

Ph file

CONFIDENTIAL

October 21st, 1980.

MEMORANDUM FOR THE PRIME MINISTER

Re: Premier Peckford's Statement
on the Patriation Resolution

Yesterday Premier Peckford made a twenty-five minute, province-wide statement on radio and T.V. challenging the Patriation Resolution. It was an outstanding piece of demagoguery, every bit as good as Premier Smallwood at his height. Bill Romkey's office considers that it will have enormous credibility in rural Newfoundland.

It will be necessary to respond to the criticisms as quickly as possible and I accordingly will advise Joyce Fairbairn that it should be addressed by government speakers today.

A summary of the points Premier Peckford made follows.

He stated that section 42 of the Constitution Act (allowing for amendment by national referendum) and the Charter of Rights will remove from Newfoundland's control certain crucial matters, such as:

- (1) the Labrador-Quebec Boundary will no longer be secure - the implication being that the federal government will side with Quebec in this dispute (presumably Premier Peckford thinks an amendment would be made to the boundary by using a national referendum);
- (2) Newfoundland's denominational schools will be struck down as a result of the provisions in the Charter of Rights respecting freedom of religion;
- (3) Newfoundland's forestry resources could be taken away without its consent by means of a national referendum (which Premier Peckford calls the "tyranny of the majority");
- (4) mobility rights in the Charter will prevent Newfoundlanders getting jobs which are rightfully theirs.

He referred to the Terms of Union signed when Newfoundland joined Confederation, and said that they were based on the understanding that no changes would be made to them without Newfoundland's consent.

He also referred to the Charter, as have others, constituting a move towards republicanism; and to the national referendum provision as constituting a move towards a unitary state.

He referred to Newfoundland's request that the federal government ensure "wheeling" rights for Labrador power in Quebec, i.e.: requiring Quebec-Hydro to purchase certain quantities of Labrador power at a price agreeable to Newfoundland, to charge an appropriate amount for transmission costs, and to export corresponding quantities of Quebec hydro to the United States. By implication, he indicated that the federal government could be expected to side with Quebec on this issue.

The following are some suggested responses which might be made to Premier Peckford.

Labrador-Quebec Boundary

What Premier Peckford has said is untrue; the boundary will only be amendable with the consent of Newfoundland. Amendment of the Constitution by national referendum (or by some of the other amendment procedures set out in the Resolution) cannot be used when there is another provision in the Constitution for amendment. Section 47 so provides. There is another provision in the Constitution for amending provincial boundaries. It is set out in the B.N.A. Act, 1871 and requires the consent of the province or provinces concerned and the federal government. The B.N.A. Act, 1871 is expressly continued as law by the Resolution - refer section 53 and item 4 of the Schedule.

Newfoundland's Denominational Schools

The section of the Charter of Rights ensuring that everyone has the fundamental right to "freedom of conscience and religion" would not lead to the destruction of Newfoundland's denominational schools. It might mean that children attending those schools could not be required to observe religious exercises therein if they were not of the particular faith.

If anything "freedom of religion" should protect rather than destroy denominational schools.

Those who pretend that the Charter of Rights could have such an effect are confusing that Charter with those provisions of the United States' Constitution which expressly forbids the establishment of religion. This has been interpreted as forbidding state support for denominational schools and for religious exercises in schools. There is no such express non-establishment provision in the Charter of Rights, and freedom of religion does not carry with it a denial of denominational schools.

It should be noted that it is not only Newfoundland which has a system of denominational schools; these are protected in other provinces, particularly Ontario and Quebec by section 93 of the B.N.A. Act, 1867.

During the February, 1979 First Ministers' Conference, all provinces except Manitoba agreed that if there were to be an entrenched Charter, these rights should be included. Indeed, the Quebec provincial Charter of Rights presently recognizes freedom of conscience and religion. The entrenchment of freedom of religion is consonant with what is already provided for by Article 18 of the U.N. Covenant on Civil and Political Rights to which Canada is a party. No one has ever suggested that the various systems of denominational schools in the different provinces infringe that Covenant.

Newfoundland's Forestry Resources

The claim that Newfoundland's forestry resources could be taken away without its consent is untrue, assuming Premier Peckford is talking about the ownership of such resources (which seems to be the case). The ownership of such resources is a matter that concerns only Newfoundland; accordingly, change to that ownership can only be brought about by amendment under section 43 of the Constitution Act. Section 43 provides that amendments to provisions of the Constitution which relate to one or more but not all provinces are amendable only with the consent of the concerned province or provinces and Parliament. Such an amendment could not be brought about by national referendum or by agreement of six of the ten provincial legislatures as required under the general amending formula in section 41. This follows from the ordinary and well-known rules of statutory interpretation which require specific provisions to take precedence over the more general.

