

February 5th, 1979.

MEMORANDUM FOR THE PRIME MINISTER

The "historic" attitude of Quebec re
an amending procedure and "patriation"

Jim Hurley is doing a note on positions taken by Quebec starting with the constitutional conferences of 1950.

It is perfectly clear that Quebec's "historic" attitude has been precisely the reverse of what Premier Lévesque claimed at dinner last night. Ever since the first constitutional conference in 1927, Quebec has participated in a search for an amending procedure and "patriation" and never until Mr. Lévesque has the position been taken that there should not be "patriation" until a new constitution is worked out.

You might want to be able to quote some of the precise decisions of 1970 and 1971 when all governments agreed that it was going to take so long to complete a total constitutional review that it would be desirable to try first to get an amending procedure and "patriation":

- (a) The "second working session" of Prime Ministers, September 14th to 15th, 1970 had the following as paragraph 6 of its conclusions:

"The Conference agreed that the examination of the question of amending procedures should now be given attention. A number of First Ministers thought that certain urgent amendments might be required before the full review could be completed and that it would be important to have an appropriate method of making such amendments. It was the view of some that the ways of amending the constitution could best be examined in the light of discussions concerning specific provisions."

lorsque la Guerre de Corée a interrompu les pour-
parlers.

- (b) The "third working session" of Prime Ministers - February 8th to 9th, 1971 had the following as paragraphs 1 and 2 of its conclusions:

"In accordance with the conclusions of their working session last September, the First Ministers gave priority to the questions of an amending formula and an early patriation of the Canadian Constitution. The Conference agreed that the Government of Canada and the provinces should proceed as quickly as possible to patriate the constitution, with an appropriate amending formula applicable entirely within Canada, and with such other changes as can be agreed upon quickly. This approach would permit a substantial degree of progress to be made quickly, while work on other aspects of constitutional revision continues. The First Ministers considered that such action might incorporate the elements set forth in the following paragraphs. However, the First Ministers reserved their right to further analyze all the juridical and other implications."

"The Constitutional Conference agreed on a procedure to be undertaken in Canada at a very early date in order to bring home the Constitution and to transfer to the people of Canada, through their elected representatives, the exclusive power to amend and to enact constitutional provisions affecting Canada. This procedure would involve:"

The work up to and including Victoria was entirely based on the proposition, in which Quebec agreed, that it would be desirable to secure an amending procedure and have "patriation" as soon as possible. At no time either before or at Victoria was it argued by Quebec that the amending procedure and "patriation" should be postponed until after a new constitution had been worked out. The position was precisely the reverse.

R.G.R.

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parlers.

Deuxième session de travail
14 - 15 septembre 1970

La Conférence convient qu'il faut dès maintenant prêter attention à l'examen des formules de modification. Pour certains Premiers ministres, il est nécessaire qu'on fasse quelques modifications urgentes avant de terminer la révision globale, et il importe d'établir une méthode appropriée pour faire ces modifications. D'autres sont d'avis qu'il conviendrait d'abord d'étudier les formules de modification à la lumière des discussions concernant certaines dispositions bien précises.

Troisième session de travail
8 - 9 février 1971

1. Conformément aux conclusions de leur séance de travail de septembre dernier, les Premiers ministres accordent la priorité à la recherche d'une formule de modification et au rapatriement prochain de la constitution canadienne. La Conférence convient que le gouvernement du Canada et les provinces devraient chercher dès que possible à rapatrier la constitution, à trouver une formule de modification appropriée pouvant être appliquée entièrement au Canada, et à apporter tout autre changement acceptable dans l'immédiat. Cela permettrait d'accomplir rapidement d'importants progrès tout en poursuivant l'étude d'autres aspects de la révision constitutionnelle. Les Premiers ministres sont d'avis qu'une telle mesure pourrait incorporer les éléments exposés aux paragraphes suivants. Toutefois, les Premiers ministres se réservent la faculté d'analyser toutes les implications juridiques et autres.

Le rapatriement de la constitution

2. La Conférence constitutionnelle convient d'une mesure que prendra bientôt le Canada pour rapatrier la constitution et remettre aux Canadiens, par l'intermédiaire de leurs représentants élus, le pouvoir exclusif de modifier et d'adopter des dispositions constitutionnelles intéressant le Canada. Cette mesure comprendrait:

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parlers.

OFFICE OF THE PRIME MINISTER
PROVINCE OF QUEBEC

January 20, 1966

The Right Honourable Lester B. Pearson, P.C.
Prime Minister of Canada
Parliament Buildings
Ottawa

My dear Prime Minister,

As is fitting upon the eve of a new session of the Legislature, the Quebec cabinet recently reviewed the principal items likely to be considered thereat. Among them are the draft bills entitled "Quebec Parliament Act" and "An act to provide for the amendment in Canada of the Constitution of Canada".

