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May 8th, 1975.

MEMORANDUM FOR THE PRIME MINISTER

Discussions with the Premiers on
"patriation" of the constitution

Following your letter of April 19th to the Premiers, I talked to Julien Chouinard to get his judgment as to whether it would be best for me to see Mr. Bourassa first or whether it would be preferable to see some of the English-speaking Premiers first, having in mind particularly the speech that Mr. Bourassa made on April 20th which got a good deal of publicity. In that speech, you will recall that he made mention of Quebec's desire to have increased powers in respect of communications and immigration or (apparently as an alternative) to have some constitutional guarantees of the French culture in Quebec before agreeing to "patriation" of the constitution. (The relevant extract from Mr. Bourassa's speech is attached.) Chouinard talked to Mr. Bourassa and later told me that the Premier would prefer it if I saw a few of the English-speaking Premiers first and he specifically mentioned Mr. Davis and Mr. Lougheed. He then wants to see me very privately with Chouinard.

In the light of Mr. Bourassa's position, I have now arranged to see Mr. Schreyer on May 15th, Mr. Lougheed on May 16th and Mr. Davis on May 20th (it was not possible to get an earlier appointment with Mr. Davis). If I can see Mr. Bourassa thereafter, I will try to arrange that: if not, I may try to see one or two of the Atlantic Premiers and then visit Mr. Bourassa.

In considering things that may come up during the discussions, there are two matters that, I think, are very likely to arise and on which it would be helpful to have your guidance. They are the following:

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A. What does Mr. Bourassa mean and how can the federal government meet his "condition"?

If the English-speaking Premiers are well informed of Mr. Bourassa's speech, they will almost certainly raise the above question.

Your basic approach with the Premiers on April 9th was that the present exercise would be to achieve "patriation" and to secure an amending procedure without getting into any questions relating to the distribution of powers. Consistent with that (and without opening up a Pandora's box of troubles), there can be no question of doing anything about legislative powers with regard to communications or immigration - even if one had any idea what some revised powers might be. The real question may therefore relate to Mr. Bourassa's "condition" about some sort of constitutional guarantee for the French culture. You mentioned that he had also raised this in the conversation you had at the dinner on April 9th.

I can see no way in which any "constitutional guarantee" can be provided without getting very heavily into the question of legislative powers. The question I think is whether anything short of a constitutional guarantee could or should be provided which would give Mr. Bourassa something to "hang his hat on" and claim that he had got something that was significant for the preservation of the French culture as a part of the "patriation" exercise. The only thing that seems possible along this line is something that would amount to a declaration of intention by the Parliament of Canada and which would be incorporated as a part of the preamble to the proclamation of the Governor General that would formally establish the agreed amending procedure. It would be possible to devise such a statement of purpose and to relate it to the amending procedure in a way that would make quite clear the fact that that procedure in itself provides a quite significant "guarantee" for the French culture in Canada through the permanent veto that it gives to the province of Quebec. I think this point has not been fully appreciated and there might be something to be said for being prepared to register it in a formal way if it will help to get Quebec's participation.

The problem about accepting a preambular paragraph (assuming that it would help to get Quebec's consent) is that it would raise a host of discussions about bilingualism and it would also almost inevitably stimulate demands for specific reference to matters of concern to other groups or regions in Canada. Indeed, it would probably be almost impossible to have a paragraph in a preamble that was about the official languages and cultures without having a paragraph that was, directly or indirectly, related to other groups and regions.

We have at this stage only a rough draft of the proclamation that would be required to establish the amending procedure. Until now, no thought has been given to any preamble. In order better to assess this question, I have tried a rough draft of a couple of paragraphs of my own and I am attaching those simply to show one way in which some kind of a declaration of intention might appear in such a document.

I have no thought of course of saying anything about Mr. Bourassa's "conditions" unless the matter is raised with me. If it is raised, I would think I should simply say that we do not at this stage know what Mr. Bourassa has in mind in talking about "constitutional guarantees" but that the whole idea at this time is to achieve "patriation" without getting into any question of distribution of powers. I could presumably say that we do not at this time see how such guarantees could be given without getting into these questions. The only other question is whether I should, if the problem comes up at all, test what the reaction would be to some kind of a declaration of purpose (along the lines described above) if this becomes important in getting Quebec's consent.

It would be very helpful if I could have your guidance on the above point.

