australian people as a whole" 152, since on almost all matters there is available to the Australian people an alternative and workable procedure for giving effect to their clearly expressed wishes without involving the UK. *The same cannot be said of Canada.*

107. We do not believe it has ever been the policy of the UK Government and Parliament in their dealings with territories for which they retain any responsibility to recognise unconditionally any convention or principle which could indefinitely deprive the peoples or communities of those territories of the opportunity of giving legal effect to constitutional changes clearly desired by those peoples. It goes without saying that, where a commumty is federally structured, the expression of that "clear desire" (in relation to some matters) involves more than simply the resolution of majorities in the Federal legislature. But we should need strong evidence to support any view that the UK Parliament had in 1867 or thereafter acknowledged any principle or convention (applicable to its own activity) which would make for such a degree of constitutional rigidity as would the supposed requirement of unanimity in relation to Canada. We have found no such evidence.

108. There is evidence that the requirement of unanimity may have to come to be regarded as excessively rigid by the very Provincial governments, and constitutional experts, whose opinions may be said to have created the requirement (as applicable to the Parliament of Canada) in its acknowledged forms. For example, many items of evidence submitted to us cited or quoted from a work of the Canadian constitutionalist, W R Lederman, QC. In 1967 Professor Lederman argued that the fourth principle in the 1965 White Paper was applicable to the UK Parliament itself, in relation to requests directly affecting provincial powers: "In the face of any provincial dissent I think the present convention requires that the British Government and Parliament do nothing, simply regarding the request from the Canadian Parliament in these circumstances as improper" 153. But in 1978, he wrote, in a paper also tendered in evidence to us:

> "Underlying custom, precedent and practice are of course the established expectations of the people about the process, and these expectations are not unchanging ... I believe the Canadian people would accept as legitimate what I would call *substantial compliance with the requirements for provincial consents*. My inference about all this is that if all the larger provinces and most of the smaller ones agreed with the federal government and parliament, then, given the urgencies of today and tomorrow, this would be generally accepted by our people as a legitimate mandate for basic constitutional change . . . In other words, I am suggestmg that the enduring basis of public acceptance underlying our customary law of amendment has probably moved . . . very close to the Victoria formula proposed in 1971 . . . " 154

The "Victoria" or "Victoria Charter" formula just mentioned is the one approved by the Federal. Government and all Provincial governments in June 1971 155 as part of a constitutional package which foundered, It seems on the desire of the Quebec authorities for a different arrangement of legislative powers in relation to social security. The formula was to the effect that constitutional amendments on matters affecting Provincial rights or powers, would require the agreement of the Federal Parliament and a majonty of the Provincial legislatures, including those of (a) every Province which at any time has contained 25 per cent of the population of Canada (ie at present Quebec and Ontario), (b) at least two of the four Atlantic Provinces and (c) at least two Western Provinces that have a combined majority of the population of all the four Western Provinces.

109. The "general" (ie permanent) amending formula proposed in the Canaadian Government's 1980 proposals (sections 41 to 47) as modified on 12 January 1981 follows the main lines of the Victoria formula of 1971 156, with two significant dtfferences: (1) the agreement of the Senate would not need to be secured, (ii) the required Provincial agreements could, if there was insufficient Provincial concurrence after a 12-month delay and the Federal Government and Parliament so desired, be registered by majorities of voters in the respective Provinces voting in a Canada-wide referendum 157.

110. The introduction of an optional procedure of approval of constitutional amendments by referendum would, of course, tend to diminish the political power of Provincial governments and legislatures as such. It would not diminish the powers, rights or privileges secured to them by BNA Acts or the Statute of Westminster. Even if it should be said to diminish powers, rights or privileges secured to them by constitutional conventions, we should not consider that fact to be decisive when determining the constitutional responsibility of the UK Parliament. Certainly the agreement of Provincial legislatures has never been required as a precondition for UK action; the concurrence of Provincial governments, sometimes rather informally conveyed, has been sufficient 158. We think that if the UK Parliament is to take into account the clearly expressed wish of Canada as a whole, the approval of the majority of voters in a Province could properly be regarded as signifying the wish of that Province for that purpose.

Conclusions

111. The considerations set out in this Chapter, taken with the preceding Chapter, lead us to the conclusiOn that the UK Parliament is not bound even conventionally, either by the supposed requirement of automatic action of Federal requests, or by the supposed requirement of unanimous Provincial consent to amendments altering Provincial powers. Instead the UK Parliament retains the role of deciding whether or not a request for amendment or patriation of the BNA Acts conveys the clearly expressed wish of Canada as a whole, bearing in mind the federal nature of that community's constitutional system. In all ordinary circumstances, the request of the Canadian Government and Parliament will suffice to convey that wish. But where the requested amendment orpatriation directly affects the federal structure of Canada, and the opposition of Provincial governments and legislatures is officially represented to the UK authorities, something more is required.

112. We recognise that that conclusion involves an unpalatable and thankless role for the UK Government and Parliament. We have already said (paras 89-90 above) that the embarrassing potentialities of that role seem to have been clearly foreseen in 1931, when it was deliberately continued in the new context of Canada's independence. They certainly were very clearly stated in the UK Government's note to the Canadian Government in September 1943 (see para 71 above).

113. The role involves a responsibility in relation to Canada as a federally structured whole. It is not a general responsibility for the welfare of Canada or of its Provinces and peoples. It is simply the responsibility of exercising the UK Parliament's residual powers in a manner consistent with the federal character of Canada's constitutional system, *inasmuch as that federal character affects the way in which the wishes of Canada, on the subject of constitutional change, are to be expressed. It would be quite improper for the UK Parliament to deliberate about the suitability of requested amendments or methods of patriation*, or about the effects of those amendments on the welfare of Canada or any of its communities or peoples.

114. Is there any available criterion for measuring whether a request accords with the wishes of the Canadian people as a federally structured community? We do not think the UK Parliament should invent a criterion of its

own; what is needed is a criterion with a basis in the constitutional history and politics of Canada. Such a criterion seems to us to be available. We think that it would not be inappropriate for the UK Parliament to expect that a request for patriation by an enactment significantly affecting the federal structure of Canada should be conveyed to it with at *least that degree of Provincial concurrence* (expressed by governments, legislatures or referendum majorities) *which would be required for a post-patriation* amendment affecting the federal structure in a similar way 159. For example a federal request that had the support of the two largest Provinces and of Provinces containing 50 per cent of the Western and 50 per cent of the Atlantic populations would be one that could be said to correspond to the wishes of the Canadian peoples on a whole. This criterion has roots in the historic structure of Canadian federalism as reflected in the Divisions of Canada for the purposes of the Provincial representation in the Senate of Canada; and it broadly accords both with the last (if not the only) clear consensus of Canadian Federal and Provincial governments (at Victoria in 1971) and with the present proposals (see para 109) of the Canadian Government in relation to post-patriation amendment.

115. Some forms or modes of patriation would affect the federal structure of Canada less than would some amendments of the BNA Acts. So one further possibility arises for consideration. The UK Government and Parliament might receive from the Canadian Government and Parliament, without the concurrence of the Provinces, a request for patriation/amendment involving *only* (i) termination of the UK's legislative powers and (ii) a post-patriation amendment formula providing for amendment only with at least such a degree of provincial support as is required to initiate an amendment procedure in Part IV of the proposed "Canada Constitution Act, 1980" 160. It might well be proper for the UK Parliament to accede to such a request. For such action by the UK Parliament, while arguably not strictly pursuant to the clearly expressed wishes of Canada as a federally structured whole, would give effect, for the future, to those constitutional changes, and only those changes, which corresponded with such wishes. Since the UK Parliament's action would involve no other substantial constitutional change, it would not substantially affect the federal character of Canada's constitutional system and would not be out of accord with the UK's role in the established constitutional position as we have tried to explain it.

