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April 6, 1981

MEMORANDUM FOR THE PRIME MINISTER

Assessment of the Government's Current
Constitutional Position

The nine judges on the Supreme Court now control the future of the constitutional resolution. They control whether the resolution will succeed (because we know that the U.K. Parliament will pass the resolution if the Supreme Court rules that it is constitutional) and the judges control when such action could be taken (because they control the date on which they will hand down their decision).

Therefore our entire emphasis must shift to implementing a strategy which maximizes the probability of a favourable Supreme Court ruling.

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On the other hand, the Broadbent option would meet this objective nearly as well because the court would know that the content of the resolution could not be changed after their decision and they would not be in doubt about the passage of the resolution because we have a majority government.

In addition, there may well be some value to having the court believe that the resolution when it is finally passed will be supported by the NDP and hence by MPs from every province. Thus the Broadbent option may influence some judges for whom political legitimacy is a factor in their decision. However, personally I do not think this will be a critical factor in the court decision.

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In political terms, the government's supporters, and many of its opponents, expect strong leadership from the Prime Minister and having watched the Conservative filibuster for more than a week and the way in which Mr. Clark rejected the Broadbent compromise when the Prime Minister supported it, they are now fully conditioned for the use of closure to quickly end the debate.

As for the argument that it is important to keep the NDP on side in case the Supreme Court rules against us, so that two parties rather than one share the blame for misjudging the legality of the package and for forcing Parliament to vote on a measure which was subsequently found to be unconstitutional, it would appear on reflection that this argument is not valid. The constitutional issue is identified not only with the Liberal Party, but directly with the Prime Minister. The country believes it is his issue, and his issue alone. Any blame or credit for the ultimate successful completion or defeat of the constitutional resolution will be laid at the feet of the Prime Minister and no tactic will avoid this.

We know that the provinces have reached an agreement on an amending formula and that they want to present this formula to the federal government on April 16th. Our response must be that we have no intention of abandoning the Charter of Rights and we will not disappoint all those Canadians whose expectations have been raised because of the public debate on, and amendments which have been added to, the Charter. Therefore there is no sense meeting with the Premiers unless they are prepared to agree in advance that the Charter as it now stands will be part of any package which is sent to London. We know that the eight provinces will not agree to this condition.

As for the provinces' amending formula, we are delighted if they have been able to reach an agreement. It means that negotiations which we thought might last for a period of up to two years (as permitted in the resolution) can be completed in a matter of weeks or months. If the provinces' proposed amending formula is acceptable to New Brunswick, Ontario and the federal government, it can be the first constitutional amendment after patriation. Therefore nothing is lost in the initiative of the eight provinces by not meeting with them until after patriation.

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While the proposed response to a meeting with the provinces outlined above is saleable to the public in the short run, it will be difficult to maintain throughout the roughly two month period from April 16th until the Supreme Court hands down its decision. There are significant advantages to the government therefore in having the resolution through Parliament and out of the reach of the provinces by April 16th.

Finally, an assessment of the position of the NDP reveals that it is not at all clear how the NDP will vote regardless of whether their native rights and women's rights amendments are in the Charter. There are those who argue that even if we adopt the NDP amendments, they will desert us at the last minute. There are others who argue that in view of the determined effort we have made in the past ten days to get their amendments adopted, and the fact that failure has been caused by the Conservatives rather than the government, at least some members of the NDP caucus will support us in the vote on the resolution even if their amendments are not in that resolution. This view was reiterated by Robin Sears, Mr. Broadbent's chief of staff, in a conversation I had with him this morning, although even he is unable to predict how the caucus will vote in the final analysis.

In short, it is impossible to predict what the NDP will do under either the one closure or two closure options.

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I realize that this is a change in the position I took last week. But considerable reflection on the problem over the weekend has convinced me that the time has come to act swiftly and decisively via the one closure option.

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Michael J.L. Kirby

P.S. [REDACTED]