

c.c. B. Dabritz

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April 10, 1981

MEMORANDUM FOR THE PRIME MINISTER

c.c. Minister of Justice

Handling of Possible Amendments
to Constitutional Resolution

Attached hereto you will find a Memorandum to Ministers for consideration by the Cabinet Committee on Priorities and Planning next Tuesday, dealing both with amendments to the Constitutional Resolution that the NDP and Conservatives may be expected to table on April 21, and with options that the Government may wish to consider in responding to these amendments.

The Government will have only four hours on April 21 in which to react to opposition amendments and to prepare any of its own which may be considered necessary in light of those tabled by the opposition parties. In addition, amendments by each party will be voted on as a package, leaving no opportunity for accepting some and rejecting others. Thus, it will be necessary to do as much contingency planning as possible to ensure that amendments which the Government believes to be essential are introduced and adopted.

The attached Memorandum sets out a series of items that are likely to be proposed as amendments, in one form or another, by the opposition parties. With respect to most of them, I believe the Government's position is already fairly clear, namely that they be rejected. On three items, however, I think Ministers may wish to consider possible options. These items and the options are set out below.

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1. Aboriginal Rights

This involves the issue of an amendment to section 54 of the Constitution Act, which would include the rights of aboriginal peoples, as set out in section 33, as one of the matters that could be amended only by the general amending formula or by referendum.

While the NDP appear agreeable at this point to introducing an amendment on this matter in terms acceptable to the Government, it is possible they will come forward with a variation under which the native peoples would have a direct role in any constitutional amendment affecting aboriginal or treaty rights. This idea has already been rejected by the Government.

If the NDP moves in this manner, it would be necessary for the Government to defeat the whole NDP package (which is likely to consist of the aboriginal rights amendment and the amendment on equality rights for men and women), and move with its own amendment, at least on the equality rights.

As for an aboriginal rights amendment, it will be a question of judgment whether the Government moves any amendment at all. Although the Government has publicly indicated its support for both the equality rights amendment and the aboriginal rights amendment, it is by no means clear that either version of the latter amendment (amending section 54 to include either "The rights of the aboriginal peoples of Canada set out in Part II" or "Part II of this Act") would find acceptance with the native peoples or the NDP.

In these circumstances, the Government might consider it wise to move no amendment on aboriginal rights.

However, if one is to be moved by the Government, the preferable one from a legal perspective would be to add to section 54 the words "Part II of this Act".

2. Property Rights

The Conservatives will probably move an amendment to provide for protection of property rights. In considering whether to vote down this amendment, to accept it (if its wording is satisfactory) or to propose its own amendment in place of the Conservatives', the Government will wish to consider the following factors:

- the pressure (both public and within Parliament) favouring such an amendment;
- the negative impact such an amendment would have on NDP support for the Resolution;
- the strong opposition to any such amendment by all the provinces, including Ontario and New Brunswick; and
- the negative implications of such an amendment for the Government's position before the Supreme Court. (This is dealt with more fully at the end of this memorandum.)

While the Memorandum to Ministers does not recommend any position on a property rights amendment, it is my view, shared by Roger Tassé, Michel Robert and J.J. Robinette, that the Government should not propose or accept any amendment on this subject due to the problems it could create before the Supreme Court. Such an amendment would give the provinces additional leverage in arguing that the Charter seriously infringes on provincial rights in an area over which they have primary jurisdiction.

3. Preamble and God

The Conservatives will undoubtedly seek to embarrass the Government by proposing an amendment to include a reference to God, either through incorporating

the Diefenbaker Bill of Rights preamble, the revised 1980 Ontario preamble or the Statement of Principles that you tabled in the House on June 10, 1980.

Dealing with this issue will be particularly difficult, not only because of the problem of coming up with suitable wording which will not cause further difficulties in the House and before the Supreme Court, but also due to the question of whether the preamble should be one just for the Charter or for the whole Constitution.

Options for consideration include voting down any Conservative amendment, accepting the Diefenbaker preamble adapted as a preamble to the Charter (but not as a part of section 1 of the Charter as the Conservatives proposed in Committee), proposing a variant of the Diefenbaker preamble to the Charter (which would, inter alia, affirm Canada as one sovereign country under God, and include references to English and French, multiculturalism, aboriginal rights, mobility rights and equality), or proposing a general preamble to the Constitution (either the 1980 Ontario proposal or your June 1980 proposal). The last option -- proposing a general preamble to the Constitution -- could create problems of a two-fold nature.

At the political level, such a move would give the provinces additional ammunition for their argument that the Government is seeking to redefine unilaterally the basic nature and values of the Canadian federation. You will recall that there was no agreement last summer and fall on a preamble to the Constitution.

On the legal plane, there is serious concern in the minds of Roger Tassé, Michel Robert shared by me, that including a general preamble to the Constitution could jeopardize our position before the Supreme Court.

If there were a general preamble to the Constitution, the provinces could bolster their argument that this was a further unilateral attempt by Parliament to redefine the basic nature of the Canadian federation, a measure which requires the consent of the provinces. The "compact" or provincial

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"sovereignty" theories of Confederation were the basis of the dissenting judgments of the Manitoba Court of Appeal and the unanimous opinion of the Newfoundland Court of Appeal.

In light of the foregoing, I would recommend that the Government not propose or accept any amendments relating to property rights or to a general preamble to the Constitution.

However, given the Government's desire to broaden support for the Resolution, I would recommend that it agree to add the adapted Diefenbaker Bill of Rights preamble as a preamble to the Charter of Rights. I think that this will be popular with ethnic communities and Westerners, and might help to attract some Conservative support for the final Resolution. (I am informed that some Conservative M.P.s, particularly veteran members who were strong Diefenbaker loyalists, are considering voting for the Resolution in the final vote because they want to "cap" their political careers by being on the right side of history for this issue. Incorporating, without change, the adapted Diefenbaker preamble would encourage this.) I believe a conciliatory gesture of this kind at this time would have a salutary effect.

In addition, of course, including the Diefenbaker preamble would meet the overwhelming public outcry for having a reference to God in the Charter.

Finally, since there is now an opportunity for amendments to be made to the Resolution, there is one technical amendment which the Government may wish to move to the French language version of section 11(h) of the Charter. This would involve changing "trouvé coupable" to "déclaré coupable" to bring it into line with the similar wording in section 11(d), (g) and (i).

Mike

Michael Kirby