

c.c.: Mr. Pitfield
Mr. Carter
Mr. Jodouin
Mrs. Reed
Mr. Hurley
Miss Macdonald

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October 23rd, 1975.

MEMORANDUM FOR THE PRIME MINISTER

Next steps on the
"patriation" of the constitution

Thank you for your comments on my memorandum of October 10. Since receiving them, we have been giving further thought to the best way to move ahead in order to avoid the risk you mention that continued exchanges might "drag us on forever".

The substance of the 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. The document is a fairly impressive one. While it might be as well not to point it out - at least not at this stage - it now contains about three-quarters of the Victoria Charter - plus the new elements. It should have a fair bit of attraction for pretty well all the parties. For the federal government, there would be the fact of "patriation", 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 same 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 about the Supreme Court. (In respect of this, a last minute review indicated that we had omitted an Article in the Victoria Charter which was in another "Part" than the Supreme Court provisions. It is now in as Article 28A. The Articles will be re-numbered in a new typing.)

You will note that the text provides in Article 7 for Chouinard's first point - that the proclamation would be a part of the "Constitution of Canada" and, as such, subject to the amending procedure.

Article 39 (which was "paragraph 6" in the earlier text) does not have reference to "social policy". In your notes, you said you would be prepared to go along with this addition "as a last concession" at the end of negotiation. I am wondering whether we ought not to be now at the end of negotiation so far as the discussions with Mr. Bourassa are concerned. It seems to me that what we could do would be to add the words "and social policy", point out that we have done this, and take the position that the document, as it stands, is as far as you are prepared to go in meeting the several points they have raised. It seems to me that it would be better to take that position about a text that is thoroughly defensible than to take it with the knowledge that there really is no very strong reason to refuse to add a reference to social policy. If you agree, I would therefore be disposed to add the three words to Article 39 and stand firm at that point on the text. It would help, I think, to exclude any attempt to drag in "agriculture" as we know they would like to do.

The text of course has nothing whatever about the spending power. I doubt very much if Mr. Bourassa has thought through all the problems of recapturing a fiscal equivalent from the taxpayers of the province. Even if he has, I am quite certain that other provinces will resist as strongly as they did during the constitutional discussions any formula of this kind. They will want the fiscal equivalent paid to the provincial governments. If there is, as I am sure there is, a certainty of much wrangling, the time to have it is, as you say, after the constitution has been repatriated.

We think the preamble to the proclamation could be made rather better. Changes in it have not fully kept pace with changes in the substance of the document. However, there are bound to be suggestions to change the preamble when we get to discussion with the other provinces. We think, therefore, that the

3. CONFIDENTIAL

best course is to leave the preamble as it now stands while at the same time working here on a better formulation that we can have ready in response to suggestions at some future time.

In other words, subject to your view on the addition of "and social policy" to Article 39, I think we now have the text of a proclamation that we could send to Mr. Bourassa, and possibly also to other Premiers, to move into the next phase of the "patriation" operation.

The question of a reference to the Courts

As you say in your note, it is very apparent that Mr. Bourassa is wildly optimistic in thinking that a reference to the Courts could be accomplished in "quelques mois". Apart from the considerations of timing, we are, on further assessment in the FPRO, strongly of the view that a Court reference would be a mistake.

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 Article (Article 37) contains "a non-enforceable obligation and is directory only". While the "directory" indication would be 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 of any decision.

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.

Next steps toward "patriation"

It seems to me that what we want now is to get the attached text of the proclamation to Mr. Bourassa forthwith, to indicate that it is as far as you are prepared to go in modifications and that you want to move ahead in the discussions with the other Premiers who have, so far, had no follow-up to the initial discussions I had with them (except with Mr. Barrett) in May, June and July. I have already had inquiries from several officials which indicate that Premiers are wondering just where things stand.

If Mr. Bourassa is still absent in Iran, I could talk to Chouinard and have a messenger go to Quebec with copies of the proclamation. Whenever Mr. Bourassa is back, it would obviously be very desirable if you could have a further word with him as a follow-up to your telephone conversation of October 16. It would help greatly in making clear that this is the end of the road on modifications.

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 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.

Original signed by
Original signé par
R.G. ROBERTSON
R.G.R.