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The Thorson Proposal for Article 40

This formulation would appear more acceptable than the earlier suggestions from Justice and should satisfy both Judge Chouinard and the Prime Minister. The following comments may be of use.

1. "Manner of"

Now that the first paragraph of Article 40 has been qualified by "within the limits of the powers otherwise accorded to each of them respectively by law", it might be judicious to remove "manner of" before the word "exercise". Given the other qualifications, these two words should no longer be necessary.

2. Immigration, communications and social policy

In terms of legislative drafting, it is rather strange to grant (as we have done) a general power (to make agreements), and then to specify three fields in which this power may be exercised. Judicial interpretation of Article 91 of the British North America Act, the preambular portion of which gave a general grant of legislative power to the Parliament of Canada and then proceeded "for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section" to enumerate specific powers, would suggest that the Courts have a tendency to be preoccupied more with the specific enumeration than with the general grant of power.

The first six lines of paragraph 1 of Article 40 constitute a preambular statement of intent, of which there are two elements:

- a) the desire to ensure a greater harmony of action by Governments, which is general to all Governments in Canada; and
- b) a special desire 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 specific mention of immigration, communications and social policy was added not in the hope of restricting the general nature of the grant of power to all governments to enter into agreements, nor in order to clarify specifically why it would be desirable for all governments to ensure a greater harmony of action, but rather as a special indication of intent with respect to the need to avoid adverse effects for the French language and culture in three major areas.

If immigration, communications and social policy were left at the end of the first paragraph of Article 40, some authorities

might feel that it would restrict the generality of the power of the governments to enter into agreements; accordingly, "for greater Certainty, but not so as to restrict the Generality of the foregoing", Ontario might say that it was not terribly concerned with immigration but would like to add a specific reference to "fiscal policy" and Nova Scotia might say that it was not overly concerned with communications but would like to add a specific reference to "regional economic development". The list could become endless. After a general grant of power, why should the only specific references be those of concern to Quebec?

One way to avoid the impression that the generality of the power is, in some way, restricted to areas of concern to Quebec and to avoid squabbling among the other provinces when they are confronted with the Form for a Proclamation, would be to have the specific mention of immigration, communications and social policy as a qualification of the intent to avoid adverse effects on the French language and culture. This is in fact what we had wished to do. One of the problems that Pierre Gravelle and I encountered when we were drafting this Article was the fact that the word "especially" appeared twice; we changed the second to "particularly". The first paragraph might then read:

"Art. 40(1) In order to ensure a greater harmony of action by Governments, and especially in order to reduce the possibility of action in the fields of immigration, communications and social policy 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 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 exercise of such powers.

The advantages of such a formulation might be:

- a) It would strengthen the presentation from the point of view of legislative drafting, since the qualification now clarifies the intent of the second portion of the preambular statement;
- b) By so doing, it should render the Article stronger from the point of view of Quebec since it would make clear the fact that the three fields were mention specifically in terms of the preservation of the French language and culture and not because they were of general interest to all governments which might desire a greater harmony of action;
- c) It would remove doubt as to whether or not the generality of the power in the substantive portion might be considered to be restricted; and
- d) It would lessen the potential arguments of other First Ministers for the inclusion of other specific areas in which agreements might be made.

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*Decided  
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