

cc: Mr. Carter  
Mr. Gravelle  
Mr. Hurley

CONFIDENTIAL

June 20th, 1975.

*Mrs. Reed*

MEMORANDUM FOR MR. ROBERTSON

*A very helpful memo. See a few comments & queries.*

*MR*

Re: Constitutional Guarantees for Cultural Security

Preamble

I do not see any major constitutional difficulties in the draft preamble which you sent to me. There are, of course, aspects which you will wish to have polished at a later stage in the drafting process. Some of these that occur to me at the moment are: paragraphs 1 and 4 overlap to some extent and it may be preferable to telescope the two overlapping ideas; you would probably also want to change the opening of paragraph 4 into a "whereas" and possibly break that paragraph into the three separate ideas contained therein; also you might wish to consider whether it is appropriate that Indians and Inuits be singled out for special mention. If you do not, paragraph 3 might be re-phrased to read:

And whereas it is desirable that the cultures based on the two official languages should both be assured of preservation and full development, and that Canada continue to be enriched by the cultures of those of other linguistic groups as well as by the cultures of its native peoples;

*This would seem quite OK to me. It is really a question of "prohibes", I think, whether the elections & consent should be mentioned.*

I do have some concern about the second paragraph of the preamble. It could perhaps be taken as implying that (changes in) the Constitution, Parliament, the federal government and even the courts can have a destructive effect on French culture. While this might be true, I wonder whether we would want to include anything susceptible of this interpretation in the Constitution. The idea expressed in this paragraph is really the converse of that expressed in paragraph 3 (respecting the preservation of culture) and therefore you may wish to consider whether the thought in paragraph 2 is sufficiently covered by paragraph 3.

*I think this is precisely what we do need to get across.*

*It is, under control of the majority, and without awareness of the consequences of the majority's view, however well-meaning, can "impair". Personally, I would favour stating it. Again, however, it is a matter for political judgment.*

Substantive Provision

With respect to the modified version of Mr. Thorson's proposal, as you indicated in your memorandum, it is both broader and narrower. It is broader in the sense that it deals with all powers of Parliament and the federal government under the Constitution, not merely those respecting communications. Also, it deals with the preservation of both cultures everywhere in Canada, not just the French language in Quebec. It is narrower in the sense that it merely admonishes Parliament and the government to be guided by a knowledge of a fundamental principle. Mr. Thorson's proposal would have imposed a specific duty on the federal government.

I believe Mr. Thorson's proposal was sketched along the following lines:

In the provision of any services in regard to radio, television (communications?) by the federal government in Quebec due account shall be taken of the preservation of the French language and cultural makeup (of the province).

Because the new draft is broadly framed, it is difficult for me to answer your questions respecting the influence it would have. Whether it would be a significant protection for Quebec? Whether it would be a serious inhibition for the federal government? I can foresee courts interpreting it as having little effect. I can also foresee the possibility that courts might interpret it as having considerable effect. It might be used to open all sorts of decisions by administrative boards to the challenge that they do not take account of the preservation of culture. This uncertainty makes me somewhat nervous. I am reminded of the treatment section 2 of the Canadian Bill of Rights received in the courts. That section establishes principles according to which federal statutes are to be interpreted. It is, therefore, somewhat analogous to the draft proposal. You will recall that originally the courts were very cautious in their interpretation of section 2 so that it had little effect, but more recently, in the Drybones case, it was held effective to render federal statutes inoperative, and now since the decision in the Lavell case it is rather difficult to assess the effect of section 2 because the decisions are difficult to reconcile.

My initial reaction to the draft section then is  
 X { to suggest that something closer to Mr. Thorson's suggestion  
 which clearly imposed a duty in a fairly restricted area  
 might be more acceptable to Quebec because it would clearly  
 impose a duty and might also be preferable to the federal  
 government because it would be easier to foresee the effect  
 that section would have.

As I mentioned to you, Mr. Thorson has not yet had  
 an opportunity to consider the draft and he may have quite a  
 different view.

Section 59

With respect to Nova Scotia's suggestion respecting  
 an amended section 59, I think they are quite right in saying  
 that this must be included. Although I did not call this to  
 your attention, I included in the memorandum I sent to you on  
 May 2nd in the remarks regarding "the procedure to be used ...  
 precisely the same as that worked out in 1971?" a parenthetical  
 reference to an amended section 59. Section 7 of Appendix B  
 to that memorandum contains a draft of a modified version of  
 section 59 and a preliminary, but not complete, schedule of  
 enactments to which that section refers is also attached.  
 These may be of some assistance in indicating how the mechanism  
 would work.

I had  
 forgotten this,  
 thank you.

X I would do strongly in favour  
 of this kind of formulation, especially  
 if we can confine its application on a somewhat wider base than Scott's  
 formulations. It is desirable to radio & TV — or possibly "communications".  
 Quebec also is worried about immigration policy (swamping French Canada),  
 federal policy on cultural assistance (grants for music, theatre, literature, arts),  
 the use of the federal spending power (both the distribution of programs for, say,  
 scientific research and also the underwriting of Quebec policy by agencies for  
 federal programs in a provincial field), etc. Also there any way the "duty"  
 concept can be applied more widely — without becoming too wide &  
 too restrictive on federal action?

Barbara

Barbara Reed

*[Handwritten signature]*  
 27/10/70