At the last regular session, the Legislative Assembly voted an address to Her Majesty, praying her to cause to be laid before the Parliament of the United Kingdom the bill entitled: "Quebec Parliament Act". This is linked up with the proposed constitutional amendment bill since the latter would have the effect of ensuring definitively to the only provincial upper House still in existence an absolute right of veto over any amendment of its own powers. Since the British parliament has not yet been seized of the request of the Legislative Assembly, the latter has not been called upon to consider the proposed formula for amending our constitution.

Many events have occurred since this formula was elaborated, and it would not be proper to ignore them. Among them should be mentioned the country-wide debate which has taken place respecting the formula itself, the continued dialogue between Quebec and the rest of the country, a constant and sustained evolution towards a new relationship between Quebec, the other provinces and the Government of Canada, the progress of the studies and discussions undertaken by the Tax Structure Committee, the Royal Commission of Inquiry on Bilingualism and Biculturalism and our own Special Committee on the Constitution.

You are also aware that the proposed formula for amending our constitution has caused some anxiety in Quebec. Whatever the cause of this feeling, it is a factor which should not be ignored. For instance, I personally am struck by the fact that, as early as last spring, the formula was not being interpreted everywhere in the same way. Thus I had always assumed that, as regards the amendment of legislative powers, any diminution of provincial power required unanimity, whereas any increase of such power called for the concurrence of only two-thirds

of the provinces representing one-half of the population. This view, however, is not shared by everyone, even the specialists. It is contended, in fact, that under the formula any province could prevent the extension of the powers of another province. Needless to say, if that interpretation were to prevail, the evolution of our constitutional system in the direction desired by Quebec might become very difficult.

The visit which I recently had occasion to make to Western Canada also made me aware of the considerable difference between the manner in which Quebec wishes to see our constitutional system develop and the views held on this subject by many Canadians in other provinces. This difference of opinion, moreover, was confirmed to some extent by statements made after that visit by authorized representatives of other provinces. My feeling is that after this interval for everyone to ponder our country's future, we shall be in a better position to know what to aim for. It will also be most useful, in that regard, to reflect upon the work of the Tax Structure Committee and the forthcoming report of the Royal Commission on Bilingualism and Biculturalism. By then, I imagine, each of the governments in the country will have had an opportunity to define its policy, not only in the field of federal-provincial relations, but also respecting the relations between French-speaking Canadians and English-speaking Canadians.

In the circumstances, the government of Quebec has decided to postpone indefinitely the consideration of the proposal for constitutional amendment.

Trusting that you will consider this decision as an indication of our sincere solicitude for the present and future progress of Canada, I remain, my dear Prime Minister,

Yours sincerely,

Jean Lesage.

lorsque la Guerre de Corée a interrompu les pour-
parlers.

le 5 février 1979

LA POSITION DU GOUVERNEMENT DU QUEBEC DEPUIS 1950:
Rapatriement de la Constitution
avec une formule de modification constitutionnelle

- Le Premier ministre du Québec semble vouloir épouser la thèse voulant que tous les Premiers ministres du Québec aient établi, comme condition préalable à toute la discussion du rapatriement de la Constitution avec une formule de modification constitutionnelle, le règlement définitif de toutes les questions relatives à la répartition des compétences qui intéressent le Québec.
- C'est une thèse qui correspond mal cependant à la réalité historique.
- Il y a eu quatre tentatives en vue de trouver une formule de modification constitutionnelle depuis la 2e Guerre mondiale. Est-ce qu'aucun Premier ministre du Québec avant M. Lévesque a déjà refusé d'entamer des discussions au sujet d'une formule de modification et de rapatriement de la Constitution? La réponse est non.
- 1. M. Duplessis a participé en 1950 aux discussions qui avaient pour unique but le rapatriement de la Constitution avec une formule de modification. Il n'était pas question alors d'une nouvelle répartition des compétences. Les Premiers ministres n'avaient toujours pas pu s'entendre sur une formule lorsque la Guerre de Corée a interrompu les pourparlers.

- 2. De 1960 à 1964, le gouvernement de M. Lesage a participé aux discussions qui avaient pour unique but le rapatriement de la Constitution avec une formule de modification constitutionnelle, assortie des dispositions constitutionnelles relatives à la délégation de l'autorité législative. M. Lesage a même accepté la formule Fulton-Favreau. Il a présenté une motion à l'Assemblée législative le 22 janvier 1965 pour faire approuver la formule. M. Lévesque, qui n'était pas un partisan du statu quo, s'est joint à M. Pierre Laporte pour appuyer la formule et la position du gouvernement Lesage lors d'un débat à l'Université de Montréal le 18 mars 1965. D'après M. Lévesque, ceux qui militaient en faveur des Etats associés avaient tort de s'opposer à une formule qui ne représentait ni un gain, ni une perte: ce n'était qu'un reflet des coutumes établies. Par la suite M. Lesage a décidé de ne pas procéder avec la motion, notamment parce qu'il craignait que la formule ne soit trop rigide et n'empêche - à l'avenir - des modifications constitutionnelles. Il a fait part à M. Pearson de ses craintes dans une lettre datée le 20 janvier 1966.

