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EXTÉRIEURES.

NOTES FOR A SPEECH BY
THE SECRETARY OF STATE
FOR EXTERNAL AFFAIRS,
DR. MARK MACGUIGAN,
TO THE EDMONTON
CHAMBER OF COMMERCE
CONSTITUTIONAL CONFERENCE,
FEBRUARY 6, 1981

"COMMENTS ON THE REPORT OF
THE UK SELECT COMMITTEE ON
FOREIGN AFFAIRS ON THE
BNA ACTS "

Mr. Chairman,

I am delighted to be able to come to Edmonton and participate in this panel on different perspectives on our current constitutional situation.

I am particularly pleased to see Sir Anthony Kershaw here. He is with us because of what he and others have referred to as an "anachronism", namely the remaining constitutional linkage that Canada has with the United Kingdom because the BNA Act resides in Westminster.

With your permission, Mr. Chairman, I should like to take advantage of Sir Anthony's presence to review the recent report of the British Select Committee on Foreign Affairs. The committee reported matters as it saw them from Westminster and it reached certain conclusions which, if accepted by the British parliament, would produce a major constitutional crisis between our two parliaments and governments.

I want to assure Sir Anthony that the Government of Canada did not undertake its present constitutional initiatives lightly. Far from it. The government has tried for years, in meeting after meeting with the provinces, to make some progress towards constitutional reform in this country. Every attempt has failed. We have come very close on occasion, for example at Victoria in 1971, but every time the elusive goal has escaped our grasp. In fact, if anything, we have moved further from the possibility of agreement in the last ten years. This is despite a series of offers by the federal government aimed at accommodating the provinces. The tendency has been for provincial governments to add to their demands regarding the amending formula and the distribution of powers as a pre-condition for action on patriation or a charter of rights. For example, the resource power was not on the agenda before 1973 and fisheries was added in the late 70s. Both became provincial pre-conditions for patriation. The federal government decided that this stalemate could not continue: it was proving destructive to national unity and accrediting the arguments of those who wish to destroy Canada as a united nation.

In considering its alternatives to break this dead-lock the federal government was determined that its measures should satisfy three conditions: their substance should respond to the wishes of a substantial majority of the population; they should strengthen the federation; and they should be legal and "constitutional" in the proper sense.

There can be no doubt that the two major elements of our package, patriation and the charter of rights, have

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the support of the overwhelming majority of Canadians. All public opinion polls show this, even those taken only in Western Canada. The Conservative Party acknowledges it. Mr. Epp, the Conservative Party spokesman has stated:

> "...It is the popular will of Canadians that our constitution rest in this country. It is also the popular will that we have a charter of rights and freedoms for the Canadian people embedded in the constitution."

There is no real doubt that the substance of the government's package has the support of the large majority of Canadians.

The package is designed to strengthen our federation, after a period of severe challenge, particularly in Quebec. The symbolic act of patriation is important in this regard. So is the establishment of an amending formula that will be more flexible than the long-sought unanimity and that will break the vicious pattern of bargaining amendments to the distribution of powers against such basic principles as patriation and the charter of rights. I may say to our British friends that a charter of rights has a special place in a federation which it may not have in a unitary state. It establishes that certain basic rights will be available to a citizen throughout the country, and particularly responds to our pluralistic, multicultural society.

The third criterion was that the government's measures should be legal and constitutional. Again, this was not something we considered lightly. I personally am a former professor of constitutional law, as is Prime Minister Trudeau. Cabinet received carefully-weighed advice from its most senior legal officers. It was concluded that there was no reasonable doubt as to the legality and constitutionality of the course we proposed. We recognised that it represented a change in direction in terms of <u>policy</u>, but the change was fully within the rights of the federal governement and parliament. We knew the measure would be politically controversial, but we were confident that it was justified and that it would severe the long-term interests of Canada.

I know that members of the British parliament have been exposed to very intensive lobbying by certain provinces arguing that the measure proposed is illegal and unconstitutional. I hope some of them appreciate the irony of the Quebec Agent General now lobbying to keep Canada from realizing full sovereignty when the Parti québécois was

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trying ardently for Quebec's sovereignty so recently. But I would have hoped that British M.P.s would have recognised that the Canadian government has too much respect for the dignity and sovereignty of Westminster than to try to use it as a tool of some shabby constitutional ploy. We would never ask the British parliament to act in any way contrary to legal and constitutional practice. We were confident of the foundation of what we were doing and we were pleased, but in no was surprised, that the British government agreed with us.

