

September 29, 1980.

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NOTE RE SUPREME COURT HEARING

ON PATRIATION RESOLUTION

1. The hearing to commence Tuesday, April 28th, is an appeal from the three reference cases heard by the Appeal Courts of Manitoba, Newfoundland and Quebec respectively.

It was not generated by a reference of questions by the federal government to the Court.

2. On October 24th, 1980, the Executive Council of the Province of Manitoba (i.e.: the Cabinet) issued Order in Council 1020/80 referring three questions to the Manitoba Court of Appeal.

The first question asked whether the proposed resolution, if enacted, would affect federal-provincial relationships or the rights, powers and privileges of the provinces. The second question asked whether there is a constitutional convention that the consent of the provinces must be obtained before the Senate and the House of Commons can request an amendment to the Constitution which affects federal-provincial relationships or the rights, powers and privileges of the provinces. The third question asked whether the agreement of the provinces is constitutionally required for an amendment to the Constitution of Canada affecting federal-provincial relationships, provincial rights, powers, etc..

3. On December 5th, 1980, the Lieutenant-Governor in Council of Newfoundland issued Order in Council 1479/80 referring four questions to the Newfoundland Court of Appeal. The first three were identical to those asked by Manitoba of its Court of Appeal; the fourth concerned the method by which the Newfoundland Terms of Union and section 3 of the British North America Act, 1871 could thereafter be amended if the proposed resolution were enacted.

4. On December 17th, 1980, the Quebec government referred two questions to its Court of Appeal. While different in form, the two questions asked essentially the same questions as had been asked in the other two courts. The first question asked whether the proposed resolution, if enacted, would restrict the legislative

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authority of the provinces; the second question asked whether the Constitution gave the two Houses of the Canadian Parliament authority to request the constitutional amendment without the consent of the provinces.

5. On February 3rd, 1981, the Manitoba Court of Appeal rendered its decision. Three members of the Court refused to answer question one on the ground that it was speculative and premature; the other two answered that it did affect provincial powers, etc.. In answer to question two, none of the judges found that a convention exists requiring provincial consent. In answer to question three, a majority of the Court, three members, found the consent of the provinces was not constitutionally required; a minority, two members, found such consent to be necessary.
6. On March 31st, 1981, the decision of the Newfoundland Court of Appeal was rendered. The three members of that Court answered all questions in the affirmative and found that the Terms of Union with Newfoundland could be changed, if the resolution were enacted, without the consent of Newfoundland if the present amending formula in the resolution was itself changed at some time in the future. The Court recognized this as a remote possibility.
7. On April 15th, 1981, the Quebec Court of Appeal rendered its decision. All five members of the Court found that the proposed resolution would restrict provincial legislative powers. Four members held that it was within the constitutional authority of the Senate and House of Commons to pass the resolution, and legislation enacted pursuant thereto would be constitutionally valid. One member of the Court held the contrary view.
8. The Supreme Court has ordered that the appeals from all three decisions be consolidated and heard together starting April 28th.
9. A copy of the resolution, in its present and final form, will be filed with the Court to enable it to have before it this version. A version which will not be subject to continual change during the course of the Court hearing, as would have been the case had agreement to settle the resolution's final terms not been agreed upon.

April 24, 1981