

February 20, 1975

Mr Bryce

MEMORANDUM TO MR. ROBERTSON

c.c. Mrs. B.J. Reed

From: R.B. Bryce

Re: "Patriation" and the "Legal Vacuum"

I agree with your point. I simply decided not to pursue the matter. The P.M. will not be confused because he does not know of the Strayer idea. I regard my confusion here

WRB  
21/II/75-

You have made several references to the legal vacuum that might exist if we bring the Constitution of Canada to Canada without a ready amending formula. I am not sure that there would be such a vacuum if the British power to amend the BNA Act is terminated in the way we contemplated in the past, as indicated by Strayer's 1970 memo that we looked at this week.

I agree. The problems there are different ones. At first I was going to go into the "Strayer system" with the P.M. but I decided there was little point — unless he does not like our other proposal. (The "1949-50" one.)

What we had in mind in 1970 as a means of the U.K. terminating its jurisdiction was action by the British Parliament repealing section 7 (1) and 7 (3) of the Statute of Westminster 1931. These read as follows:

- (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."
- (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 within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively."

When that has been done section 4 of that Statute would apply to the BNA Acts and, by reference, to the Constitution of Canada Act. That section reads as follows:

4. "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 has requested, and consented to, the enactment thereof."

As you will see it would still be possible legally, though repugnant politically, for the Parliament of Canada to request an amendment to the patriated Constitution of Canada before the amending formula is fully approved. Moreover this power would legally only require the action of the Federal Parliament (or Government indeed) and not that of any of the Provinces. In fact we would probably have to undertake not to use it except by agreement with the Provinces.

The action proposed in 1964 went further than the repeal of sections 7 (1) and (3) above-noted and it included a section as follows:

10. "No Act of the Parliament of the United Kingdom passed after the coming into force of this Act shall extend or be deemed to extend to Canada or to any province or territory of Canada as part of the law thereof."

In 1971 the proposed British legislation was I believe of this nature, rather than along the line of Strayer's 1970 memorandum, and I would assume that is what we would intend now. In that case there is the danger of the "legal vacuum". There will also be a problem for the British of just how they do deal with Canada under the Statute of Westminster.

*R.B.B.*

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