It was thus a shock and surprise to find the select committee reach conclusions which, put baldly, are that the federal government's proposals are, in part, unconstitutional and on the sole ground that some provinces claim that they are -- this entirely unsubstantiated claim is the only basis for the most crucial conclusions of the report. I would have hoped that our fellow parliamentarians in Britain would have shown more confidence in the integrity of the large majority in the Canadian House of Commons.

The select committee reported on Friday, January the 28th. On Tuesday, February the 3rd, the Manitoba Court of Appeal delivered a judgement which reached directly opposite conclusions. It concluded that there is no constitutional convention that the consent of the provinces must be obtained before our parliament can request an amendment to the constitution which affects federal-provincial relationships, or the rights, powers and privileges of the provinces. And it concluded that the agreement of the provinces is not constitutionally required for amendment of our constitution in matters affecting federal-provincial relationships.

The Manitoba court reached these conclusions because it viewed a number of key questions very differently from the select committee.

It showed that the 1965 federal white paper on the constitution did not, as the committee concluded, establish a principle that the federal government would not request an amendment directly affecting federal-provincial relationships without the agreement of the provinces. In fact, a passage in the white paper expressly negated that proposition. As Chief Justice Freedman wrote:

> "In my view there is no such constitutional convention in Canada, at least not yet. History and practice do not establish its existence; rather they belie it. That we may be moving towards such a convention is certainly a tenable view. But we have not yet arrived there."

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The Manitoba court also differed from the select committee in its view of the significance of the federal government's reference to the Supreme Court of the proposed amendments to the Senate in 1979. Chief Justice Freedman flatly concluded:

> "The language used by the Supreme Court (in this case) is not language appropriate to recognition of the existence of a convention full-blown, vigorous, and operative. A convention should be certain and consistent; what we have is uncertain and variable."

Another striking contradiction between the view of the Manitoba court and that of the select committee concerns the pattern of constitutional amendment in Canada. Where the committee sees a convention the court sees none. Chief Justice Freedman concludes that the history of amendments where provinces have been consulted do not in themselves constitute a pattern of legislative conduct "nor do they possess the vigour, warranting the ascription to them of a constitutional convention".

The court adopts a very different view of the significance of Canada's constitutional links with Westminster being preserved in the Statute of Westminster in 1931. The committee concluded that this somehow demonstrated some sort of requirement for provincial consent for federal requests. The court concludes the effect of the statute to be "neutral" and that in no way did provincial concurrence figure in the scheme of things prior or subsequent to 1931.

These are only a few of the points on which the Manitoba court reached conclusions very different from the select committee.

Let me turn to the notion frequently expressed by Sir Anthony Kershaw that still in 1981 the Parliament at Westminster is, in some way, the "guardian" of the federal character or balance of Canada. As he said this morning, "We regret we should have been called upon to adjudicate in this dispute." This striking word "adjudicate" implies the imperial sense of guardianship Sir Anthony sees as the British burden.

The governments of Canada and of the United Kingdom take the view that constitutional precedents require the British parliament to give effect to any request coming from the Canadian parliament. It is also the view of the two governments that there is no constitutional convention requiring provincial consultations or consent. This view

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has just been sustained by the Manitoba court. I appreciate that this authority of the federal parliament looks out of place in relation to classic notions of federalism with two sovereignties separate and protected from one another. Clearly such a power or authority could be subject to abuse. But the fact that a constitutional power might be subject to abuse does not mean that it is less real for that, or that it will be abused, or that there must be some neat external check or limit found for that power.

The present position of the government and parliament of Canada as the sole authorities having standing in constitutional matters in relations with the British government and parliament is in many ways an anachronistic or unfederal or unitary character of our constitution. But it is, I repeat, the true position. And we should not be astounded by it. There are many similar "unfederal" or "unitary" aspects to our federal constitution. So many, in fact, that the great authority on federalism, Sir K. C. Wheare, described Canada's constitution as "quasi-federal".

Let me just list some of these unitary aspects written into our constitution back in 1867:

-- the federal government appoints the Lieutenant-Governors of our provinces;

-- these Lieutenant-Governors can on their own or under instruction from the federal government reserve any piece of provincial legislation or even disallow it;

-- the federal government, with the so-called declaratory power, can declare any work under provincial jurisdiction to be for the general advantage of Canada and thus bring it under federal jurisdiction;

-- the federal government can under the "peace, order and good government" clause impose its authority as necessary in case of an emergency;

-- the federal government can, under the so-called spending power, raise and spend money for any object it sees fit, including, for example, education;

-- the federal government alone appoints members of Canada's Senate which is the regionally distributed upper house.