VIII. SOME SPECIAL QUESTIONS

Indians, Inuit and other Native peoples

116. We received and studied documents prepared for us by representatives of the National Indian Brotherhood, the Inuit Committee on National Issues and the Native Council of Canada, and by Mr George, MP, a Member of the House. We considered these important and have published the memoranda amongst the Appendices to the Minutes of Evidence. They argued that the Crown in right of the United Kingdom remains legally and morally responsible for the Indian rights secured by the Royal Proclamation of 7 October 1763 and/or by treaties subsequently contracted between the Crown and indigenous peoples in Canada. They further argue that the UK Parliament should not patriate the BNA Acts unless and until satisfied that those rights are adequately secured by the new Canadian Constitution.

117. We know of no reason to doubt the FCO's evidence that the UK has no treaty or other obligations to Indians in Canada: "All treaty obligations in so far as they still subsisted became the responsibility of the Government of Canada with the attainment of independence, at the latest with the Statute of Westminster" 161. The BNA Act 1867, section 91(24), conferred on the Parliament of Canada legislative authority (exclusive and paramount as against the legislative powers of the Provinces) to make laws in relation to "Indians and Lands reserved for the Indians". We know of no reason to suppose that the Royal Proclamation was in any way entrenched or protected against the legislative power of the Canadian Parliament. Since that Proclamation, even if still in force, is not part of the BNA Acts 1867 to 1930, the UK Parliament could not make any law affecting it unless Canada had requested and cosented to the enactment of such law: such is the effect of the Statute of Westmmster 1931, sections 4 and 7(1).

118. It appears to us that Indian rights and interests are among the many topics, connected with *the welfare of Canada and its peoples, which could not rightly be made the subject of deliberation by the UK Parliament in dealing with a request for amendment or patriation of the BNA Acts*: see para 113 above. These are all matters

for the appropriate Canadian authorities, and we understand that Indian rights and interests, in particular, are being considered now by the Canadian Parliament.

B. Patriation unilaterally by the UK?

119. "Patriation", as we have explained (para 21 above), is a term which usually signifies (i) the termination, by UK Act, of the power of the UK Parliament to legislate for Canada, together with (ii) the creation, by a final UK statute, of provisions for the amendment within Canada of all parts of the Canadian constitution. Because of section 7(1) of the Statute of Westmmster 1931 the UK Parliament retains the legal power to enact any form of patriation without the request or consent of the Canadian Government or Parliament162. But any such enactment would be a grave breach of the convention recited in the preamble to the Statute of Westminster. Such was the clear view wh1ch the Minister of State, FCO, expressed to us and we noted his statement that it is not HM Government's policy to propose unilateral amendment under any circumstances 163.

120. Moreover, if such a unilateral act of patriation by the UK Parliament took the form of simply terminating Parliament's power to legislate for Canada, without creating any post-patriation provision for constitutional amendment, it would at one stroke deprive the Canadian people of any lawfully estabhshed means of amending their own constitution 164. It would thus amount to a gross interference in the internal affairs of Canada and a grave breach of relations between the UK and Canada. The same would have to be said of any unilateral decision by the UK Government or Parliament to undertake, henceforth, no more enactments amending or patriating the BNA Acts 165.

121. Similarly, there would be a grave breach of long-established constitutional principles and a serious interference in the internal affairs of Canada if the UK Parliament, without the request and consent of the Canadian Government and Parliament, patriated the BNA Acts by a UK Act which conferred on the Canadian Parliament power to amend all provisions of those Acts w1thout the consent of the Provinces or of referenda. Such an Act would at one stroke overturn the federal character of the Canadian constitution, in a manner which no Canadian Government or Parliament, including the present Government and Parliament, have ever contemplated.

C. Enactment of a partial package?

122. For the reasons mentioned in para 119 above, we accept Dr Marshall's evidence 166 that it would be unconstitutional for the UK Parliament, if requested to patriate the BNA Acts along with a new Charter of Rights, to enact only part of the requested package (eg by enacting it without the whole or part of the requested Charter of Rights). Such a course of action would amount to legislating for Canada without its request and consent. A partial package is a new package.

D. Litigation

123. We gave much consideration to the question how far the response of the UK Government and Parliament to a request for patriation of the BNA Acts ought to be affected by the pendency of genuine and substantial litigation in the Canadian courts on all or some of the matters discussed in this Report. We have concluded that it would be appropriate not to make recommendations to the House on this question until a request is forwarded to the UK. The nature, progress and prospects of such litigation could be better assessed at that time, particularly in relation to the exact terms of the requested package. We would wish to report to the House on this question at that time. But we do consider that it would be constitutionally questionable as well as politically undesirable for the processes leading to UK legislation to be hastened so as to pre-empt the decision of Canadian courts. Indeed, that could be interpreted as involving the UK authorities in improper intervention in the internal affairs of Canada.

124. The FCO's view, put to us by the Minister of State, is that there is "such a degree of variation in the possible nature of such litigation that it would be wrong to give a blanket answer, yes, or a blanket answer, no" to the question whether the UK Government would avoid making recommendations to Parliament about constitutional change in Canada until relevant proceedings in Canadian courts had been completed 167. The FCO found one

case in which litigation about a proposed amendment (in that case, to unite Canada and Newfoundland, in 1949) was technically pending in the Privy Council at the time the UK Parliament debated and enacted the amendment. But the plaintiffs' action had already been described by the Canadian courts as nonsensical and without legal foundation; in the UK Parliament the Attorney-General, Sir Hartley Shawcross, described the proceedings as frivolous and vexatious 168.

125. The FCO also informed us that "there is no difficulty in the UK Government being informed about the initiation and course of such proceedings in Canada, through our High Commission in Ottawa, and of course FCO Ministers would thus be in a position to inform Parliament to the extent that that was necessary" 169.

126. The questions currently before the Court of Appeal for Manitoba are stated in para 5 of the written submission (factum) of the Attorney-General of Canada dated 26 November 1980 170. Other information about these and other contemplated proceedings is contained in the Brief presented to the Committee by the Government of Newfoundland 171.

127. Professor Wade 172 and Dr Marshall 173 gave important and differing evidence to us about the proper course of action for the UK Government and Parliament in the face of relevant Canadian litigation. We would wish to review that evidence if and when a request for constitutional amendment is forwaded by the Canadian authorities in the face of those legal proceedings. There is obviously much to be said in favour of Professor Wade's view that "very considerable difficulties" could be foreseen if the UK Parliament were to await the end of all relevant proceedings in Canadian courts. Equally, there is obviously much to be said for Dr Marshall's argument that the most prudent course for the UK Government would be, at an early date, to indicate to the Canadian Government the difficulties that the UK authorities would feel if requested to enact legtslation m circumstances where the constitutional propriety of the making of the request was under serious challenge in the Canadian courts.

IX. SUMMARY

128. Our Conclusions and Recommendation have been set out in paras 14 and 15 above. They are based on considerations which we can now summanse in barest outline.

Canada's federal character

129. The federal character of Canada's constitutional system affects the processes for amending that system. For it would be inconsistent with that federal character to treat the Canadian Federal Government or Parliament as having the power to secure the amendment of all parts of that system on its own initiative, regardless of all parts of that system on its own initiative, regardless of the will of Provincial governments and legislatures affected by those amendments.

