

CONFIDENTIAL

October 29, 1975

MEMORANDUM FOR MR. R.G. ROBERTSON

cc: Mr. F.A.G. Carter
Mr. P. Jodouin
Mrs. B.J. Reed

Further Action on Patriation

Mrs. Reed and I had a brief conversation yesterday morning about further action on patriation. She will have a meeting early Wednesday afternoon with Mr. Thorson and Mr. Strayer in Justice in order to review the full Form for a Proclamation with them. This is the earliest time they could make available for a meeting. They will also discuss the points raised by the Prime Minister.

Mrs. Reed and I did discuss in a preliminary way the three points raised by the Prime Minister.

1. Article 5

Article 5 indicates when the formulae for amendment contained in Articles 1 and 2 may or may not be used to amend the Constitution of Canada. Article 7 makes clear that "this Proclamation" will form part of the Constitution of Canada. The Proclamation refers, in its totality to all the Provinces and to the Government and Parliament of Canada and therefore should, I assume, require amendment by the formula contained in Article 1. However, Part III (Language Rights) refers basically to the Parliament and Government of Canada and Part IV (Protection) refers solely to the Parliament and Government of Canada. I assume that the federal government could not amend these provisions unilaterally even though they refer only to the federal Government and Parliament and not to all of the Provinces (Article 1) or to one or more but not all of the Provinces (Article 2), since Article 91 (1) of the BNA Act stipulates that the legislative authority of the Parliament of Canada extends to "The amendment

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from time to time of the Constitution of Canada, except as regards ... the use of the English or the French language ..."
I would like to be reassured on this question; otherwise it might be desirable to clarify the issue by revising Article 5 in the following manner:

Article 5. The procedures prescribed in Articles 1 and 2 may not be used to make an amendment when there is another provision for making such amendment in the Constitution of Canada, but the procedure in Article 1 may nonetheless be used to amend this Proclamation of any part thereof, any provision for amending the Constitution, including this Article, or in making a general consolidation and revision of the Constitution.

2. Article 16 (2)

Barbara Reed will raise this matter with Mr. Strayer on Wednesday.

3. Article 37

The interpretation of this Article may revolve around the question of punctuation. At present, the final clause of the Article "and neither the Parliament nor the Government of Canada" is not separated from the main body of the Article by a comma, a semi-colon or a period. Barbara Reed would argue, although she is by no means categorical, that, as long as there is no punctuation to separate this element from the rest of the Article, it could be held to qualify the guiding principle: "shall be guided by ... the knowledge that a fundamental purpose ... is to ensure the preservation and the full development of the French language and the culture based on it and neither the Parliament nor the Government of Canada shall act ..." In this sense, it is not binding. Were it to read: "... the full development of the French language and the culture based on it. Neither the Parliament nor the Government of Canada shall act ...", it would indeed be much stronger. The Prime Minister does not appear to have misgivings about this stronger interpretation which would enjoin the Parliament and Government of Canada not to act in a way that will adversely affect the preservation and development of the French language and culture, but Mrs. Reed does fear that Justice might query this provision. When the matter is raised, she will explain why this provision was added and what meaning we had attached to it.

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4. Communication with Mr. Chouinard

A note to send to Mr. Chouinard is being drafted as well as a comparative note on his reactions and those of the Prime Minister. I shall keep Friday free for a trip to Quebec as requested.

5. Memorandum for the Prime Minister

A memorandum for the Prime Minister will be prepared after Barbara Reed's meetings with Mr. Thorson and Mr. Strayer.

6. A new typing

A new typing of the Form for a Proclamation will be produced after Barbara Reed's meeting on Wednesday.



James Ross Hurley