

CONFIDENTIAL

October 21st, 1975.

MEMORANDUM FOR THE PRIME MINISTER

Next steps on the
"patriation" of the constitution

Since my memorandum to you of October 10, we have here, in the FPRO, considered further the points raised by Chouinard in his telephone conversation with me. That further consideration does not alter the views that I then expressed to you. Further thought, however, throws a good deal more doubt on the wisdom of having any reference of the proclamation to the Courts. In summary, our views on the points raised by Chouinard are as follows:

- (a) The proclamation should come under the amending formula as being a part of the "Constitution of Canada".
- (b) There appears to be no reason not to add "social policy" to the specific references in the proclamation about "agreements".
- (c) We should not consider adding anything about the spending power to the proclamation.
- (d) We should be completely negative about a reference of the proclamation to the Courts.

The question of reference to the Courts

Mrs. Reed, on behalf of the Department of Justice, thinks that a reference to the Court "would not be in the least helpful". Even if a

question could be posed in an appropriate legal way (about which she thinks there would be great difficulty), she thinks the answer would almost certainly be one that would lack the conclusive quality that would help Mr. Bourassa. In her view, it would be likely to be to the effect that the paragraph (paragraph 6 in the draft we sent to Quebec) contains "a non-enforceable obligation and is directory only". While the "directory" part is very important so far as a constitutionalist is concerned, it would seem inconclusive to commentators and critics and they would focus on the "non-enforceable" aspect.

Mr. Hurley shares Mrs. Reed's concerns and feels that, apart from the problem of delay, a Court reference would be more likely to prejudice than to help the success of the "patriation" exercise. Both Mrs. Reed and Mr. Hurley feel that if a Court reference were to be made it should be to the Supreme Court direct since a reference to the Court of Appeal of Quebec would, at best, be inconclusive. To go there would simply be to add to the hazard of an inconclusive opinion and to lose time.

Having thought about the matter in the light of the views that I have received, I think it would be very unwise to insert a Court reference of any kind into the programme.

The "patriation" proclamation

I am attaching herewith, in English and in French, a copy of the "form for a proclamation" as fully drafted to include the full text of the parts on the amending formula, the Supreme Court and **the** language rights. I think the document is a pretty impressive one and I wonder whether we are not at the point where we ought to try to move it ahead to a more conclusive stage with Quebec, possibly with the Cabinet and then with the other provinces.

I think the document can be validly represented as having a fair bit of attraction for pretty well all the parties. For the federal

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government, there would be the establishment of the amending procedure and a firmer foundation than we now have for language rights and protection of the French culture. For Quebec, there would be the linguistic and cultural advantages plus elements of "constitutional guarantee". For seven of the ten provinces, there would be the provision on regional disparities. For all of the provinces, apart from Quebec, there would be some attraction in having this constitutional problem out of the way and there would be a gain in the provisions with regard to the Supreme Court. So far as the Court is concerned, Mr. Hurley points out that the change to 70 years as the retirement age would automatically create three vacancies, including one from the Quebec Bar. Within five years, the majority of judges (five) would have been appointed under the new formula with provincial participation.

I am very dubious whether longer consideration is going to produce a much better document for presentation to the nine provinces that have not, so far, seen this one.

Next steps

If you agree with the above analysis, it seems to me that either you should speak to Mr. Bourassa or I should speak to Mr. Chouinard (or both) to indicate the conclusions set forth at the outset of this memorandum and to say that we are sending a full text of the proclamation. Perhaps it could be on the basis that there is nothing more we feel can be added and that we think it should be acceptable to Quebec in this form. I am not sure what Mr. Bourassa's reaction will be and, because of that uncertainty, there would be undoubted advantage if you could find time to speak to him.

If it looks as though Quebec is going to be prepared to go along with the document as it now stands, presumably our next steps should be:

- (1) Submission of the text to the Cabinet.

As you know, neither the text nor the results thus far of the process of

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discussion have been in front of Ministers. Dependent on the answer from Quebec, we would seem to be at the point where Ministers ought to look at the proposals before they go further.

- (2) Transmission of the text to the Premiers of the other provinces.

A question here is how best to communicate the text to the other Premiers. Probably the best course would be to do it under a letter from you which would give a degree of explanation as to the considerations that have led to this document. Most of them will probably want to have more explanation than can be given in a letter and probably also the chance to talk about particular points or problems that occur to them. Your letter could perhaps say that I would, before a certain date, get in touch with each Premier to see whether he would like to have me (or a Minister ?) come to talk about the text with him.

I shall still of course try to arrange an interview with Mr. Barrett. I have not pushed this during the last couple of weeks when the situation has been so charged and so uncertain with regard to the restraint programme and the provincial response to it.

R.G.R.