130. The bearing of CanaJa's federal character on its processes of constitutional amendment has been extensively acknowledged in the statements and practice of Canadian Governments, and in a very recent unanimous opinion of the Canadian Supreme Court. It has also been acknowledged, though less plainly and extensively, in the practice of the UK Government, notably in 1907 and in the conferences leading up to the Statute of Westminster 1931.

The UK role before 1931

131. Prior to 1931, the UK authorities acknowledged that they would not seek to assess the merits or suitability for Canada of any constitutional amendments requested by Canada. But they did not acknowledge that they were constitutionally required to enact those amendments whenever requested by the Canadian Government or Parliament, regardless in all cases of Provincial concurrence in or dissent from that requested amendment. Nor, on the other hand, did the UK authorities acknowledge any requirement that amendments affectmg the powers or rights of Provincial governments or legislatures could be made only with the unanimous concurrence of the Provmces affected. They did not profess to act as general trustees for Provincial rights or powers.

The UK role assumed in 1931

132. When the Statute of Westminster 1931 conferred on Dominion legislatures powers equivalent to those formerly exercised only by the UK Parliament, an exception was made in relation to the amendment of the BNA Acts 1867 to 1930. That exception was made at the request of Canada; that request was signified by the Canadian Government and Parliament, but was substantially the request of a Federal-Provincial Conference held for that purpose, and the unanimous agreement of all the Provinces was recited in the Address conveying the request. Thus, at the invitation of Canada, the UK Parliament assumed the continuing role of enacting amendments of the Canadian constitutional system. The explicit purpose of the Canadian invitation was that the pre-1931 status quo, in relation to constitutional amendments, be retained until such time as agreement could be reached by the appropriate Canadian authorities on methods of constitutional amendment within Canada itself. The UK authorities accepted their continuing role, conscious of the risk that at some future time it might involve them in friction and political embarrassment. The UK authorities awareness of this risk was conveyed to the Canadian Government again after the constitutional amendment of 1943.

133. The fundamental cause of the potential embarrassment is the federal character of Canada, which means that in certain circumstances the request of the Canadian Government and Parliament cannot be accepted unconditionally as the request of Canada itself as a federally structured whole. In particular, that would be the case if the Canadian Government's request were for an amendment (or mode of patriation) which significantly affected the powers of the Provincial governments or legislatures, and those governments made known to the UK authorities their opposition to it.

The UK role in circumstances of Federal-Provincial disagreement

134. In such circumstances, it would be in accord with the role accepted by the UK authorities in 1931 for those authorities to satisfy themselves that the request conveyed the clearly expressed wishes of the Canadian people as a whole. Since that role was assumed at the specific invitation of Canada as a federally structured whole, such an exercise of it would neither violate Canada's sovereignty or independence nor improperly question the authority of Canada's national Government or Parliament. Nor would it be inconsistent with any precedent established by the practice or statements of UK Ministers since 1931, for these have not been directed to circumstances of the sort now being considered.

135. In these circumstances, it would also be in accord with the role of the UK authorities for them to take into consideration the existence of court proceedings in Canada testing the constitutionality of the request for amendment or patriation.

[*The Committee's Conclusions and Recommendation are stated in paras 14 and 15 above.]*

Notes

1 See also the Chairman's Opening Statement of 12 November 1980, Appendix A, p. lxii.

2 See Appendix C, p. lxiv.

3 See Appendices 1-5 to the Minutes of Evidence in Volume II.

4 See page lxxxiii for further details.

5 Background paper, " Patriation of the British North America Act", dated 2 October 1980, "prepared by the Department of External Affairs ... to explain the relationship between the Canadian and UK Parliaments in connection with the patriation of the Constitution of Canada" Minutes pp 48, 43.

6 *Ibid*, P. 48. We noted with some surprise that, in debate in the House on 19 December 1980, the Lord Pnvy Seal used almost the precise words of these two sentences of the Canadian document to define HMG's position.

" ... the British Parliament ... is bound to act in accordance with a proper request from the Canadian authorities and cannot refuse to do so. The British Parliament or government may not look behind any federal request for amendment, including a request for patriation of the Canadtan constitution": H C Parl Deb vol 996, col 1049. Indeed, the Lord Privy Seal, wtthout saying so, virtually reproduced, in its entirety, conclusion (d) of the Canadian document and the first sentence of conclusion (e).'

7 Minutes pp 6, 54-60.

8 On such matters (not being matters within the authority of the Federal Parliament or Government) an Australian State, unlike a Canadian Provmce, had (and has) the right to make the request without the concurrence of the Federal Government or Parliament: section 9(2). Note that in 1935 the Statute of Westmmster 1931, save sections 2-6, extended to Australia: see Lord Wright's statement in House of Commons Paper 88 of 1935, p 133; contrast Minutes p 61 (reply to Q 6); p 134, para 2A.

9 Joint Committee Report (HC 88 of 1935), para 2.

10 ibid. para 7.

11 ibid, para 12.

12 ibid, para 12.

13 See paras 23-31 below, and Minutes, pp 10-42.

14 See Appendix 1 (Annex 1) to Minutes of Evidence.

15 See Appendix B, especially references to works by Clokie, Dawson, Hogg and Livingston.

16 See paras 31 and 126 below, and Appendices 1 and 10.

17 For an account of the Canadian initiatives, resolutions and agreements, between 1864 and 1867, on which the Act of 1867 is based, see Parl Pap 1865 vol XXXVII pp 351-364 (7 February 1865); 1867 vol XL VIII pp 333-537, esp pp 494-500 (Quebec Resolutions of 10 October 1864) and 500-506 (London Resolutions of 4 December 1866) (8 February 1867); and 1867-8 vol XLVIII pp 527-536, esp pp 534-6 (Reply of HMG dated 4 June 1868 to an Address of the Assembly of Nova Scotla against Union) (10 June 1868); and Parl Deb, 3rd Series, vol 185 (February-March 1867), cols 557-576b (Second Reading speech by the Secretary of State for the Colonies, the Earl of Carnarvon), 576b-582, 804-807, 1011-1020, 1164-1196 (Second Reading, House of Commons), 1313-1322. See also para 35 below, and Minutes pp 118-119.

18 The Colonial Laws Valid ity Act 1865, section 2, provides: " Any colonial law whic h is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony ... shall be read subject to such Act ... and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative".

19 Statute of Westminster 1931, section 2: " 2 -(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion . (2) No law . . . made after the commencement of this Act by the Parliament of a Dominion sha ll be void or inoperative on the ground that it is repugnant to ... the provisions of any existing or future Act of Parliament of the United Kingdom . . . " For Provinces see section 7(2).

20 Section 7 of the Statute of Westminster also specially provides : " (3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters with in the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively".

21 This appears to be the standard legal opinion ; contrast para 11 of the FCO Memorandum of 4 November 1980, Minutes p 4. Statute of Westminster, section 4, provides: "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion ha s requested, and consented to, the enactment thereof."

22 Leaving aside Statute Law Revision Acts repealing obsolete and spent provisions.

23 There is room for dispute about which UK Acts extending to Canada have altered the BNA Acts.

24 Minutes pp 7-9. For a fuller statement of the procedures followed in the more notable instances, see Appendix 9, chapter II.

