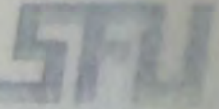


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July 22, 1980

July 22, 1980

Mr. P.-E. Trudeau, M.P.,
Ottawa, Ontario.

Professor Edward McWhinney,
International Law and Relations,
Simon Fraser University,
Burnaby, B.C. Meet you again in Winnipeg, and I - who I had enjoyed
VA 1A6 - to chat with you.

For Professor McWhinney: recapitulating several of the points that
Winnipeg. They are, of course, issues of which

On behalf of the Prime Minister, I wish
to acknowledge receipt of your letter of July 15.
Please be assured that your comments will be
brought to Mr. Trudeau's attention.

Yours sincerely,

ORIGINAL SIGNED BY
ORIGINAL SIGNÉ PAR

Peggy Dillman

Original to: L. Taschereau
cc: C. Viau
M. Kirby
N. Gwynn

PJD/lis

L. Taschereau
A. L. ...
M. Kirby
N. Gwynn



July 15, 1980.

- PERSONAL -

The Rt. Hon. P.-E. Trudeau, M.P.,
Prime Minister,
Ottawa, Ontario.
K1A 0A2

Dear Mr. Prime Minister,

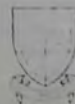
It was good to meet you again in Winnipeg, and I very much enjoyed the opportunity to chat with you.

I am taking the liberty of recapitulating several of the points that we touched on in Winnipeg. They are, of course, matters on which we have been in correspondence before, at earlier stages in the political-constitutional debate.

First, on the matter of any forthcoming request by the Canadian Government to the British Government for legislation of the British Parliament in effect terminating the "Imperial" source of the B.N.A. Act and "repatriating" it to Canada, it is beyond question now, as a matter of inter-Commonwealth constitutional law, that the British Government must act on any request from the Canadian Government, and that it must act in timely fashion and in accord with the strict letter of the request from the Canadian Government. It is not constitutionally competent for the British Government to entertain any representations from the Provinces within Canada, nor have our Provinces any constitutional locus standi to raise points directly with the British Government or other than through the intermediary of the federal government.

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PARLIAM. DIV.
C.C. FILE
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L. T. Schlegel (4)
cc. A. ...
M. Kirby
N. Gray



JULY 15, 1980

Second, it is not in fact constitutionally necessary for the Canadian Government to have legislation from the British Parliament in order to "repatriate" the B.N.A. Act. The better view would be, simply, that such British legislation would simply ratify or confirm a legal condition - the "Canadianisation" of the B.N.A. Act - that has already occurred over the years, by developing constitutional Custom and Convention within Canada itself. You might wish to consider a declaratory statute of the Canadian Parliament recognising, in terms and retroactively, the new "Canadian", juridical status of the B.N.A. Act created over the years; and you might also wish, if time allows, to take the further, ultimate and symbolic step of legitimation through a nation-wide popular referendum. Neither step seems necessary, however, in strict constitutional-legal terms, but would simply make assurance doubly or triply sure.

These remarks are, of course, directed to the immediate issue of "repatriation" of the B.N.A. Act, in its present form, or with the addition of amendments, such as an "entrenched" federal Bill of Rights, coming within the ambit of the federal Government's unilateral power of amendment under the B.N.A. (No. 2) Act, 1949. As to a constitutional charter going beyond the existing B.N.A. Act and further amendments wholly within federal power, I would still suggest that an approach to the British Government for special British legislation is not constitutionally necessary but simply a matter of constitutional courtesy; there exist plenary powers to adopt and legitimate any such new constitution by constitutional action wholly within Canada itself. This leads us, of course, to the choice of popular ratification through nation-wide popular referendum. The ultimate source or sanction of constitutional government derives from the people, and my view remains that, at a certain point in time, any new or substantially "renewed" federal constitutional charter should be submitted to the people - with or without the prior consent of all or even a majority of the Provinces. I am not surprised, in this regard, that some of the Provincial Premiers seem to be fearful of the referendum route, for their own claims to a popular mandate from the voters of their individual Provinces to insist on a drastic weakening of the federal government have never been empirically tested in popular vote. The more one looks at the present process of constitutional change in which we are engaged - with the discussions on change left to the federal Government and the ten Provincial Premiers, the more that process looks to be narrow and parochial in its implications and too defensive of Provincial special interests. You might wish at some future stage to open up the process by bringing in other important community groups - the Mayors of the great Metropolitan regions whose interests are often antagonistic to those of the Provincial Premiers,

THE RT. HON. P.-E. TRUDEAU, M.P.

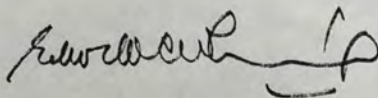
JULY 15, 1980

the Indian Nations and Inuit peoples generally; and you might also wish to place on the agenda important new issues like the readjustment of the often quite arbitrary Provincial territorial boundaries of 1867 and thereafter by increasing the number of Provinces and creating new Provinces in order to correct existing economic and other imbalances between the existing Provinces.

I should add, as a final point, that current talk by certain English-speaking Provincial Premiers of launching their own Provincial referendum on separatism or on a re-writing of the federal constitution, rests on flimsy constitutional foundations. There is no Provincial constitutional power to hold any such referendum. Federal constitutional jurisprudence indicates clearly that the federal Government could successfully challenge any such Provincial referendum legislation before the Courts and obtain an injunction against its application; and the federal Government's Disallowance power was developed for just such a situation of violation, by a Province, of the principle of federal comity. The federal Government legally tolerated, for quite pragmatic political considerations which seem fully justified in retrospect, the Quebec sovereignty-association referendum; but no similar pragmatic political considerations would seem to justify similar federal Government legal tolerance in regard, for example, to a second or third Quebec referendum in the next several years or, even more, to a B.C. or Alberta referendum. A federal system cannot survive with a continuing question mark hanging over its future; and I hope, therefore, you will lower the boom on those Provincial politicians now talking so irresponsibly of launching their own private, Provincial referendum on our country's future.

With all good wishes,

Sincerely yours,



Edward McWhinney, Q.C.,
Professor of International Law & Relations,
Membre de l'Institut de Droit International.

EMcW/lm