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CONFIDENTIAL

October 28th, 1980.

October 24th, 1980.

MEMORANDUM FOR THE PRIME MINISTER

Enclosed is a briefing book containing some notes on issues which Premier Blakeney may raise with you in Regina on the Constitutional Resolution.

If you have a chance to read the enclosed notes tonight and wish anything more on this item, you could let me know tomorrow.

Additional notes will be coming tomorrow from Energy, Mines and Resources on energy issues, and from Finance on budget (non-energy) issues.

Also enclosed are:

- (1) a note from Roger Tassé on the use of the word provisions in section 43 of the Constitution Act, in response to your request;
- (2) a note sent to me by Fred Gibson on issues of legislative timetable, with which I fully agree; and
- (3) a note prepared at my request by Roger Tassé on issues surrounding the provincial court challenges to the Resolution.

With respect to this last, I asked why we were using Scollen and Gibson as Manitoba counsel. It is Justice's view that, particularly in a case such as the present, it is preferable to use eminent local counsel rather than parachuting in an outsider. Eminent local counsel are likely to have more influence on the Court than someone seen as an import, especially one from Toronto. It was pointed out to me that Scollen was our counsel in the Forest case - the decision which struck down Manitoba's unconstitutional language legislation. I understand that, in any event, J.J. Robinette and Michel Robert will be keeping an eye on all three cases since they will be in charge of proceedings at the Supreme Court level. You will notice that the last line of Roger Tassé's note indicates that he will not take any further steps until he hears from me. Are there any particular issues which you want me to raise with him?

Michael J.L. Kirby

Encl.

CONFIDENTIAL

October 24th, 1980.

MEMORANDUM FOR THE PRIME MINISTER

Re: Use of the Word "Provision" in Section 43
of the Constitution Act, 1980

You raised with me the other day whether a constitutional amendment which transferred ownership, for example, of all forestry resources in all provinces from the provincial governments to the federal government would be one which could be made under the general amending formula (either section 41 or section 42), or would have to be made under the rules for amendments to provisions affecting one or more but not all provinces (section 43).

I think there is a good argument that it is section 43 which would have to apply.

To effect such a transfer of resource ownership, sections of the various Resources Transfer Agreements given force of law by the British North America Act, 1930 and which individually deal with the ownership of resources in Manitoba, Alberta, Saskatchewan and part of British Columbia would have to be amended, either expressly or implicitly. Section 109 of the British North America Act, 1867, which applies only to the four original provinces, would have to be amended, either expressly or implicitly. The specific provisions of the Terms of Union with Prince Edward Island, British Columbia and Newfoundland would have to be amended, either expressly or implicitly. All these various sections are "provisions affecting one or more but not all provinces" even though their collective effect is to put the provinces in approximately identical positions.

The word "provision" in a legal sense usually means a legal statement or clause thereof. It was used in section 43 in contradistinction to the word "amendment" which appears elsewhere in the same section. Thus, in order to determine where section 43 applies, one must examine the scope of the provision (i.e.: section, sections, or part thereof) which is being amended rather than the scope of the amendment being made. As noted, the aforementioned amendment respecting resources would require amendment to several provisions whose scope extends to one or more but not all provinces.

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This same argument does not apply with respect to the legislative jurisdiction over resources as opposed to their ownership. In general, the various statutes and orders in council under which provinces, other than the original four, entered Confederation, confer legislative jurisdiction on such provinces by a general clause which merely extends the terms of the original B.N.A. Act, 1867 to them. Thus, in the case of legislative jurisdiction, one does not find a series of separate provisions which relate to one or more but not all provinces.

1. From discussions I have had today, it would appear that it will be possible to take an uninterrupted run at the constitutional debate in the House of Commons from December 13 to the commencement of the Christmas recess. *to*
2. The logical date for commencement of a Christmas recess is the close of business on Friday, December 19. An adjournment on this date would allow for 6 days of debate.
3. If the House were kept sitting for Monday and Tuesday, December 22 and 23, and Monday, Tuesday and Wednesday, December 29, 30 and 31, 9 days could be added to the debate for a total of 15 days.
4. My estimate of the reaction of members of the House of Commons is that, if the debate is not completed before the Christmas recess and is resumed following the Christmas recess, the resumed debate will go back to square one and will extend for a prolonged period unless closure is possible.
5. Following from the above, if you have an opportunity to express recommendations regarding the constitutional debate following December 9, I would suggest the following:
 - a) the debate should commence on December 13 and be continued without interruption;
 - b) the government attitude should be that the Christmas recess will follow completion of the constitutional debate and will be of a fixed duration (i.e., 2 weeks or 3 weeks);
 - c) the government should offer to extend hours throughout the debate;

