CONFIDENTIAL

November 3, 1975

Jim Hurley

Thanks you. I think you handled this very well.

MEMORANDUM FOR MR. R.G. ROBERTSON

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

4/XI/75

Meeting with Judge Chouinard
on the Form for a Proclamation
Quebec, October 31st, 1975

As agreed, I met with Judge Chouinard at the Palais de Justice in Quebec on Friday, October 31st, 1975, and gave him a copy in French and in English of the Form for a Proclamation. We had a full, frank and friendly conversation for about an hour and a half.

1. Article 40

During an initial period, his comments were directed solely to Article 40, which he qualified variously as "un recul", "ça ne veut rien dire", and "inacceptable". He said that he would not show it to Mr. Bourassa, "autrement, ça serait la fin du patriement".

As agreed, I explained to him that this version had been submitted in the eleventh hour by "des conseillers juridiques" in the hope of removing certain ambiguities and for the sake of legal clarity. We went over each of the points in turn. He maintained that the question of with whom governments could make agreements and who might take the initiative could be resolved to his satisfaction by adding two words to the original formulation: "entre eux". The clause would then read: "... le gouvernement du Canada et les gouvernements des provinces peuvent conclure des ententes entre eux ...."

He maintained that qualifying such agreements with a grant of power from the legislatures would narrow in an unacceptable fashion the spirit of the original proposal, that it would not legitimize agreements such as the Andras-Bienvenue Agreement, that it would lead to posturing and confrontation similar to that in the Duplessis régime, and that it totally missed the point, which was to symbolize a new era of cooperation "as of right". If clarity were needed, he would add one word, "respectifs": "... relatives à l'exercice de leurs pouvoirs respectifs ...."

He also queried the use of the verb "continuer" which, he maintained, would render the Article meaningless; it would invalidate the notion that a new era of cooperation as of right was dawning. I asked him whether he could think of another verb. He could not and said he was quite happy with the original version. There is no point in giving something that has not been requested, but if the process bogs down again, we may have a bargaining point here. Judge Chouinard's intent could be strengthened considerably by saying that governments may and are encouraged to make agreements. On the other hand, he desires no strengthening: he is satisfied with the original version.

He was pleased to note that "politique sociale" had been added, but he did not appear to consider that this was a concession. Rather, he said that "on a oublié de l'ajouter" in the earlier version.

In sum, he wishes to return to the earlier version, adding three words:

> "Dans le but d'assurer une plus grande harmonisation de l'action des gouvernements et plus particulièrement d'éviter toute action qui pourrait compromettre la sauvegarde et l'épanouissement de la langue française et de la culture dont elle constitue l'assise, le gouvernement du Canada et les gouvernements des provinces peuvent conclure des ententes entre eux relatives à l'exercice de leurs pouvoirs respectifs, notamment dans les domaines de l'immigration, des communications et de la politique sociale".

2. Article 38

Judge Chouinard expressed great satisfaction with Article 38, noting that the negative aspect is what gives it its salience and its strength.

3. Article 29

I explained that Article 29 came from the Part on Modernization in the Victoria Charter. He understood and made no comment.

4. Clarity in the French text

In order to properly qualify the degree to which culture, like language, would be protected, Barbara Reed suggested that the word "de" should be inserted before "la culture" in the second last line of the second paragraph of the preamble; in the second last line of Article 38; and in the fourth line of Article 40. This would be very prudent indeed. For the sake of good grammar, I also inserted "ni" before "de la langue française" in the second last line of the second paragraph of the preamble. Judge Chouinard noted that the verb in the first line of the second paragraph of the preamble should be "soient", not "soit". He corrected his version to take account of all of these points, with which he agreed. They should now read:

OK.

