

February 5th, 1975.

Dear Don:

As agreed in our conversation this morning, I am enclosing herewith a copy of the memorandum that I sent to Barbara Reed on February 3rd.

It would be extremely helpful if you could give this matter your personal attention in the light of all the considerations and factors that we discussed this morning.

I shall try to be in touch with you in the course of the next week or ten days to see if we could have a small meeting - probably just you, Barry Strayer and Barbara Reed, plus Bob Bryce, Frank Carter and myself - to discuss this particular matter and related questions of tactics and substance.

Yours sincerely,

Original signed by  
Original signé par  
R.G. ROBERTSON

D.S. Thorson, Esq.,  
Deputy Minister of Justice,  
Ottawa.

CONFIDENTIAL

February 3rd, 1975.

c.c.: Mr. Carter  
Mr. Bryce

MEMORANDUM FOR MRS. REED

"Patriation" of the Constitution:  
amending procedure

As you know, the Prime Minister indicated in his speech in the Debate on the Address last October, that he would like to see us succeed in getting the B.N.A. Act "patriated" to Canada so that it would not, in future, any longer be necessary for us to go to the British Parliament for amendments to those parts of the Constitution that do not come under the limited amending powers of Parliament and the provincial legislatures under sections 91 and 92. I will be wanting in the course of the next month or two, to put to the Prime Minister some ideas as to how this matter might best be raised with the provinces.

The position that was taken by the federal government in the course of the constitutional negotiations in 1968 to the Victoria Conference in 1971 was that it was necessary to secure agreement on a procedure of amendment before the Constitution could be "patriated". This was of course because it was recognized that if the power of the British Parliament to act was cut off before there was agreement on an amending procedure we would be faced with a Constitution that was "frozen" in those aspects that could not be dealt with by Parliament or provincial legislatures. There was also some feeling that the only way in which legitimacy could be accorded to an amending procedure was under a process that would include action by the British Parliament. As you know, the whole process was worked out in detail, including discussions with the British legal experts, in 1970-71. The formula for amendment that was put to the Victoria Conference appeared to have unanimous consent but the Charter floundered on the insistence of Quebec to

establish a position with regard to jurisdiction over social policy that the federal government was not prepared to accord.

The logical procedure in launching a new consideration of patriation and amending procedure would be to start with the processes worked out in 1970-71 including the amending procedure that formed a part of the Victoria Charter. It is not improbable, however, that this will run into difficulties. Quebec has traditionally regarded agreement on an amending procedure as something for which there should be a quid pro quo - probably some concession in legislative jurisdiction. On the other side, the western provinces which were prepared to accept the Victoria amending procedure in 1971 may be quite unwilling to accept it today. Alternatively, they may be prepared to accept it only if they get some quid pro quo - such as some concession in jurisdiction with regard to mineral resources, taxation of minerals or something of the kind.

The above possibilities lead to the question whether an alternative approach - to be adopted only if reactions such as the above make it necessary - would be for the federal government to indicate that it is prepared to seek "patriation" of the B.N.A. Act without an amending procedure. Obviously, this would not be a desirable course. It would be one to be adopted only if the alternative is failure again to get any move on this problem. While it is undesirable, and obviously as a last resort, I think we should examine it to know what its merits and demerits may be and by what mechanism it could be carried through if the government so decided. Would you please, therefore, take a look at this question and let me have your views.

It seems to me that, among the questions to be considered, are the following:

(a) How would one carry out a process by which the power of the Parliament of the United Kingdom to legislate with respect to the B.N.A. Act would be legally and finally discontinued? I think this was worked through in 1970-71 and that most of the answers are available in some of the files or materials of that day. I would think that what would be required would probably be a resolution by

the Parliament of Canada asking for action by the British Parliament followed by legislation by the British Parliament. In 1970-71 we contemplated resolutions by the provincial legislatures as well but in the situation that I am postulating presumably there would not be any such resolutions. If so, what problems of a legal or constitutional character would that create? What would be the content of the British legislation on the basis that is being contemplated?

(b) If one proceeded by whatever means that are available without provincial consent or resolutions by provincial legislatures, would there be any doubt as to the constitutionality or "legitimacy" of the result?

(c) If one were to proceed in this way, what would the resulting constitutional situation be? Would there, in fact, be an area in respect of which there would then be no entity that could legislate to change parts of the B.N.A. Act?

(d) Whether the above would be the result or not, would one be able subsequently, by some undoubted legal process, to arrive at and to establish an amending procedure which would thereafter have undoubted constitutionality and legitimacy?

(e) Is it possible to make any assessment of the seriousness of having our Constitution frozen in certain respects if that would be the result of the procedure here contemplated?

What I am asking you to look at and advise me on is purely and simply the constitutional and legal aspects. There are, of course, very important questions of a "political" character that would have to be considered before launching on any approach of this kind. The first step, however, is to know what the legal possibility is and what the constitutional and legal results would be.

If, after you have given this matter some thought, you would like to discuss it, please let me know. I would like to try to move ahead to some view on this and other questions in the course of the next two or three weeks, if at all possible.

