

FOR MINISTERS'
EYES ONLY

MEMORANDUM TO THE CABINET

"Patriation" of the Constitution
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1. Object

In April 1975, the ten provincial Premiers agreed to study the possibility of "patriating" the British North America Act by adopting the amending formula that had been proposed and accepted in principle at Victoria in 1971. It was agreed that this exercise would not involve a discussion of the distribution of powers between the two orders of government. Approval is sought of a draft Proclamation by the Governor General as the basis for further discussion.

2. Background

I arranged with the Premiers in April for the Secretary to the Cabinet for Federal-Provincial Relations to visit each of them to discuss my proposal to proceed towards "patriation" on the basis of the amending formula that was accepted in principle at Victoria. Discussions have been held with all the Premiers, save Mr. Barrett with whom it has not, so far, been possible to secure a meeting. The other Premiers have all agreed in principle to proceeding with the "patriation" plan. Almost all have, however, proposed the addition of some other matters to the original proposal which was intended to include the amending formula only. The suggested additions are:

- (a) Mr. Bourassa: "Constitutional guarantees" for the "cultural security" of French Canada, with particular attention to immigration, communications and social policy.
- (b) Mr. Lougheed: Part IV of the Victoria Charter concerning consultation with the provinces on appointments to the Supreme Court. He also wants the amending formula changed to delete the population qualification for agreement to an amendment by the Western provinces. No such qualification was applied to the Atlantic provinces. (Compare Article 1 (2) and Article 1 (3) of the draft Form for a Proclamation).

- (c) The Atlantic Premiers: Part VII of the Victoria Charter concerning Regional Disparities. They feel that their position will not be defensible if the particular interest of Quebec is dealt with and their particular interest in the reduction of regional disparities is not.
- (d) Mr. Hatfield: He is opposed to a constitutional guarantee for the French language and culture unless there is some equivalence of treatment of English and French. This brings in the broader guarantees of the two official languages. He would also like the Official Languages Act of New Brunswick to be entrenched in the Constitution. As at Victoria, he is reticent about the principle of consultation on appointments to the Supreme Court.

While there are other points of detail that have been raised, the above are the main suggestions of substance. The problem of greatest difficulty has been to devise some form of "constitutional guarantee" to meet Mr. Bourassa's need without becoming involved in the distribution of powers. All Premiers have expressed sympathy with Mr. Bourassa's concern, although they wished to reserve final judgment until a concrete proposal had been put forth. After prolonged discussion, including several personal talks between me and Mr. Bourassa, concepts have been worked out which are embodied in Articles 38 and 40 of the Appendix to this memorandum. Mr. Bourassa has now agreed in principle to these as constituting adequate cultural and linguistic guarantees for the purposes of this exercise.

3. The Proposal

A draft Proclamation which would be the final step in "patriating" the British North America Act to Canada is appended. The main elements are the following:

- (a) A Preamble. This is entirely new.
- (b) Part I is the amending formula contained in the Victoria Charter made applicable to those parts of the Constitution not now amendable in Canada. Thus Articles 49, 50, 51, 52, 56 and 57 of Part IX of the Victoria Charter are included, while Articles 53, 54 and 55, which were designed to replace Articles 91 (1) and 92 (1) of the British North America Act, are not. The amending formula has not been modified to take account of the objection raised by Premier Lougheed concerning the population qualification for agreement by the Western provinces. Mr. Barrett will have to be consulted. (Part IX of the Victoria Charter is attached as Appendix B for comparison.)

- (c) Part II, which is Part IV of the Victoria Charter concerning the Supreme Court, with a final Article (included in another Part of the Victoria Charter) to protect the status of Judges already appointed.
- (d) Part III, which is a modified version of Part II of the Victoria Charter concerning language rights. This modified version entrenches the constitutional status of the English and French languages federally and permits a province, under Article 35, to entrench its own provision, which should answer the points raised by Mr. Hatfield. It is not possible to reproduce the whole language provision of the Victoria Charter without getting into problems over Quebec's Bill 22, which has been passed since Victoria. (Part II of the Victoria Charter is attached as Appendix C for comparison.)
- (e) Part IV, which is a new Article designed to protect the French language and culture against adverse action by the Parliament and Government of Canada and provides a guarantee that satisfies Mr. Bourassa in principle.
- (f) Part V, which is essentially Part VII of the Victoria Charter on Regional Disparities, although the presentation has been slightly altered. There is no change in substance, although Premier Campbell has asked for something "stronger".
- (g) Part VI, which is a new Article designed to indicate the spirit in which Governments may enter into agreements. In two of the three areas specifically mentioned, major agreements with Quebec have been concluded over the past two years (family allowances and consultation on immigration). An indication of this spirit is particularly important to Mr. Bourassa in view of the sensitivities in Quebec over immigration, communications and social policy. The Article does not alter the legal or constitutional situation as such.

4. Factors

Mr. Lougheed is opposed in principle to the population qualification for agreement to an amendment among the Western provinces, and Mr. Barrett has not yet been consulted. Mr. Bourassa has accepted the draft Proclamation in principle, but the other Premiers have not yet seen the document.

5. Recommendation

I recommend:

- (a) that the appended draft Proclamation be approved as the basis for further discussion with the provincial Premiers on "patriation" of the Constitution;
- (b) that I be authorized to communicate the draft to the Premiers with the indication that the federal government would be prepared to proceed to "patriation" on the basis of it;
- (c) that the federal position should be one of resisting further additions to the Proclamation or substantial changes other than the modification of the amending formula along the lines sought by Premier Lougheed; and
- (d) that, once the provinces have been consulted on the draft Proclamation, the document as a whole be subject to detailed consideration and approval by Cabinet, including any modifications that may have been proposed by the provinces.

The Prime Minister