B. Why not establish the totality of the Victoria amending formula rather than simply part of it?

You may recall that Articles 53, 54 and 55 of Part IX of the Victoria Charter would have involved a re-statement, and to some extent a revision, of the amending paragraphs in sections 91 and 92. These were

I agree

My guess would be that you probably would do nothing for Bourassa's parting and that he would not want it. My inclination would be to revise the Bill of Rights (including language) if asked about it. And then discuss the whole matter when you visit Bourassa.

included in Part IX for two reasons. One was for "constitutional neatness" - to have the whole of the powers of constitutional amendment in one place rather than scattered through the constitution. The other was (at provincial instance) to modify and limit the powers that Parliament now has under section 91(1). As you know, at present Parliament can amend the constitution under that section as respects the powers of the Senate, representation in the Senate and representation in the House of Commons. Under Part IX, amendments respecting these would have been transferred from section 91(1) to the general amending formula.

Your letter of April 19th is based on the fundamental premise that what we are doing now is to get a formula of amendment for those parts of the constitution that cannot now be amended in Canada and to do it without opening sections 91 and 92. It is for this reason that the proposal is to establish Part IX of the Victoria Charter less Articles 53, 54 and 55. It is conceivable, however, that some province will argue that, if anything is to be established, it should be all of Part IX.

The disadvantages in establishing all of Part IX would be two: it involves a degree of "opening up" of sections 91 and 92 (which might weaken the argument against getting into the distribution of powers at all) and it would amount to a reduction in the powers of Parliament without getting anything in return from the provincial side. The advantages of going for all of Part IX are also two: the action would be more defensible as being precisely the amending formula discussed at Victoria and it might increase the likelihood of getting agreement.

As in the case of Mr. Bourassa's "constitutional guarantees", I would propose to say nothing about this particular point unless it is raised from a provincial side. If it is brought up, I would assume that I ought to argue in favour of the "partial Part IX" which is proposed in your letter since that is the precise discharge of your proposal - to get an amending procedure that covers the parts we cannot now amend and to do it without

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opening sections 91 and 92. If a province presses strongly for the whole of Part IX, I would think I should simply indicate that I would report that view to you so that you could give it consideration in the light of whatever comments are received from all the Premiers.

Again, it would be helpful to have your guidance.


R.G.R.

I agree

ANNEX A

Extract from Mr. Bourassa's speech of April 20th, 1975

After dealing with Bill 22 as something "to protect the cultural security" of the people of Quebec under "the only French-speaking government in North America", Mr. Bourassa went on to say:

"Dans l'optique de la souveraineté culturelle, c'était une étape fondamentale. Il nous faut poursuivre cet objectif dans le domaine des communications et dans le domaine de l'immigration.

Si dans ces deux domaines le Québec obtient des pouvoirs additionnels ou des garanties constitutionnelles qui lui donnent la pleine sécurité pour le développement de sa culture, le fédéralisme aux yeux des Québécois sera renforcé.

Cet aspect, parmi d'autres, est particulièrement important dans la question du rapatriement de la Constitution. Les Québécois ne sont pas opposés en principe au rapatriement de la Constitution au Canada. Cependant, comme nous avons une situation culturelle tout à fait particulière, surtout avec l'évolution dont je parlais tantôt, il est normal que nous exigions des garanties constitutionnelles pour la protection de notre culture. Nous avons actuellement à Ottawa un groupe francophone très fort qui contribue avec toutes les régions du Canada et avec le Québec en particulier à promouvoir la culture française. Nous n'avons pas de garantie que dans 10, 15 ou 20 ans, alors que notre proportion décline au sein du Canada, nous aurons encore une représentation francophone aussi forte que celle que nous avons depuis que M. Pearson a pris le pouvoir il y a une dizaine d'années, avec près d'un tiers des ministres qui sont francophones.

Nous n'avons pas de garantie qu'en 1980 ou 1985 nous aurons la même proportion de ministres francophones. Il est donc normal dans le domaine culturel que nous travaillions à la protection de notre culture avec des garanties constitutionnelles. Sur le plan économique il est aussi normal que nous collaborions étroitement avec le reste du Canada."

ANNEX B

Possible paragraphs for a Preamble to
the Proclamation of the Amending Procedure

Whereas... (the desirability of establishing a procedure for the amendment of those parts of the Constitution of Canada which cannot now be amended in Canada) ... and

Whereas it is desirable that the procedure should be one which will ensure that any change which could adversely affect the use of the English or the French language or the legislative powers that are relevant to the continuation of their use or to the preservation of the cultures based on them should not be made without the participation of provinces representative of both official language groups in Canada; and

Whereas it is also desirable that the procedure should ensure that no change of importance to a region of Canada or to the people and groups resident therein should be made without the participation of provinces in each region

Therefore ...