25 See Minutes pp 44-45 (External Affairs Department "Background Paper"); and para 120 below.

26 In February 1968, the Canadian Government proposed to the Provinces "the incorporation into Canadas Constitutin of a Charter of Human Rights as quickly as the federal and provincial governments and legislative bodies can agree": "Federation for the Future: A Statement of Policy by the Government of Canada. The Constitutional Conference, 1968" (a White Paper tabled by the Rt Hon L B Pearson, Prime Minister of Canada), p 18. See also p 46.

27 Section 4 of the Statute of Westminster 1931 would accordingly be repeated by para 16 of Schedule 1 to the "Constitution Act, 1980.

28 The text of these proposed Acts, as at 2 October 1980, is reproduced in Minutes pp 12-41. On 12 January 1981, the Canadian Mmister of Justice placed before the Special Joint Committee of the Canadian Senate and House of Commons various amendments which we note where necessary.

29 In the version of 12 January 1981, this reference to governments is deleted.

30 In the version of 12 January 1981, this reads "seven".

31 In the version of 12 January 1981, seven.

32 In the version of 12 January 1981, the Federal Parliament.

33 Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland.

34 In the version of 12 January 1981 , thi s requirement that an amendment be approved by Provinces having 50 per cent of the population of the Atlantic Provinces is deleted.

35 Manitoba, British Columbia, Saskatchewan and Alberta.

36 According to the version of 12 January 1981, it would be provided that the referendum could be initiated only when, after 12 months, an insufficient number of Provincial legislatures had approved the amendment.

37 In the version of 12 January 1981, the whole Constitution would, by virtue of section 52(1), prevail over any inconsistent law, Federal or Provincial; section 29(1) would continue to specify that the Charter applies to, inter alios, the government and legislature of each Province.

38 Submission by the Attorney General of Canada to the Manitoba Court of Appeal, Appendix 10 to Minutes of Evidence.

39 eg in the Memorandum of the Government of British Columbia (Appendix 5, part IV). The arguments mentioned in thi s paragraph and para 30 are taken from the su bmission of the Attorney General of Manitoba to the Manitoba Court of Appeal [not printed].

40 In the version of 12 January 1981, the words here quoted would read" as can be demonstrably justified in a free and democratic society"; reference to the "parliamentary system of government" is deleted.

41 Attorney General of Manitoba, factum (note 3 above).

42 ibid. But see now p xviii, note 4 above.

43 ibid. See also Memorandum by the Government of Quebec (Appendix 2), para 47.

44 The amendments proposed on 12 January 1981 (seep xvii note 3 above) do not appear to us to affect what we have said in the first sentence of this paragraph.

45 The Amendment of the Constitution of Canada, a White Paper dated February 1965, in the name of the Hon Guy Favreau, Minister of Justice for Canada (see paras 48-49 below), p vii. We refer to this document as "the 1965 White Paper", and print substantial extracts from it as Appendix 9.

46 1965 White Paper, p 45.

47 Reference re Legislative Authority of the Parliament of Canada in relation to the Upper House [1980]

48 SCR 54: see Appendix 1 (Annex 1).

49 Re the Regulation and Control of Aeronautics in Canada [1932] AC 54 at 70; quoted in [1980] 1 SCR at 71 (see Appendix 1, Annex 1).

50 See also para 49 below.

51 See the speech by the Prime Minister of Canada, Mr St-Laurent, to the ConstitutiOnal Conference in 1950, quoted in the 1965 White Paper at p 26, lines 13-16.

52 HC Parl Deb, Fourth Series, vol 175, cols 1616-17 (13 June 1907).

53 See, eg, Q 21-23, 27-30 (Mr Freeland).

54 See Appendix 6.

55 Cd 3404 (April 1907) p 14: the term adopted was suggested by the Pnme Minister of Canada, Sir Wilfrid Laurier: Cd 3523 (May 1907), p 80. Sir Wilfrid (opposing the invitation of Provincial governments to future subsidiary Imperial conferences) also told the Conference, on 20 Apnl 1907:

> "Even in the best and most satisfied countries, like Canada at the moment, we may have differences of opinion between the Federal and State Governments There is one at present between us and the Government of British Columbia, and Lord Elgin has authorised the Government of British Columbia to come here as to some matter which has been in issue between them and us, that is to say, between British Columbia and Canada. This will always be done whenever a Province or State appeals to the Imperial Government here. They are always sure to have a hearing ... " Cd 3523, p 93.

56 As was stated by the Imperial War Conference of April 1917 : Cd 8566 , May 1917, p 5.

57 Cmd 2768, November 1926, p 14.

58 Cmd 3479, January 1930, para 68.

59 ibid, para 71.

60 ibid, para 62.

61 ibid, para 62; the para continues: "it was also pointed out that for a similar reason an express declaration was desirable that nothing in the [Statute of Westminster Jshould authorise the Parliament of Canada to make laws on any matter at present within the authority of the Provinces , not being a matter within the authority of the Dominion".

62 Cmd 3717 (November 1930), p 19.

63 ibid pp 17-18.

64 ibid p 20.

65 Debates of the House of Commons of Canada (HC Deb (Canada)), 1931, vol III, 30 June 1931, p 3192: see Appendix 6, Attachment 4.

66 Report of Dominion-Provincial Conference 1931 (Appendix VI to factum of Attorney-General for Canada), p 1; see also p 3 (see Appendix 10 to Minutes of Evidence). We do not assume that this Report as a whole was made available to the UK Government. The FCO informed us that its records of communications to the UK Government from Canada, in relation to the Statute of Westminster, cannot now be found. But we can be confident, on the basis of earlier and later practice, that the UK authorities would have been informed not only by the Canadian Prime Minister's statement in the Canadian Parliament on 30 June 1931, but also by the April conference's Ministerially drafted press notice (see para 65 below).

67 HC Parl Deb, vol 629, cols, 1369-70 (11 November 1960) (Minister of State for Commonwealth Relations, Mr Alport); the first sentence is repeated almost verbatim by the Parliamentary Under-Secretary, the Duke of Devonshire, HL Parl Deb, vol 226, col 1043 (29 November 1960). For another statement recognising that, at least as a matter of Canadian politics, constitutional amendments affecting the status of the Provinces would await the concurrence of the Provinces, see HC Parl Deb, vol 470, col 1462 (2 December 1949) (Secretary of State for Commonwealth Relations, Mr Noel Baker); see Q 164.

68 Appendix 10, paras 45, 49.

69 Written answer by the Rt Hon L B Pearson (Prime Minister), HC Deb (Canada) 1965 Vol XI, p 11574 (22 February 1965).

70 H C Deb (Canada), vol I, p 422 (28 January 1966). The Prime Minister's letter continues: "Indeed, the Quebec authorities actively participated in the preparation of the French texts of both the amendment formula and the White Paper, and accepted them officially". (Minutes, pp 137-9). As to the status of the 1965 White Paper, see also Q 115 (Prof Wade).

71 [1980] 1 SCR, at p 65 (Append ix 1, annex 1).

72 1965 White Paper, p 11 (Appendix 9, chapter II). See, to similar effect, the Canadian Government's White Paper of June 1978, the Canadian Constitution and Constitutional Amendment, p 13, and the references in the accompanying Bill C-60 (for a proposed Constitutional Amendment Act 1978, not enacted), sections 125(2), 130(2) and 131(2), to "resolutions for the amendment of the Constitution of Canada . . . which resolutions may be taken up and dealt with ... by action as on a joint address ... as and when they may lawfully be so taken up and dealt with in accordance with the procedure for such amendment then recognised by accepted usage".

73 1965 White Paper, p 15 (emphasis added only in fourth general principle). (See Appendix 9, chapter II).

74 "Patriation of the British North America Act": Background Paper dated 2 October 1980, Canadian External Affairs Department: Minutes, p 48.