If Premier Peckford is talking about legislative jurisdiction over forestry resources, as opposed to ownership, then such could be transferred to Parliament without the consent of the province. To effect such a change, however, either the legislative assembly or a majority of the people in the following provinces would be required: at least two of the four Atlantic provinces (New Brunswick as well as Newfoundland having extensive forestry resources), in Quebec (with its great forestry resources), in Ontario (with its great forestry resources), and in at least two of the Western provinces.

Mobility Rights

The mobility rights guarantee does not prevent Newfoundlanders seeking and holding jobs in Newfoundland; it enables other Canadians and permanent residents of Canada to also have a right to compete for a job in Newfoundland. It means that Newfoundlanders will have an equal right to compete with persons in other provinces for jobs in those provinces and could not be disqualified merely because they come from outside the province. Discrimination by one province explicitly gives nine other provinces the right to do the same. And when this happens no one should think that the weaker provinces will be the beneficiaries. Thus, if our economic union is not strengthened to prevent such action, our concept of a single Canadian citizenship could become meaningless.

Newfoundland Terms of Union - Only to be Changed with Consent of Newfoundland?

The terms of union were given force of law in 1949 by a United Kingdom statute - the B.N.A. Act 1949. Union of the four original provinces was given force of law in 1867 by a United Kingdom statute - the B.N.A. Act 1867. Newfoundland is in no different position than the other provinces. Article 3 of the terms of union expressly places that province in a position comparable to that of the other provinces. Newfoundlanders voted by referendum to become a province of Canada; they did not come in as an associated state.

Charter of Rights - Republicanism?

It seems strange to argue that the Charter of Rights is a move towards republicanism when section one of the Charter expressly provides that the guaranteed rights shall be subject to such limits as are "generally acceptable in a free and democratic society with a parliamentary system of government."

The conclusion that a Charter of Rights is republican is based on an outdated and oversimplified study of the constitutions of other countries. It is based on the knowledge that the United States has a Bill of Rights and is a republic and that the United Kingdom does not have a Bill of Rights and is a parliamentary system of government, ergo Bills of Rights are creeping republicanism.

In fact, a number of governments with Parliamentary systems have Charters of Rights and virtually all federal states in the world have constitutionally entrenched rights and freedoms. It is simply false to suggest that Bills of Rights are creeping republicanism. And indeed Britain, since joining the European Common Market, is bound by the European Charter of Human Rights. Also, in recent years in that country there has been substantial consideration to going even further and to adopting a domestic Bill of Rights.

Charters of Rights are not inimical to Parliamentary systems of government. Should peoples' rights be less guaranteed because they choose a parliamentary as opposed to a republican form of government?

National Referendum - A Unitary State

The charge that use of a national referendum is a move towards a unitary state is silly. Firstly, under the proposal regional majorities as well as a national majority is required. The section places authority to consent to an amendment directly in the hands of the people as an alternative to amendment by Parliament and the provincial legislatures. Thus the required regional majorities parallel the consent required from provincial legislatures under section 41. On the basis of the present section 41 approval by referendum could require approval by a majority of voters in

- 2 Atlantic provinces containing at least 50% of the population of that region
- Ontario
- Quebec, and
- 2 Western provinces containing at least 50% of the population of that region.

Premier Peckford's analysis implies that requiring the consent of provincial legislatures is not a centralizing tendency but requiring the consent of the people in those very same provinces is a centralizing tendency - a somewhat strange logic

In any event, the government has indicated that it intends the referendum mechanism to be used only when required to break a deadlock between the federal and provincial governments. Amendments will be introduced in committee to ensure that the section reads accordingly.

It is interesting to note that in at least the following federal, not unitary states, referenda play a part in the constitutional amendment formula: Switzerland, Australia, United States.

Hydro Power Corridor through Quebec - Wheeling Rights

Premier Peckford's conclusion that the federal government has decided against the province in determining this matter is premature. You responded on July 29th, 1980 to a letter from Premier Peckford indicating that the federal government stood ready to act if it could be clearly demonstrated that the exportation of electricity from Newfoundland was in fact being prevented by Quebec.

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While the federal government is sympathetic to Premier Peckford's problem he grossly oversimplifies the whole matter by stating that the transmission of power is identical to the transmission of oil through a pipeline, or goods on a railway; it is not. What Premier Peckford seems to require is for the federal government to force the Quebec government (through Quebec Hydro) to purchase a certain amount of Labrador power, at a price agreeable to Newfoundland, and for consumption in Quebec by Quebeckers, and to sell a corresponding amount of Quebec's own hydro to the United States.

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Thus, if our sovereign union is not strengthened or preserved such action, our concept of a single Canadian citizenship could become meaningless.

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