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NOTE FOR MR. KIRBY

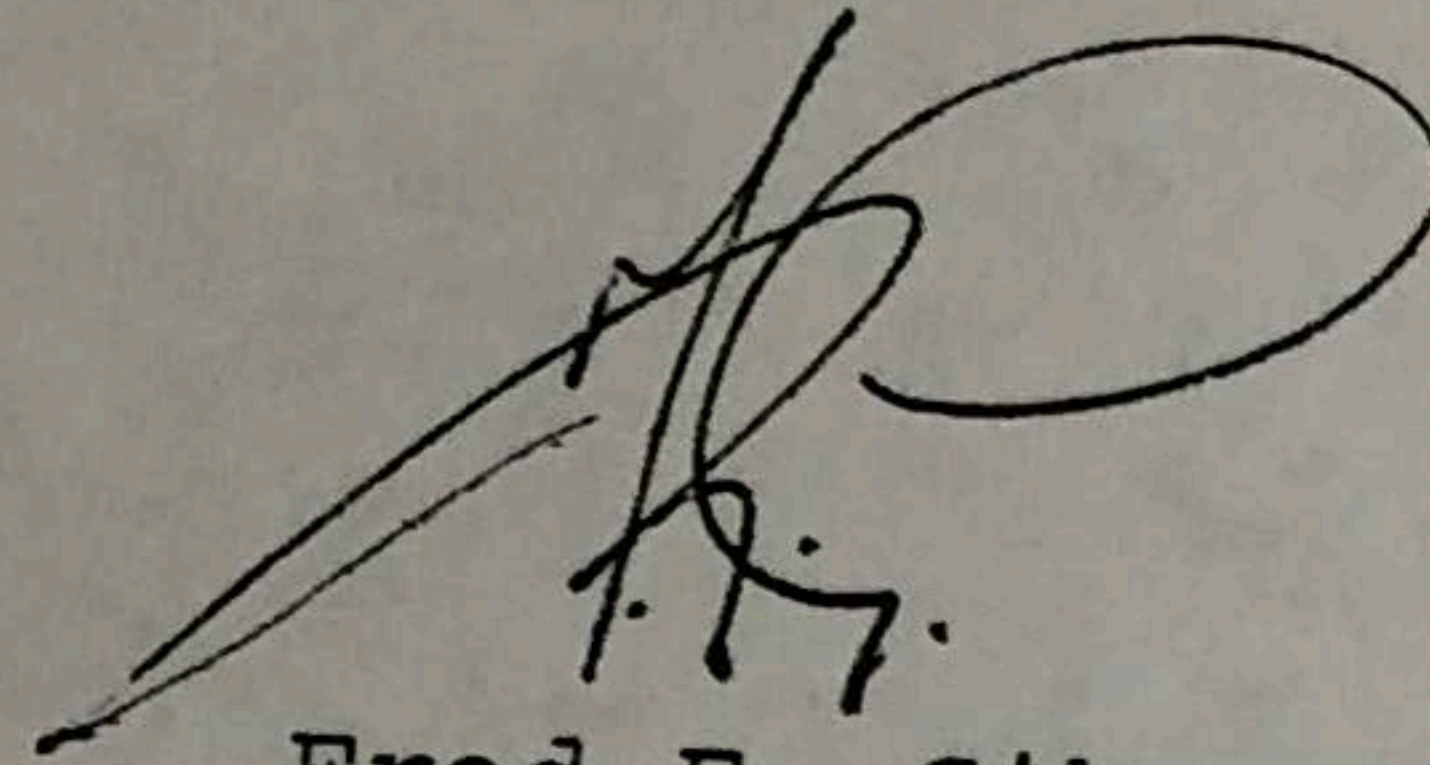
cc: Eddie Goldenberg

Legislative Timetable

1. From discussions I have had today, it would appear that it will be possible to take an uninterrupted run at the constitutional debate in the House of Commons from December 9 to the commencement of the Christmas recess.
2. The logical date for commencement of a Christmas recess is the close of business on Friday, December 19. An adjournment on this date would allow for 8 days of debate.
3. If the House were kept sitting for Monday and Tuesday, December 22 and 23, and Monday, Tuesday and Wednesday, December 29, 30 and 31, 5 days could be added to the debate for a total of 13 days.
4. My estimate of the reaction of members of the House of Commons is that, if the debate is not completed before the Christmas recess and is resumed following the Christmas recess, the resumed debate will go back to square one and will extend for a prolonged period unless closure is possible.
5. Following from the above, if you have an opportunity to express recommendations regarding the constitutional debate following December 9, I would suggest the following:
 - a) the debate should commence on December 10 and be continued without interruption;
 - b) the government attitude should be that the Christmas recess will follow completion of the constitutional debate and will be of a fixed duration (i.e., 2 weeks or 3 weeks);
 - c) the government should offer to extend hours throughout the debate;

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- d) if the debate is not concluded by December 19, the House should sit on Monday and Tuesday, December 22 and 23, and Monday, Tuesday, and Wednesday, December 29, 30 and 31;
- e) if the end of the debate is not clearly visible by the opening of business on December 29, consideration should be given to invoking closure.



Fred E. Gibson