"que soient arrêtées des dispositions plus spécifiques quant au statut constitutionnel de l'anglais et du français au Canada et qu'il importe de ne pas compromettre, par la révision de la Constitution, l'interprétation de ses dispositions ou l'action du Parlement ou du gouvernement du Canada, le maintien et l'épanouissement ni de la langue française, ni de la culture qu'elle sous-tend,"

Art. 38 Le Parlement du Canada, dans l'exercice des pouvoirs que lui confère la Constitution du Canada, et le gouvernement du Canada, dans l'exercice des pouvoirs que lui attribuent la Constitution et les lois adoptées par le Parlement du Canada, sont tenus de prendre en considération, outre, notamment, le bien-être et l'intérêt du peuple canadien, le fait que l'un des buts essentiels de la fédération canadienne est de garantir la sauvegarde et l'épanouissement de la langue française et la culture dont elle constitue l'assise. Ni le Parlement du Canada, ni le gouvernement du Canada, dans l'exercice de leurs pouvoirs respectifs, agira de manière à compromettre la sauvegarde et l'épanouissement de la langue française et de la culture dont elle constitue l'assise.

Art. 40 Dans le but d'assurer une plus grande harmonisation de l'action des gouvernements et plus particulièrement d'éviter toute action qui pourrait compromettre la sauvegarde et l'épanouissement de la langue française et de la culture dont elle constitue l'assise ...."

5. Article 7

The P.M. is also of this view now.

On initial reading, Judge Chouinard was of the impression that Article 7 was sufficient to cover the amending formula for the Proclamation.

6. The Spending Power

He mentioned that Mr. Bourassa was still interested in the spending power. I gave him some photocopies from the Secretary of the Constitutional Conference's report on the constitutional review which summarized the various positions taken, a copy of the text published under the name of the Prime Minister in mid-1969 which summarized the federal position, and a brief summary of the main items of debate. I discussed some of the difficulties in arriving at an agreement in this field, pointing out that federal contributions might well come from the "fonds consolidé" and could not be related directly to personal income tax points, a matter which does not appear to have been covered in the Secretary's summary. We agreed that it would probably take several years to come to any agreement. He suggested that Mr. Bourassa might accept a firm commitment to pursue this matter on the part of the Prime Minister as adequate if such commitment were made publicly prior to patriation.

The P.M. might well give to this — i.e. to pursue.

7. An agreement in the field of communications

Judge Chouinard agreed that the two recent agreements in the fields of immigration and social policy would be sufficient to hold out serious hope for a subsequent agreement in the field of communications. However, he added that if steps were taken to begin the process of a negotiated agreement in the field of communications in the near future, Mr. Bourassa might make his agreement to patriation dependent upon the progress of such negotiations during the period of ratification of the Proclamation. This might lead to procrastination, an on-again-off-again attitude on the part of Mr. Bourassa and further bargaining. A "firm commitment" from Mr. Bourassa may bear conditions attached to the state of negotiations in the field of communications or, for that matter, of the federal spending power which he could just as likely add to his list.

I do not think the P.M. would accept this. It is much better not to get into either negotiation at all — although it may be difficult to avoid on communications. Some de facto arrangements may be possible then, but I doubt if any over-all, negotiated solution is likely to be fruitful in the near future.

8. A reference to the courts

Judge Chouinard did not appear very happy about the Prime Minister's rejection of a court reference. The idea originated with Mr. Bourassa. He had made a review of the time factor involved in a Quebec reference that was agreed to by the Cabinet of Quebec in mid-1963, although the "arrêté" was not published until January 1964. The matter was dealt with first by the Quebec Court of Appeal and then by the Supreme Court and was disposed of in mid-1965. This would suggest that the time period required for a double reference would be about 18 months. If one went directly to the Supreme Court, he felt that it would take about a year. I summarized the objections and suggested that a protracted public examination might permit the media to try to manipulate opinion and change the positions of various parties. He merely noted that positions do change over a period of time. He suggested that Mr. Bourassa might want to consult the population in 1977 and that the Proclamation could prove to be an important element in his request for a mandate. I got the impression that Mr. Bourassa does not feel a great urgency in this matter and that, while negotiations may continue and a final draft might be agreed to informally over the next few months, Mr. Bourassa does not, at present, envisage a ratification of the Proclamation before he is ready for an election.

I offered Judge Chouinard a second set of the draft Form in English and in French, but he declined, noting that the current version is unacceptable and that he would not present it to Mr. Bourassa.

James Ross Hurley.

James Ross Hurley