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If this catalogue were read literally and in isolation it would give a completely distorted idea of the current practice of Canadian federalism. Yet all of these powers are real and all of them are open to political abuse. A determined federal government could seriously damage the federal character or balance of our institutions. But no federal government ever would act that way because our politicians and our people have far too great a respect for our federal system. We have seen our system evolve from a highly centralized, quasi-federalist system in 1867, to a largely decentralized, truly federal system in 1981. We have not required any external "guardian" to keep us on the true federalist road.

This is why any Canadian parliamentarian must find offensive the select committee's conclusion that Westminster must serve as the "guardian" of the federal character of our constitution. The federal government is already endowed with more than enough means to make a legal assault on Canadian federalism if it ever chose to do so. But it never will. Certainly it is not proposing any such assault in its present constitutional proposals. If it were, it would have to answer to the people in the next election.

It is this answerability of the Canadian parliament which is fundamental to the present exercise. A large majority in the House of Commons has decided that Canada cannot continue indefinitely in the constitutional stalemate we have known so long. All of us who support the present package believe very deeply that it will secure and strengthen the federal character of Canada. The select committee gives great weight to its unsubstantiated view that certain parts of the charter of rights would limit provincial jurisdiction, but it does not mention that whatever the charter may do, it will apply equally to both the federal and provincial jurisdictions. It in no way represents a transfer of power between levels and it is fundamentally federal in its objectives. The only action in relation to provincial powers will be to confirm their ownership of resources and to extend their powers in inter-provincial trade. Beyond that, the amending formula will give them new rights, in that they will have a constitutional role in amendments. Thus the federal proposals do pass the test the Kershaw report established. They do not directly affect federal-provincial relationships except where they give the provinces additional powers. There is in the federal package not a single instance in which provincial powers are directly diminished in favour of the federal government. Where the provinces lose, they lose to their own people, not the federal government.

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In advancing these proposals the government has faced opposition from the official opposition and from a number of provinces. Obviously the government takes this opposition seriously. I can assure you it has affected the design of the package. But ultimately the government and a majority in parliament must act, confident that they are acting within their authority and that they are ultimately responsible to the Canadian people.

And this, of course, is the great difference between the British parliament and the Canadian parliament in these questions. The Canadian parliament must answer to the Canadian people. The British parliament does not. I believe this difference is absolutely fundamental and I would encourage every member of the British parliament to weigh its significance fully. Does the British parliament really wish to replace the parliament of Canada as the guardian of the federal institutions of Canada?

Some may reply that the British parliament clearly has the legal ability to pass or defeat a Canadian proposal. This may be true in the narrow, legal sense. But the Canadian government -- and, as I say, the British government -- insists that this narrow, legal right is, to use the term again, an "anachronism" which can only properly be used by passing "on the nod", without looking at the substance, any request from the Canadian parliament. To quote Viscount Jowett on an earlier request in 1940, "It is sufficient justification for the bill that we are morally bound to act on the grounds that we have here the request of the dominion parliament."

I recognize that the present constitutional anachronism creates an uncomfortable or embarrassing situation for some British parliamentarians. For us in Canada as well there is something strange about having to resort to the mechanisms of the British parliament in order to secure an amendment to our own constitution. Canada has long since won its sovereignty and its independence, in two world wars and through a process of constitutional development which in some ways at least could serve as a model for the world.

For both Canada and Britain it would be a tragedy to mar the shared history of that constitutional development at the very end of the process. To those British parliamentarians who may feel uncomfortable about the present situation, and especially to Sir Anthony Kershaw, let me only say this: You do not solve a problem in Britain

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or Canada by making it a problem between Britain and Canada. You cannot patriate the problem without patriating the solution. And, above all, you cannot dispose of a live anachronism of procedure by evoking a dead anachronism of substance, by claiming a "guardianship" which surely must seem as unreal to you as it does to us. Yet there is a way for Canada's constitutional problems to be dealt with in Canada, where they belong. There is a way that is consistent with precedent. There is a way that is consistent with the dignity and the sovereignty of the mother of parliaments. There is a way that is consistent with the dignity and sovereignty of the parliament of Canada. And, perhaps above all, there is a way that is consistent with the great principle of responsible government that is the most fundamental element in our common heritage. And there is only one way. That one way is for the British parliament to enact the constitutional measures requested by the Government of Canada, and to let the responsibility for these measures rest where it must rest in the end in any case--with the government and parliament of Canada. That way, we ensure our continuing deep friendship."

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