75 1965 White Paper, pp 35-36.

76 ibid, p 46.

77 See those discussed in paras 29-33, 36-39 of the factum of the Attorney-General of Canada. (See Appendix 10).

78 1965 White Paper pp 46-47. (See Appendix 9, chapter V). For a more detailed analysis see Appendix 2, annex 2.

79 When we speak of "automatic" accession to a request, we leave altogether out of account any merely techrucal drafting changes by the UK Parliament; our concern is with substance, not forms and technicalities.

80 See statements of Ministers, 13 June 1907 (HC Parl Deb 4th series, vol 175, col 1617); 10 July 1940 (H C Parl Deb vol 362, cols 1177-1181); 22 July 1943 (vol 391 , cols 1101-1104); 26 July 1946 (vol 426, col 390); 2 December 1949 (vol 470, col 1458).

81 H C Deb (Canada) 1906-7, vol III (25 March 1907), cols 5308, 5316-7, 5321, 5330-1, 5335-6, 5344, 5361-2.

82 See letter from Lord Elgin (Secretary of State for the Colonies) to the Prime Minister of Canada, dated 14 June 1907 (Appendix 6, attachment 2); letter from Lord Elgin to the Canadian Minister of Finance, dated 6 July 1907 (ibid); letter from the Canadian Minister of Finance to Lord Elgin, dated 8 July 1907 (ibid).

83 See letter dated 8 July 1907 from Canadian Minister of Finance to Lord Elgin (ibid). The Bill had been introduced into the House on 13 June 1907 and given its Second Reading on 21 June 1907, seventeen days before the Canadian Government stated "we withdraw our objections to the Bill".

84 See for example Lord Elgin's letter dated 14 June 1907 (ibid).

85 See Report of Mr McBride to the Lieutenant Governor of British Columbia, 28 December 1907: British Columbia Sessional Papers 1908, C2.

86 See para 2 of the Colonial Office letter dated 5 June 1907 (para 39 above).

87 Dr O D Skelton, who was for many years Canadian Under Secretary of State for External Affairs (and who had been on the Secretariat of the 1926 Imperial Conference and a delegate at the 1929 ODL Conference), testified to the 1935 Special Committee of the House of Commons of Canada that "the episode *left undetermined what the attitude of the British Parliament* or of [the UK Government] *would have been if three or four or five provinces instead of one had protested*. That was the most important instance of amendment, and the only one on which any question arose in London": Proceedings and Evidence and Report of the Special Committee (see Appendix 8), p 35; see also p 38. At least two other expert witnesses -Maurice Ollivier KC (p 48), and Professor Kennedy (p 70) - agreed with Dr Skelton on this point, and none disagreed.

88 A B Keith, Responsible Government in the Dominions, vol II (1912), p 771. In later years and writings, Keith expressed more forceful views which seem exaggerated and are not our concern: see Proceedings (etc) of the Special Committee (see Appendix 8), p 54.

89 Copies of Colonial Office minutes relating to the request (covering the period October 1920 to May 1921) were supplied to us, at our request, by the FCO. They reveal, inter alia, a marked reluctance (based on an opinion of the Law Officers of the Crown dated 24 December 1920) to accept the views of the Canadian Ministry of Justice (stated on 25 August 1920 and reiterated on 1 March 1921) as to the meaning and effect of certain provisions of the BNA Acts. In opinions dated 13 July 1920 and 31 May 1921, the Law Officers advised rejection of any Canadian request for new extra-territorial legislative powers; but in August 1921, the Secretary of State, Mr Churchill, took a different view, while continuing to question the formulae suggested and requested by the Canadian Government and Parliament: for the text of these communications, see D P O'Connell and A Riordan, Opinions on Imperial Constitutional Law (Law Book Co, Sydney, 1971), pp 112-116. See also the

statement of the Canadian Minister of Justice (Mr Lapo inte), H C Deb (Canada) 1924, vol IV, p 3818 (30 June 1924).

90 The BNA Bill 1915, for altering the membership of the Senate, was commended to the House of Commons by the Secretary of State for the Colonies (Mr Harcourt) as "an Imperial and uncontroversial measure "which was "not a party measure. It comes to us as a unanimous request from both parties, and both Houses in Canada ... ". HC Pari Deb, vol 71, col 2087 (17 May 1915).

91 Proceedings (etc) of the Special Committee (see Appendix 8), p 116. (Only one other witness, Professor Kennedy, expressed a simil ar view as to the post-Statute position, and Professor Kennedy spoke of what was hke ly, not of what was required by convention or principle).

92 ibid, p 115.

93 ibid, p 116.

94 ibid, p 125. See also (>P 16-17 (W S Edwards, KC, Deputy Minister of Justice of Canada); and p 42 (Dr O D Skelton, [the External Affairs Department official whose status and experience we mentioned in para 59, note 7 above]: "to retain perm anently the intervention of the parliament of the United Kingdom is either superfluous or dangerous. If that parliament is to act automatically , its intervention is superfluous; if it is to exercise its own discretion, its intervention is fraught with danger to continued good relations between Canada and the Mother Country"). See also the statement of the Minister of Justice, Mr Guthrie, in the debate on the establishing of the Special Committee, para 66 note 3 below.

95 Report of Dominion-Provincial Conference 1931 (Appendix VI to Appendix 10), pp 3--4.

96 See Daily Star (Montreal), 8 April 1931; The Gazette (Montreal), 9 April1931, p 1.

97 HC Deb (Canada), 30 June 1931, p 3206.

98 *Mr Lapointe*: " . . . the Imperial Parliament is not really a dominating power; it acts as a trustee and as a guarantor, and merely gives effect to the will of the Canadian people . . . I think that amendments to the constitution could be divided into two classes: first those which would affect the provinces, which would add powers to the federal parliament and in that way affect provincial rights. In such cases surely the British Parliament, even under the situation as it exists today, would not agree to pass a law to effect the change . .. on the question of the respective jurisdiction of the Dominion and the provinces, there is no doubt that this could not be changed b)' either without agreement with the other." H C Deb (Canada) 1931, vol II, pp 1477, 1478, 1479 (ll May 1931). Mr Guthrie: "I take the view that the provinces should be and must be consulted in regard to any important change in our constitutional act which affects provincial interests ... Mr Woodsworth: May I interrupt? Do I understand that the statement of the Minister means that the provinces must agree, or simply that they must be consulted? Mr Guthrie: I think we would have to have agreement. I do not think the parliament of Westminster would disregard the views of the provinces merely at the request ofthe parliament ofCanada. Ifthe provinces refused to agree upon any fundamental question which concerned their rights I doubt very much if the parliament of the United Kingdom would grant such amendment." HC Deb (Canada) 1935, vol I, pp 222-223 (28 January 1935). See also para 67 note 2 below (statement by Mr Bridges).

99 On 25 June 1940, in debate in the Canadian House of Commons on the Address requesting enactment of the BNA Act 1940, the Pnme Minister, Mr Mackenzie King, said: "The difficult but most necessary part of the whole business was to get the consent of the several provinces ... While, however, we save lost time in that way, we have made an exceedingly important gain in another direction, which, in the end, may mean much saving of time, namely today we are able to introduce an act which carnes with it the consent of every single province of this dominion ... Moreover we have avoided the raising of a *very critical* constitutional question, namely whether or not in amending the British North America Act it is absolutely necessary to secure the consent of all the provinces, or whether the consent of a certain number of provinces would of itself be sufficient ..." (HC Deb (Canada) 1940, p 1117). Professor Wade (Memorandum para 13) (Minutes, p 104) pointed out to us how "it is

clear from this remark that the Canadian Government accepted that in the case of such amendments [ie those affecting the legislative powers of the Provinces] convention made it 'absolutely necessary' that the consent of at least some Provinces was obtained." See also para 69, note 1 below.

