



October 31st, 1975.

MEMORANDUM FOR THE PRIME MINISTER:

Further steps re patriation of the  
constitution

Since our conversation at lunch on Wednesday, I have spoken on the telephone to Chouinard about the final adjustments made, pursuant to your notes on my memorandum of October 23rd, in the draft proclamation and made very clear to him that the addition of a reference to "social policy" in Article 39 is the last change of substance that you are prepared to consider in these discussions about the draft. I also made clear that you would not be prepared to attempt to include anything about the spending power, although you saw no objection whatever to having that as an early subject for attention under the amending procedure once patriation has been accomplished. I also was quite negative on your behalf with regard to a reference to the courts or to any attempt to resolve the question of "communications" before proceeding with patriation. (I am not certain whether I mentioned this last point to you. It came up when Mr. Bourassa discussed the matter with his Cabinet early in October and I had told Chouinard previously that it was simply a non-starter.) I ended up by telling Chouinard that you would be getting in touch with Mr. Bourassa, probably some time next week, to talk to him further about this matter and to emphasize that the draft proclamation is really the end of substantive discussion on it as far as you are concerned.

Chouinard said he assumed that this did not mean that we could not still discuss drafting and presentational aspects. I confirmed that that was so. The "finality" was as to substance.

Jim Hurley of our office has gone to Quebec this morning with the new draft in English and French of the proclamation. It contains a change in the Article on "Federal-Provincial Agreements" (formerly Article 39 and now Article 40 in the new enumeration). It is a point that emerged from discussion by Mrs. Reed with Messrs. Thorson and Strayer on Wednesday afternoon. The Article as now included in the draft going to Quebec reads as follows:

"Art. 40 In order to ensure a greater harmony of action by governments, and especially in order to reduce the possibility of action that could adversely affect the preservation and development in Canada of the French language and the culture based on it, the Government of Canada may continue to enter into agreements with the Government of any Province and the Government of any Province may continue to enter into agreements with the Government of Canada concerning the exercise of powers accorded to them under the laws of their respective legislatures, particularly in the fields of immigration, communications and social policy."

The significant changes and new additions are the underlined words. Thorson and Strayer have two points of concern:

(a) They think that, unless the words "continue to" are inserted, a declaratory provision of this kind will be read as according new constitutional powers which do not hitherto exist. Their argument is that a constitutional provision, even if declaratory, must be intended to have some substance: it cannot be simply a re-assertion of an existing situation unless that is made apparent. They are very worried as to what might be read into the provision without these words.

*JK*

(b) They are also worried, for similar reasons, about a provision that referred to "the exercise of powers" without adding any qualification about "the laws of their respective legislatures".

I am pretty sure that Chouinard will be very unhappy about the inclusion of "continue to". I would have preferred to go into this matter further before sending anything to Quebec but, in order to get things moving ahead, I decided to send the draft with the above modifications and to see what reaction we get from Quebec. \*

\* See note at the end of this memo.

With regard to the points you raised concerning the draft:

Article 5

*on reflection, I think this is sufficient*

You wondered whether there should be specific reference, in relation to the procedure for amendment, to "including the preamble and this proclamation". The inclusion of the proclamation as such is made clear in Article 7 but Mrs. Reed is examining the question whether there ought to be any clarification in Article 5.

Article 16(2)

✓

You wondered why the period of six months had been settled on in the procedure about appointment of judges to the Supreme Court. Mrs. Reed has checked the Victoria transcript and has sent me a memorandum, a copy of which is attached. I think six months is a not unreasonable time and that it would be unfortunate to raise any question about it unless we get into discussion on any related parts of this procedure.

Article 37

You queried whether an interpretation of this would be as limited as Mrs. Reed had suggested.

As I told you on Wednesday, after considering carefully the points you made, she has revised her view. She has also discussed the matter with Messrs. Thorson and Strayer. There is general agreement that the interpretation would almost certainly be more along the lines you suggested. The principal qualification on the analogy you made with Article 30 is, of course, the fact that Article 37 will involve matters of interpretation as to what meaning is to be given to "adversely affect" and to "the preservation and development". We spoke of this in the course of lunch on Wednesday.

Discussion with Mr. Bourassa

Chouinard thinks that it is unlikely that he will be able to see Mr. Bourassa before Tuesday evening or possibly Wednesday morning, since Mr. Bourassa is only getting back to Quebec on Monday and the Legislature opens on Tuesday. He thinks that a telephone call to the Premier made Wednesday or Thursday or Friday would be best.

Information to the Governor General

The Governor General has, on one or two occasions, asked me about the patriation exercise and I have told him in a general way about the discussions with Quebec and about my visits to the other provinces. I have not given him any text. I feel quite sure that he would be very interested in having a copy of the proclamation as it now stands - not only because of the substance of the question but because we are contemplating a situation in which, if all succeeds, the document will be forthcoming from him. You might wish to speak to H.E. about the general approach. If you agree, perhaps I could, after you have spoken to him, give a copy of the proclamation to the Governor General and talk to him about any questions he may want to raise, either as to substance or as to the procedure we contemplate.

*This will have to be later, as the Liberal convention will be beginning then*

*yes*

*R.G.B.*

P.S. (5.30 p.m.)

I have now had a report from Hurley after his conversation with Chouinard. His reaction to the modified Article 40 is very much what I expected.

He says it is completely impossible; would be presentationally destructive and negative; and that he cannot, in its present form, put it in front of Mr. Bourassa. I agree with him.

I am going to talk to Thorson and company on Monday about a possible re-revised version. Chouinard suggested to Hurley the possibility of inserting the words "with one another" and "respective" as indicated in the text below. I think the Justice worries might be further met by inserting the words "manner of". With these insertions, the original text would then read as follows:

"Article 40 In order to ensure a greater harmony of action by Governments, and especially in order to reduce the possibility of action that could adversely affect the preservation and development in Canada of the French language and the culture based on it, the Government of Canada and the Governments of the Provinces may enter into agreements with one another concerning the manner of exercise of their respective powers, particularly in the fields of immigration, communications and social policy."

I shall see what Justice have to say about this on Monday and will then try to get in touch with Chouinard by telephone. Your own comments and reactions on the total argument would be most helpful.

*I am satisfied with art 40 as it appears on this page, but am somewhat worried by the argument made in the last lines of p 2. Let me hear what Justice thinks.*

R.G.B.  
