



Ottawa, December 2, 1975.

Mr. Gordon Robertson,
Secretary to the Cabinet,
Federal-Provincial Relations
Office,
59 Sparks Street,
Ottawa, Ontario.
K1A 0A3.

Re: "Form of a Proclamation
of the Governor General"

Dear Mr. Robertson:

Following your recent discussion of this matter with the Minister of Justice and our telephone conversation yesterday, I met with my Minister today to review with him the general framework of the above document and its more important implications.

We did not attempt to discuss the language of the document in any detail, on the understanding that you, in your several discussions with Quebec officials, have repeatedly made it clear that the different drafts through which the document has gone were for discussion purposes only, and did not constitute settled proposals which the Government was prepared to put forward without further change.

Not unexpectedly the provision that gives both the Minister and myself the most concern from a legal point of view is article 38. While the first branch of article 38 can, we think, be read as being merely for the guidance of Parliament and the Government in exercising their respective powers, the second branch of article 38 (beginning with the words "and neither") appears to be of a quite different order.

One interpretation of this second branch of article 38 is that it is, at most, a constitutional direction to Parliament and to the Government of Canada as to how

.....2

each shall comport itself in doing that which it may lawfully do, now or in the future, under the constitution as it now stands.

The other interpretation, which obviously carries with it much more far-reaching consequences, is that the second branch of article 38 is, in fact, a genuine constitutional limitation on the legislative jurisdiction of Parliament and on the authority of the Government of Canada to exercise the powers conferred upon it by law. On this interpretation, Parliament, notwithstanding its present exclusive jurisdiction in relation to, say, "the criminal law", could henceforth be viewed as being limited by article 38 in the manner in which it could constitutionally exercise that jurisdiction, without being challenged on the ground that, in so doing, it had exceeded its jurisdiction.

While it would be possible to express a view as to which of the above two interpretations appears to be the better one, perhaps the only question that needs to be asked at this stage is whether there is a real possibility that the courts of Canada might adopt the second interpretation. Both the Minister of Justice and I are agreed that there is such a real possibility, i.e. that no assurance can be given that the second interpretation would be unlikely to prevail.

Mr. Basford has asked me to convey this advice to you, and to ask you to so inform the Prime Minister. In this regard he is aware of the Prime Minister's intention, as we understand it, of speaking to Premier Bourassa on the subject at an early date, perhaps later this week.

Yours truly,



Deputy Minister.