- 3. De 1968 à 1971, trois Premiers ministres du Québec - MM. Johnson, Bertrand et Bourassa - ont participé aux discussions visant à une révision globale de la Constitution. Au mois de septembre 1970, les Premiers ministres, y compris M. Bourassa, sont convenus qu'il serait préférable d'en venir à un accord sur un projet plus restreint, comportant le rapatriement de la Constitution avec une

formule de modification constitutionnelle plus flexible que celle de 1964 et un certain nombre de modifications de la Constitution. C'est ainsi que la Charte de Victoria a vu le jour au mois de juin 1971. Si M. Bourassa a refusé par la suite d'entériner la Charte de Victoria, qui comportait une formule de modification agréée par le Québec, c'est parce que les dispositions de la Charte relatives à la politique sociale n'étaient pas entièrement satisfaisantes pour son gouvernement.

- 4. De 1975 à 1976, M. Bourassa a participé à un exercice restreint visant le rapatriement de la Constitution avec une formule de modification constitutionnelle en remettant à plus tard la question de la révision constitutionnelle. Sa seule condition, c'était que le rapatriement ne puisse s'effectuer sans que figurent à la Constitution des garanties pour la langue française et la culture dont elle constitue l'assise. A ce moment-là non plus, il ne fut pas question de régler tout le dossier constitutionnel avant de commencer à discuter du rapatriement avec une formule de modification.

- Je demande donc à M. Lévesque de réviser sa position. Tous ses prédécesseurs ont accepté de participer activement aux discussions en vue de rapatrier la Constitution, soit comme seul article à l'ordre du jour, soit assorti à d'autres préoccupations constitutionnelles. Ils n'ont jamais exigé le règlement définitif de tout le dossier constitutionnel comme

condition préalable ni pour entamer les discussions,
ni pour consentir à une formule de modification.

Si nous cherchons une formule de modification, c'est
parce que nous savons que les circonstances sont
susceptibles un jour de changer et qu'il nous faut
la faculté de s'adapter à ces changements. Il nous
faut, en bref, une formule qui marie d'une façon
satisfaisante des exigences de stabilité et de
protection, d'une part, avec celles de flexibilité
d'autre part.

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March 18, 1965.

Debate at the University of Montreal, sponsored by the Union Générale des Etudiants de Québec, on the Fulton-Favreau Formula. Supporting the Formula were two of the strongest ministers of the provincial Liberal government, M. René Lévesque, Minister of Natural Resources, and M. Pierre Laporte, Minister of Municipal Affairs and of Cultural Affairs, both with a wide following amongst radical and nationalist opinion because of their demands for "associate statehood", "special status", and « Maitres chez nous » for Quebec. M. Lévesque being a particularly powerful leader of left wing opinion. They supported the government's position by arguing that the situation was essentially unchanged, as what had been custom was to become law. Whatever could have been obtained by negotiation before the Formula could be obtained under it. M. Lévesque thought that opposition to the Formula now in order to obtain associate statehood would be to fight the wrong battle in the wrong place at the wrong time; that the legal text was like all legal texts, a reflection of the past; and was neither loss nor gain; that no great power, let alone Ottawa which was not one, could resist self-determination; that Quebec's status would be renegotiated in a massive step; but that a formula which would guarantee what Quebec did not already have would be unobtainable immediately and to insist on it would provoke total confrontation. M. Laporte suggested that the Formula would shelter Quebec from a coup, which, he said, Ottawa had shown in 1949 it could undertake, and might again. In any case agreement with one's neighbours was always necessary, otherwise, whatever the amendment procedure, the outcome would be the same. Professor Jacques-Yvan Morin, of the University of Montreal law Faculty, a leader of nationalist intellectual opinion, attacked the Formula as a yoke, and Messrs. Lévesque and Laporte as defenders of associate statehood who had become advocates of a formula designed to prevent it. Moreover, a. 132 of the B.N.A. Act, respecting treaty implementation, could be amended without Quebec's consent, under the formula. The Formula was like a woman with complicated undergarments — which he proceeded to expose [see Article below: *Les dessous de la Formule*]. The opinion of the student audience, which the press suggested had come into the hall in his favor, generally supported M. Morin, and even apparently showed some hostility to the generally-popular M. Lévesque. See reports in *Le Devoir*, March 20, 1965; *La Presse*, March 19, 1965; *Le Quartier Latin*, March 25, 1965.