100 See P Gerin-Lajoie, Constitutional Amendment in Canada (University of Toronto Press 1950) pp 133-4; See also the 1965 White Paper's analysis (p 13) of the 1943 amendment process:

> "The position of the federal government was that this amendment concerned only the Government of Canada, since it did not affect provincial governments or legislatures."

That is a fair summary of the argument made in the Canadian House of Commons on 5 July 1943 by the Minister of Justice, Mr St Laurent:

> " . . . if there were to be any suggested amendment to change the allocation of legislative jurisdiction as between the provinces, on the one hand, and the federal parliament, on the other, it could not properly be done without the consent of the organism that was set up by the constitution to have powers that would assumedly be taken from that organism ... representation in this house .. is somethmg which is not allocated to the provincial governments ... That ... disposes of the objection founded on the protest of the Quebec government or the Quebec legislature. They may have expressed their opinion, but in respect of matters concerning representation in this house they are merely electors ... ": HC Deb (Canada) 1943, pp 4365-6.

In the same passage, speaking of the 1940 amendment, the Minister of Justice said that that was "a case where It was emmently proper that the consent of the legislatures be obtained beca use it meant transferring to this parliament jurisdiction which in 1867 had been allocated to those legislatures. I submit that *it would have been quite improper to take away from the provinces without their consent anything that they had by the constitution*. In moving the resolution for the Address requesting the BNA Act 1946 (see para 72 below), Mr St Laurent forcefully reiterated both aspects of his 1943 argument: HC Deb (Canada) 1946, vol II, pp 1936-7 (28 May 1946) ; see also vol III, p 2621 (18 June 1946). (See Appendix 5, annex V and annex VI. 1). Another Minister, Mr H F G Bridges, said:

> Does anyone for one minute really believe that this or any other government would dare to endeavour to amend sections 92 or 93 of the Bnt1sh North American Act without consultation with the provinces? If we did, I am sure the Imperial Parliament would not accede to that request. With regard, however, to those other matters, such as the present resolution before the house, I am firmly convinced that it is not necessary that this house should consult the provinces ... " HC Deb (Canada) 1946, vol III, p 2609 (18 June 1946). See also para 66 note 3 above.

101 About three weeks after the amendment was enacted, the Dominions Office received copies of the debates in the Canadian Houses of Parliament on the Address requesting the amendment. The Dominions Office internal minute (DO 35/592/G 176/23 pp 1-2) is largely devoted to transcribing the short passage in the Canadian Prime Minister's speech in which he said that by securing agreement with all the Provincial governments" we have avoided the raising of a very critical constitutional question, namely, whether or not in amending the British North America Act it is absolutely necessary to secure the consent of all the provinces, or whether the consent of a certain number of provinces would of itself be sufficient. That question may come up ... at some time later on. For the present, at any rate, we have escaped any pitfall in that direction ..." (See para 67, note 1, above).

102 DO 35/1121/G631/1 p 42.

103 A telegram from the Premier of Quebec received by the British Prime Minister on 23 July was not received by the Dominions Office until 26 July 1943. For the procedure then followed, see Q 71.

104 DO 35/1121/G631/2, p 2. As to HMG's practice in regard to representations from Provincial governments, see Q 24 (Mr Freeland), Q 196-197 (Mr Ridley); Minutes, p 141, reply to Q 1.

105 DO 35/1121/G631/2, p 30. On 15 July 1946, Sir Eric Machtig, who was then (as in 1943) Permanent Under-Secretary, Dominions Office, said (in a minute to the Secretary of State for the Dominions) in reference to the note of September 1943: " ... on this occasion (see No. 10 in 631/2) we protested somewhat strongly through the United Kingdom High Commissioner, and he addressed a note to the Canadian Government . . . " : DO 35/1121/G631/7, p 5. The UK High Commissioner in Canada in September 1943 was Mr Malcolm MacDonald, who had earlier been Secretary of State for Dominion Affairs and was Under-Secretary of State for Dominion Affairs at the time of the parliamentary proceedings leading to the enactment of the Statute of Westminster 1931.

106 The attitude of the UK Government appears to be conveyed in a letter from the UK High Com?missioner in Canada to the Permanent Under-Secretary, Dominions Office, in September 1946:

> "... while the Secretary of State (Viscount Addison] was staying with the Governor-General in Quebec , Lord Alexander invited members of the Quebec Cabinet to a dinner party . The Secretary of State therefore had an opportunity of meeting (the Premier of Quebec] and I gather that the latter lost no time in voicing his complaints that the recent amendment of the BNA Act had been made without consultation with the Provinces. The Secretary of State replied that there were only three possible courses of action for the UK Government on the receipt of the Canadian Government request. One was to pass the Act as requested, the second to refuse to do so and the third to amend it ; if we had refused to pass the legislation there would have been an outcry from one end of Canada to the other; the Secretary of State was advised that we had no power to amend the legislation: therefore he had no alternative to passing the Act and he took this in hand as quickly as possible. " DO 35/1121/G631/7, p 24.

Though anecdotal in form, this account of the contrast informally drawn by the Secretary of State - between the unconstitutionality (in terms of convention) of the UK Parliament amending a request, and the politically adverse consequences of refusing a request-seems to us significant. The High Commissioner's letter also conveys, apparently as the view of the Canadian Under-Secretary of State (but without dissent), that it is "the thin end of the wedge to have established the doctrine that the Dominion Parliament has power in itself to propose amendments without consulting the Provinces. Once this has sunk in, and it is realised that the UK action is and must be purely automatic, it will begin to be appreciated that Section 7(1) of the Statute of Westminster serves no useful purpose."

107 Minutes, p 105, para 17.

108 Minutes, p 58.

109 See paras 69 and 70 above, and Q 71-73 (Mr Freeland).

110 Minutes, p 85.

111 Q 167.

112 Q 167 (emphasis in original).

113 Q 165.

114 HC Parl Deb Vol 362, col 1180 (10 July 1940); see Minutes p 83.

115 Q 159. See also Q 162.

116 Q 153.

117 Minutes, pp 85-86.

118 ibid p 86.

119 ibid.

120 *The Law and the Commonwealth* (Royal Institute oflnternational Affairs; OUP 1949) (first published in W K Hancock, ed, Survey of British Commonwealth Affairs, vol I, OUP 1937), p 578. See also Sir Ivor Jennings, *Constitutional Laws of the Commonwealth* (OUP, 3rd ed 1957), p 194: "The practice was to secure resolutions ... from the Senate and the House of Commons of Canada; and if the proposed amendment affected the Provmces, the approval of the Provmces was obtamed before the resolutions were passed. The Statute of Westminster made no alteration in these arrangements ..."

121 Vol. 5, "Commonwealth and Dependencies" (Butterworth , London), para 1075. Professor de Smith's statement is repeated with only minor verbal changes, and additional citations, by Dr I M Finnis (Reader in Commonwealth and American Law, University of Oxford) in the fourth edition (vol 6, 1974). He pointed out to us the cautious use of the word "unlikely", which avoids any implication that there is a convention or obligation never to investigate Provincial concurrence. There is a difference, too, between investigating whether Provincial concurrence had been obtamed and taking notice of official representations that it had not been obtained.

