

## Chapter 4—Patriation of the Constitution

### RECOMMENDATION

- 3. The Canadian Constitution should be patriated by a procedure which would provide for a simultaneous proclamation of a new Constitution by Canada and the renunciation by Britain of all jurisdiction over the Canadian Constitution.**

The question of patriation was not explicitly dealt with in the Victoria Charter, but is mentioned in conclusion 3 of the statement of conclusions of the Conference. Presumably, therefore, the fuller agreement on this subject at the Conference in February, 1971 stands. Few things would better symbolize the independence of Canada or the coming of a new constitution than the patriation of the Constitution from the United Kingdom of Canada.

At the same time it would be unwise to proceed with patriation in the absence of agreement on an amending procedure. The present amending procedure is humiliating to an independent state, but it is nevertheless effective. Amendment formally takes place by act of the British Parliament, which follows the constitutional convention that the United Kingdom Parliament will make any amendment to the British North America Act which is requested by the Government of Canada. Such a request of the Government of Canada is traditionally preceded by a joint address of both Houses of the Parliament of Canada. Some argue that there is a secondary convention that the Canadian Parliament will request amendments only with unanimous consent of all the provinces, or of the provinces affected where not all provinces are involved. However, the British Parliament has shown, by its refusal to entertain objections from Provincial Governments in disputed cases, that it will follow the request of the Canadian Parliament without reference to the views of the Provinces. It seems therefore safe to assert that, as a matter of mixed law and convention, the Parliament of Canada possesses the unilateral power to change the Constitution. Nevertheless Parliament has not chosen to exercise that power since 1949, and the Government of Canada has sought the unanimous agreement of the Provinces to the constitutional changes which have recently

been contemplated. This recent practice of seeking unanimous agreement makes a less rigid amending formula desirable.

The legal procedures which the February Conference evolved for patriation would operate as follows: following agreement among the governments of Canada as to an amending formula and as to any substantive changes, the Parliament of Canada and all the Provincial Legislatures would pass resolutions authorizing the Governor General to issue a proclamation containing the formula and any substantive changes agreed to; before the issuance of the proclamation the British Parliament would be asked to take all necessary steps to ensure the legal validity of the procedures including the nullification of any British statutes, present or future, which purport to affect the Canadian Constitution; finally, the Governor General's proclamation would be timed to coincide with the effective date of the British renunciation of jurisdiction.

The complexity of these procedures results from the desire, on the one hand, to avoid having a new Canadian Constitution brought into being solely by an act of the British Parliament, and the fear, on the other hand, that, if it was not so grounded, there might be a legal gap which might conceivably lead to a court's invalidating the whole new Constitution. The effect of the agreed procedures is to have the negative action which removes Canada from the jurisdiction of the British Parliament and the positive action by which we proclaim our new Constitution occur simultaneously so that both legal continuity and national autonomy are safeguarded.

There are no precedents in such an area, and one can only speculate about possible judicial reaction to the procedures. Nevertheless, since there is no apparent deficiency in them, it is hard to believe that any Canadian judge would strain language or law to invalidate them, since they would represent the solemnly expressed will of all the legislative bodies in Canada. We are therefore prepared to accept the suggested procedures for patriation of the Constitution without any fears that they would not be legally viable.