

cc: Mr. Chrétien  
Mr. Tassé  
Mr. Strayer

Mr. Coutts  
Mr. Pitfield  
Mr. Kirby  
Mr. Gibson

*File*

Barbara Reed/ml

CONFIDENTIAL

May 6th, 1981.

MEMORANDUM FOR THE PRIME MINISTER

Re: Patriation Resolution Litigation

The appeals from the three provincial references were heard seriatim: Manitoba first, Newfoundland second, and Quebec third. In fact, the major part of the argument was heard in the context of the Manitoba appeal, with seven provinces (Quebec, Nova Scotia, British Columbia, Prince Edward Island, Alberta, Saskatchewan and Newfoundland) and the Four Nations' Confederacy Inc. (the former Manitoba Indian Brotherhood which had been granted standing before the Manitoba Court) supporting Manitoba's position. This was the first occasion on which Nova Scotia and Saskatchewan involved themselves in the litigation, and Saskatchewan's position caused some embarrassment to the other provinces.

Saskatchewan argued that unanimous consent was not required, only substantial consent, and indeed supported the Victoria formula as an adequate measure of such consent. In addition, Saskatchewan argued that those provisions of the resolution relating to provincial legislative powers could be subjected to a different test for validity than those relating to patriation and the amending formula - again, a position contrary to that taken by most of the opposing provinces.

Ontario and New Brunswick generally supported our position, the most notable event being when Mr. Justice Martland forced Mr. McMurtry to agree that if his argument were correct the federal government could have forced section 133 language rights on Ontario, had it wished to do so.

In the context of the Newfoundland appeal there was no essential difference between the position taken by ourselves and that taken by Newfoundland on the answer that should be given to the fourth question. We both agreed that the Court of Appeal had erred in finding that if the provisions of the resolution were enacted into law, section 47, which provides that matters affecting one or more but not all provinces shall only be amended with the consent of

that province, could not itself be amended without the consent of a majority of the people of Newfoundland voting in a referendum.

While it is impossible to predict with any degree of assurance, the best guess would seem to be that there will be split decision, a majority being in favour of the federal position. This guess is based largely on the kinds of questions asked by some of the judges. Selected newspaper clippings are attached from which you may get some flavour of this questioning. I would note that four of the nine judges were virtually silent during the whole case and, therefore, their inclinations are hard to predict.

We would expect, however, that the Court will likely answer question one by saying that the resolution, if enacted, would affect federal-provincial relations and particularly provincial legislative authority. We essentially conceded this to be the case in argument before the Court. We may find that in answering this question the Court, or at least some of its members, will distinguish between those provisions altering provincial legislative jurisdiction and those which do not.

On question two, it may be that at least a minority of the Court will find that a convention exists (even though not legally binding). Again, a distinction may be made between those parts of the resolution which alter provincial legislative powers and those which do not. Some members of the Court are likely to agree with out contention that the question is non-legal and therefore should not be answered.

We would guess that a majority of the Court will answer question three by saying that the consent of the provinces is not constitutionally required. Whether the split will be as high as 5-4 on this issue or less weighty, for example 7-2, is hard to predict.

In any event, thought should be given to what stance the government would take publicly if a substantial number of members of the Court find that a convention exists respecting the alteration of provincial legislative powers but that this is not legally enforceable, and

