



Department of Justice

Ministère de la Justice

cc - E. Goldenberg ✓

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MEMORANDUM/NOTE DE SERVICE

BY HAND

TO/A: MINISTER OF JUSTICE

FROM/DE: ASSISTANT DEPUTY MINISTER  
(PUBLIC LAW)

SUBJECT/OBJET: NEWFOUNDLAND DENOMINATIONAL SCHOOLS  
AND PROPOSED CONSTITUTIONAL RESOLUTION

Comments/Remarques

Fred Jordan, Barbara Reed, Eddie Goldenberg and I met on November 26 with the Joint Executive of the Denominational Educational Committees of Newfoundland to hear their concerns respecting the potential impact of the Proposed Resolution on the denominational school system in that province. The meeting was held at the request of the Honourable William Rompkey.

I BACKGROUND

Under Term 17 of the 1949 Newfoundland Terms of Union with Canada (confirmed by the BNA Act, 1949) all then existing legal rights and privileges respecting denominational schools in Newfoundland were constitutionally guaranteed, including the right of all such denominational schools to have the public funds provided for education allocated to each category of such schools on a non-discriminatory basis.

Term 17 differs from section 93 of the BNA Act (and equivalent provisions applicable to other provinces) in that it specifically authorizes public funding for denominational schools. In addition, Newfoundland is different from all other provinces in that its entire school system is denominationally based; there is no secular school system as in other provinces. At present there are three denominational educational committees, the Roman Catholic, the Integrated (Anglican, United, Presbyterian, Salvation Army and Congregational) and the Pentacostal. The latter, while not covered by Term 17 has been accorded equal status under provincial law.

This denominational school system is basic to Newfoundland society, and the Denominational Educational Committees want to ensure that its integrity is not undermined by the Charter of Rights in the

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amending formula. As the Committees' lawyer, James Greene, put it: Term 17 was one of the most basic conditions of Newfoundland's agreement to join Canada.

The Committees' principal concerns about the Proposed Resolution's impact on Term 17 relate to certain provisions of the Charter of Rights and to the amending formula as it may or should apply to Term 17.

## II CHARTER OF RIGHTS AND TERM 17

The members of the Joint Executive have two concerns here. First, they fear that freedom of conscience and religion and the right to non-discrimination based on religion in the Charter may have the consequences of undermining the ability to maintain religious qualifications for teachers in the denominational schools, and of enabling a court challenge to the right of the government to provide funds to such schools. Second, and connected with the first, is the fear that the primacy of the Charter clause (section 25) could be construed as permitting the Charter rights mentioned above to override other possibly conflicting rights in the Constitution, ie. Term 17.

Assurance was given to the members that it was most unlikely that freedom of conscience and religion or protection against discrimination based on religion would be construed as having the impact they foresee. In addition, it was indicated that it was not the intention in the Proposed Resolution that Charter rights would interfere with other rights specified in the Constitution such as those relating to denominational schools.

Both of these concerns of the Joint Executive can likely be met by the amendment to the Proposed Resolution that has already been suggested in the Memorandum to Ministers (pp.14-15) whereby all provisions of the Constitution, rather than just those of the Charter, would be given primacy over any other laws. This would ensure that the right to denominational schools and the religious rights connected therewith are not construed as being in conflict with any rights in the Charter.

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### III AMENDING FORMULA AND TERM 17

The members of the Joint Executive have two concerns here also. First, they share the fear, expressed by Premier Peckford, that the general amending formula or the referendum procedure (sections 41 and 42) could be used instead of section 43 to amend the constitutional guarantee of denominational schools for Newfoundland without the consent of that province. Second, they argue that even if an amendment were to be made to Term 17 under the section 43 formula, with the consent of Parliament and the Newfoundland legislature, to reduce or abolish denominational school rights, provision should be made for any one or more of the religious denominations that did not agree with such an amendment to continue to exercise their denominational school rights despite any such amendment. In other words, any protected denomination would have a right to "opt out" of any such amendment.