122 K C Wheare, Federal Government (OUP: 4th edition, 1963, p 57; first edition, ed 1947, p 60, identical save that the last sentence begins "It is obviously a matter of importance that Canadians should devise ... if they wish to preserve . . . "). In his book *The Statute of Westminster and Dominion Status* (OUP, 1st ed 1938, 5th ed 1953), p 180 Wheare wrote:

> "It is clear then that the most important safeguard which the provinces of Canada had before 1931 that their powers under the British North America Act would not be altered in opposition to what they consider their rights and interests, was that the Act was alterable by the United Kingdom Parliament alone, and that although the United Kingdom Parliament was bound by convention not to alter the Act except with the request and consent of the Dominion Government and (usually) Parliament, it was not bound by convention to alter the Act if and when the Dominion Government and Parliament requested it to do so. "

123 Q 175 (Mr Ridley). See also Dr Marshall's Memorandum (Minutes, p 89).

124 1965 White Paper, p 11. (See Appendix 9, Chapter 11).

125 FCO reply to Q 10 (Minutes, p 62); also Q 17 (Mr Freeland).

126 Q 151.

127 ibid. Also Mr Lauterpacht's Memorandum, paras 7-8, Minutes p 115, and Q 149.

128 As Dr Marshall put it: "My answer to that direct question about Canada's international status would be [that] the sovereignty of Canada as a state is not really relevant to the, in a sense, internal question of constitutional amendment": Q 87.

129 Mr Ernest Lapointe, KC, who as Canadian Minister of Justice attended both the 1926 Imperial Conference and the ODL Conference of 1929 (which prepared a clause intended, like the eventual section 7(1), to preserve the status quo on amendment of the BNA Acts), spoke more than once of this reluctance on the part of the UK authorities to retain the responsibility: see HC Deb (Canada), 30 June 1931, p 3202, col 1 (Appendix 6, attachment 4); Proceedings (etc) of the 1935 Special Committee (see appendix 8), p 118. See also the UK High Commissioner's note dated 22 September 1943, quoted in para. 71 above.

130 Q 153 (Mr Ridley). See para 78 above.

131 We use the now obsolete term "Dominion" as it was used during the period.

132 See House of Commons Paper 88 of 1935, pages 109-110; "FCO Memorandum November 1980 (Minutes 134-6) reply to Q 4 (including reply to "original Q 11). The argument of counsel for Australia in HC 88 of 1935

at p 110 indicates that the UK law officers in 1931 considered that the contingency dealt with by the proposed clause would involve "clearly unconstitutional" action by the Australian Parliament.

133 HC 88 of 1935, pp 109-110.

134 The Attorney-General of the Commonwealth of Australia (Dr H V Evan) assured the Australian Parliament: "the Parliament of this country would not make such a request; and, secondly . . . if it did the Imperial Parliament would not enact the legislation". Commonwealth of Australia Parliamentary Debates, vol 172, p 1396 (2 October 1942) : see also KC Wheare, The Statute of Westminster and Dominion Status (OUP, 5th edition 1953), pp 214, 216 j-k.

135 FCO Memorandum of 28 November 1980, reply to Q 3 (Minutes, pp 134-6).

136 FCO Memorandum of 11 November 1980, reply to Q 7 (Minutes pp 61-62).

137 Reply to Q 8 (Minutes p 62) ; see also Q 64 (Mr Freeland).

138 See especially Minutes, pp 47-48. In her letter to the Chairman, dated 3 December 1980, the High Commissioner for Canada suggested that "whatever questions you may have in regard to the October 2, 1980 Background Paper be considered in [the] light" of the fact that "the position of the Government of Canada on the correct procedures regarding the enactment of the Canadian Parliament has not changed and will not change".

139 See para 4 footnote 2 above.

140 Cf FCO Memorandum dated 28 November 1980, reply to Q 1 and Annex A (Minutes, pp 134, 137).

141 Cf the Canadian High Commission's correction notice p 83.

142 Q 42 (Mr Freeland quoting K C Wheare's quotation from the Premier of Ontario's Memorandum to the Prime Minister of Canada, dated 10 September 1930.

143 Q 146. See also Dr Marshall's supplementary Memorandum, Minutes, p 101: "consent is a requirement for enactment if it is a requirement for a request for enactment. The convention, though it falls into two parts, is a single convention, and though it is (for the time being) both a British and a Canadian convention, its content should be determined in Canada." See also Q 92 (Dr Marshall).

144 Memorandum, para 20 (Minutes, p 105).

145 The Secretary of State's despatch dated 9 October 1908 was copied by him to the Governor General of Australia and the Governors of each Australian State; It was confirmed by a despatch of the Secretary of State dated 19 September 1913, and again by despatches from the Secretary of State to the Governor General and all Governors dated 3 March 1926: see Parl Pap 1926, vol XXII, pp 101-2, 105-6, 94-5 (Cmd 2683, pp 47-8, 51-2, 40-1). The Secretary of State's letter of 9 October 1908 continued: " ... I understand there has been no medication that the States, whose contention is that they remain sovereign States, would desire that their prerogatives should be dimimshed, and the evidence of such sovereignty is in part secured by making the appointment of Governor in the manner and on the same terms as prior to federation". We are not overlooking the fact that for certain purposes of English and Canadian law "sovereignty" is attributed to the Canadian Provinces (see Q 145 where Mr Lauterpacht refers to *Mellenger v New Brunswick Development Corporation* [1971) 2 All ER 593, and the authorities cited by the Court of Appeal in that case; see also the argument developed in Appendix 5, annex VIII B). We do not think that the status thus attributed for these purposes of law determines the responsibilities of the UK Government and Parliament in relation to the Provinces of Canada.

146 Reply to Q 3 (Minutes, pp 134-6); see also Minutes, p 61, reply to Q 7.

147 HC 88 of 1935, para 9.

148 1180-81/FB, attachment, para 4.

149 Reply to Q 6 (Minutes, pp 134-6).

150 Minutes, p 62, reply to Q 8; reply to Q 3 (Minutes, p 134-6); para 95 above.

151 Q 64; see also Q 97 (Dr Marshall).

152 HC 88 of 1935, paras 11, 13.

153 "The Process of Constitutional Amendment for Canada" (1967) 12 McGill Law Journal 371 at 379; (see Minutes, p 87).

154 "Constitutional Amendment and Canadian Unity", Special Lectures of the Law Society of Upper Canada 1978 pp 29-30; see Minutes, Appendix 1, annex II. Cf Q 98: "[have we] some sort of constitutional obligation not to patriate the Canadian Constitution without the unanimous consent of the Provinces, or would substantial, but not literal, unanimity be sufficient? -(*Dr Marshall*) No, I am not being definite about that. I have said [Q 93] I am clear that we have an oblgation not to patriate it in the face of substantial objection . . . I really do not know what is substantial, whether 'substantial' in the sense of a majority of Provinces would be sufficient or not at this point. It is a matter I think we should not have to decide."

155 There may be some dispute about the extent to which Quebec's approval was subject to a reservation: Cf Appendix 2, Annex 1, section F; Appendix 10, para 10. For a full account of the Victoria formula see Mmutes AppendiX 13.

156 This broad correspondence between the 1971 and the 1980 formulae is stated in the Canadian Government's explanatory notes to the Resolution embodying the proposed "Canada Act" and "Constitution Act, 1980".

157 See also paras 25-26 and 30 above. In the version of 2 October 1980 before the amendments proposed on 12 January 1981, there was a further difference: an amendment would have to secure the agreement of at least two Atlantic Provinces that have a combined population of at least 5O per cent of that of all the Atlantic Provinces.

