

c.c.: Mr. Pitfield
Mr. Carter
Mr. Jodouin
Mr. Hurley
Mrs. Reed
Miss Macdonald

CONFIDENTIAL

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December 5th, 1975.

MEMORANDUM FOR THE PRIME MINISTER

Re Article 38 of the proclamation
for "patriation" of the constitution

Attached herewith is the original of a letter dated December 2nd that I have received from Don Thorson. It follows upon the briefing I gave to Mr. Basford a week ago concerning the "patriation" of the constitution and a talk he had with Thorson on December 1st.

I do not think the letter reflects any new discovery or concern on Thorson's part. I think it may, however, indicate some unease on Mr. Basford's side. Apart from everything else, he is probably imbued with the British tradition of Parliamentary supremacy and finds it a bit difficult to get used to the idea of a constitutional limitation on that supremacy. This is, however, precisely what we had in contemplation before and at Victoria and what has to be involved if there are to be any "constitutional guarantees" of any kind.

I think there might be some value in my sending Thorson a letter that he can pass on to Mr. Basford. It could be helpful in preparing a way for discussion in the Cabinet. Do you think a letter along the lines of the attached would be satisfactory?

Original signed by
Original signé par
R.G. ROBERTSON

R.G.R.



CONFIDENTIAL

December 5th, 1975.

Dear Mr. Thorson:

Thank you for your letter of December 2nd about the discussion that you have had with your Minister concerning the "Form of a Proclamation of the Governor General" for the "patriation" of the constitution.

So far as the "form" itself is concerned, it has been informally communicated to officials in Quebec who were designated by Premier Bourassa to work with me on this matter. I, of course, discussed it fully with the Prime Minister at all stages in the development and had his authority to transmit it. It has gone to the Quebec officials with the indication that the Prime Minister is prepared to recommend it to his Colleagues in the Cabinet as a basis for discussion with the other provinces provided the government of Quebec would regard it as acceptable if the federal government and the other provincial governments agree with it. It is clearly understood that the document does not, at this stage, carry the approval of the federal government and it is also understood that, if the substance were acceptable, there would almost certainly have to be modifications in expression and wording.

As Mr. Basford has requested, I am advising the Prime Minister of the views you express about the two possible interpretations of Article 38. If the proclamation were to become a part of the law of Canada, I would rather expect that it would be the second of the interpretations you refer to which the Courts would be likely to

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Deputy Minister of Justice and
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adopt - although that is obviously simply a personal view. As you say, under that interpretation, the Article would operate as "a genuine constitutional limitation on the legislative jurisdiction of Parliament". This is, of course, precisely the kind of thing that the federal and provincial governments contemplated in Part I of the Victoria Charter with regard to Political Rights and Part II concerning Language Rights. The most precise expression of such "limitation" was perhaps in Article 2 which, as you will recall, read:

"No law of the Parliament of Canada or the Legislatures of the Provinces shall abrogate or abridge any of the fundamental freedoms herein recognized and declared".

As you will recall, the basic approach of the federal government in the constitutional review had been to give first importance to the consideration of "rights" which would be protected by limitations on the jurisdictional capacities of legislative and governmental authorities. Article 38 of the proclamation, in the second interpretation to which you refer, would be entirely consistent with this basic approach.

As I mentioned to you on the telephone in our discussion the other day, I am confident that the Prime Minister is fully conscious of the possible - or probable - interpretation to which you refer. In discussion with me, he has compared Article 38 to the first amendment of the United States Constitution which, as you know, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the Press;...".

In brief, as I said on the telephone, the interpretation you refer to will, I am sure, not come as any surprise to the Prime Minister nor, I think, will it cause him concern. What it will mean, if adopted, is that the Courts of Canada will, in future use, have to decide what measures or actions by Parliament or government would or would not have to be constrained by reason of the second part of Article 38.

Yours sincerely,