On the first concern, assurance was given that section 43 was intended to be the only amending formula to be used for amendments applying to one or more but not all provinces, and that if there was any ambiguity in this regard the government would want to clarify the point. Such clarification is in fact already recommended in the Memorandum to Ministers (p.22) through an amendment to section 47 which would preclude the use of the section 41 and 42 amending procedures in cases where section 43 applies.

On the second concern, it was indicated that the special protection being sought for denominational school rights could give rise to a number of difficulties which would require consideration by the Minister of Justice and his colleagues.

What in essence is being sought here is a veto power by religious groups over a decision by the legislature of Newfoundland and the Parliament of Canada to amend Term 17 to reduce or eliminate denominational school rights in Newfoundland. If for example, Newfoundland were to decide at some future date to replace the denominational education system with a secular system, and Parliament were to concur, this could not happen unless the members of the religious denominations also agreed. Or, if some of the denominations agreed to such a change while others did not, the latter denominations would not be affected by any such amendment.

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While, as noted earlier, Newfoundland is the only province with a completely denominational school system, it would seem difficult on this ground alone to contemplate a veto power being granted to religious groups to prevent a constitutional amendment agreed to be the provincial and federal legislatures.

First, it would inject into the constitutional amendment process a new dimension -- allowing particular groups a direct role in determining whether an amendment was to be made and, if so, the extent of its application.

This could create a precedent for other groups, such as the Indians who are now insisting on a similar veto right with respect to any constitutional changes affecting aboriginal and treaty rights. Similar arguments could be advanced by others with respect to amendments to the Charter of Rights. For example, language minorities could argue that amendments to the language rights provisions should be made only with their consent, or groups covered by the non-discrimination provisions could equally contend that they should have a veto over changes in those provisions.

Second, one has to consider the impact of this proposal on guaranteed denominational education rights in other provinces. There has been no indication thus far that religious groups in other provinces are raising a similar concern, but if it were to be proposed for Newfoundland there would likely be a demand for a similar guarantee in other provinces. This in turn could give rise to an argument that denominational school rights be clarified in the other provinces, opening the old wounds of previous battles over religious educational rights in provinces like Ontario and Manitoba.

Third, there has been no indication in Premier Peckford's statements on protection of Newfoundland's denominational school rights that he is seeking an amendment of this nature. His concerns have related only to assuring that changes in Term 17 cannot be made without the consent of the Newfoundland legislature, and that the amending formula for making such changes cannot be altered to exclude the consent of the legislature of that province.

Finally, the veto power being sought by the Joint Executive goes beyond the question of establishing constitutional amending procedures to be followed by

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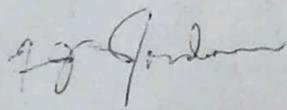
provincial and federal legislatures. It goes to the substance of legislative jurisdiction over education, placing a further fetter on the powers of the provinces to legislate in this area. Thus, any such proposal would undoubtedly generate a hostile reaction from the provincial governments who would not likely want to grant religious denominations a constitutional veto over changes in the education system where such change had been authorized by an amendment under section 43.

IV CONCLUSION

Two of the principal concerns of the Newfoundland denominational school authorities -- those respecting possible impairment of Term 17 by Charter rights or the amending formula -- can be met by amendments to the Proposed Resolution that are already under consideration by the government.

The third concern -- to give religious groups in Newfoundland a constitutional veto power over amendments to Term 17 which may be agreed to by the Newfoundland legislature and Parliament -- gives rise to an unprecedented new dimension to the amending procedures now under consideration, and would create a number of serious problems in securing adoption of the Proposed Resolution.

It is therefore recommended that the government not accede to this latter proposal of the Newfoundland school authorities.



B.L. Strayer

cc. Deputy Minister  
Fred Jordan  
Barbara Reed  
Eddie Goldenberg ✓