158 This has been so since the time of Confederation itself: see the Reply of HMG, dated 4 June 1868 to the Address of the Assembly of Nova Scotia against Union, Parl Pap 1867-8, vol XLVIII at p 535.

159 In this connection, we note the following statement by the Canadian Prime Minister at a press conference on 7 November 1980 (text supplied to the FCO by the Canadian High Commission): "I am convinced that there would never be an entrenched Charter of Rights. Particularly, there would never be entrenched educational language rights if it weren't done now by the national Parliament the last time, as it were, that we had a possibility of proceeding in this way to amend the Conslltutwn. In other words, once we have a Constitution in Canada, whether it be with the Victoria formula, or any other formula, we will never get anything saying that all Canadians are equal . . . . Therefore, I think in this last time of going to Britain, with the authority of the House of Commons and Senate, I think it is important, and so does my Cabinet and my caucus, that we should put it in and it is in."

160 See para 25 above, in relation to the interim procedure set out in section 38 of the proposed Act.

161 Q 68. See also Q 69: "Has that ever been challenged in the courts? -(Mr Freeland) Not to my knowledge". See also the speech of Lord Trefgarne in the House of Lords on 25 July 1979 Minutes pp 56-58.

162 See para 19 text at note 5 above.

163 Q 199.

164 Q 96 (Dr Marshall). See also p xvii, note 3 above.

165 Q 139, 140 (Professor Wade).

166 Q 90. See also the statement attributed to the Secretary of State in the letter quoted in para 72, text at note 2 above.

167 Q 198 (Mr Ridley); also Q 4-5 (Mr Freeland).

168 Q 2-3 (Mr Freeland).

169 Q 7 (Mr Freeland).

170 See Appendix 10.

171 See Appendix 1.

172 Minutes, pp 107-108; Q 131-134.

173 Minutes, p 91, section 8(4); and Supplementary Memorandum (Minutes, P 101); Q 92, 94.

APPENDIX A

INTRODUCTORY STATEMENT BY THE CHAIRMAN OF THE COMMITTEE

(Extract from the Minutes of Evidence taken by the Committee on 12 December 1980)

Mr Kershaw

1. I should like to say what we see as the purpose of this enquiry by the Select Committee on Foreign Affairs of the House of Commons of the United Kingdom. The terms of reference which we gave ourselves are to study the role of the United Kingdom Parliament in relation to the British North America Acts and to report to our House of Commons. The Committee will receive evidence on the legal and constitutional responsibilities of this Parliament and on no other matter. Our aim is to explain in a report to the House of Commons here in the United Kingdom what are the duties of this House under the British legislation known as the British North America Acts, if a request is received from the Government of Canada to amend or abolish those Acts. The British North America Acts exist because in 1931 the Canadian Parliament and Provinces decided that the Statute of Westminster, which declared that self-governing members of the Commonwealth were in every way equal, should not, for the time being, apply in full to Canada. It would be as well also if I were to make clear that we are undertaking this work not, and indeed by no means, at the request of British Ministers. We seek only to inform our own back-benchers of the juridical position as it affects the United Kingdom House of Commons. I emphasise that we will not look at the content of any request received from Canada. We cannot consider whether the proposals are politically for the benefit of Canada or of the United Kingdom. All we should do - all we will do - is to consider whether proper procedures according to United Kingdom law have or will be followed. We have, of course , no request before us at the moment, but we understand that a request will be received and that it is no secret that it will be more far-reaching than any other previous proposal under the British North America Acts, and it will in particular include a new constitutional law for Canada. It seems to us that the nature of these proposals justifies us in seeking to give guidance to our colleagues in the House of Commons. Canada is an independent sovereign State and has been since 1931, but some subjects affecting the most important constitutional relationships between the Federal and Provincial Governments can, by Canadian choice, only be changed by the British House of Commons. This must be done in obedience to a British Act of Parliament. The first difficult question we must ask ourselves is whether, over the years, certain conventions have attached themselves to the law. What, if any, are the conventions? Is it, for example, a convention that there should be unanimity as between the Federal and Provincial Governments? Is it proper for the United Kingdom to take note that there should be unanimity for one part of the constitutional proposal, for example, patriation of the British

North America Acts, but less than unanimity for a second part, for example, a new consitiution redefining the powers of the Federal and Provincial Governments. If such conventions exist at all, can we ask ourselves whether they have been observed, or is the British House of Commons not the proper place for such an enquiry and should it more appropriately take place in another forum not governed by the British North America Acts. Is it, in fact, appropriate for the British House of Commons in any way to look behind a request from the Government and Parliament of Canada? Perhaps there is a further question, too. What, if any, effect will litigation in Canadian or international courts have on the progress of any proposals? There are, I suggest, appropriate questions in a matter of high constitutional importance to both our countries. In examining them, we in no way seek to interfere in the affairs of a beloved sister-country of the Commonwealth. We consider that by examining carefully the British law, we are paying due respect to these matters and to Canada and that it would be wrong lightly to pass over questions of such deep importance to the futures of both our countries.

APPENDIX B

Note of some published works considered by the Committee

Annual Survey of Commonwealth Law 1974, Butterworth, London, 1975, Chapter 1.

H McD Clokie, "Basic Problems of the Canadian Constitution" (1942) 20 Canadian Bar Review at pp 420-429.

R MacG Dawson, *Constitutional Issues in Canada 1900-1931*, Oxford, 1933, at pp 28-34.

R MacG Dawson, *The Government of Canada*, Toronto, 1st ed 1948, at pp 138-149; 5th ed 1970, at pp 126-137.

P Gerin-Lajoie, *Constitutional Amendment in Canada*, Toronto 1950 at pp 78-83 108-117.

Halsbury's Laws of England, Third Edition, volume 5, London, 1953, paras 1075-6.

Halsbury's Laws of England, Fourth Edition, volume 6, London 1974 paras 832-841 913-4, 926-942.

P W Hogg, *Constitutional Law of Canada*, Toronto, 1977.

House of Commons Paper No 88 of 1935 (Report of Joint Select Committee of House of Lords and House of Commons on the Petition of Western Australia).

Arthur Berriedale Keith, *Responsible Government in the Dominions*, Oxford, 1912, Volume II pp 770-776.

R T E Latham, *The Law and the Commonwealth*, Oxford, 1949, pp 576-579.

B Laskin, *Canadian Constitutional Law*, 3rd ed rev, Toronto, 1969, pp 32-49.

W R Lederman, QC "Constitutional Amendment and Canadian Unity" Special Lectures of the Law Society of Upper Canada, 1978.

W R Lederman, "The Process of Constitutional Amendment for Canada" (1967) 12 McGill Law Journal.

W S Livingston, *Federalism and Constitutional Change*, Oxford 1956 pp 36-41 68-81, 104-5.

The Proceedings , Evidence and Report of the Special Committee of the [Canadian] House of Commons on the British North America Act, Ottawa, 1935.

Queensland Parliamentary Paper A 11-1973 (Memorandum of the Australian States on the operation of the Statute of Westminster: London, June 1973).

Cheryl Saunders and Ewart Smith, OBE, *Conventions associated with the Commonwealth* [of Australia] *Constitution*, Australian Constitutional Convention Melbourne 1980 pp 12-14.

K C Wheare, *The Statute of Westminster and Dominion Status*, 5th ed, Oxford, 1953, Chapter 8.

KC Wheare, *Federal Government*, 4th ed, Oxford, 1963, pp 56 and 57.

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W.F.M.