

November 6th, 1975.

MEMORANDUM FOR THE PRIME MINISTER:

Patriation of the constitution: Article 40
of the proclamation

In my memorandum of October 31st I told you of the difficulties we had encountered over the drafting of Article 40 which led to a very negative reaction by Chouinard. I raised for your consideration the possibility of a revised draft that would read 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 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."

Assume Provinces have been in consultation

(The underlined words were the revisions to try to meet the Justice problems and the difficulties Chouinard had.)

In your notes on my memorandum you said "I am satisfied with Article 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."

*Returned by L.M.
He has spoken to
both Mr. Bourassa
& Chouinard (before
Dec 21/75). They promised to consider
& to let him know their position
"in January"*

Don Thorson felt that the revisions did not go quite far enough to make it clear that the article would not confer new powers on the governments which they do not now have by virtue either of

*WJR
21/II/76*

legislation or the prerogative. He thought this could be met by inserting the words "within the limits of the powers otherwise accorded to each of them respectively by law".

for example,
In a completely opposite direction, Thorson has some concern that a document of this kind, which is constitutional and therefore of great authority, could conceivably be read restrictively - in the sense that the entry into an agreement between the federal government and a province within the terms of this article might be deemed to exclude the possibility of a province entering into agreements with other provinces that are now within its powers. For ample caution, he thinks it would be wise to add a second paragraph that would remove any conceivable danger of this kind.

The draft of Article 40 that Thorson now proposes would read as follows:

"Art. 40(1) 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 or of any one or more of the Provinces may, within the limits of the powers otherwise accorded to each of them respectively by law, enter into agreements with one another concerning the manner of exercise of such powers, particularly in the fields of immigration, communications and social policy.

(2) Nothing in this Article shall be held to limit or restrict any authority conferred either before or after the coming into force of this Proclamation upon the Government of Canada or the Government of a Province to enter into agreements within the limits of the powers otherwise accorded to it by law."

It seems to me that the above draft should be acceptable to Quebec. I am having a French version prepared and, when it is ready, I shall try it out on Chouinard.

It would be very helpful to know whether you see any problems or points of concern in this latest draft. I do not.

*I find it
acceptable.*
R

R.G.R.
WR