



# Royal Commission on Renewing and Strengthening Our Place in Canada

## THE TERMS OF UNION: AN ANALYSIS OF THEIR CURRENT RELEVANCE

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The views expressed herein are solely those of the author and do not necessarily reflect those of the Royal Commission on Renewing and Strengthening Our Place in Canada.

## Contents

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<b>Introduction</b> .....	171
<b>Negotiation of the Terms of Union</b> .....	173
<b>Comparison with Other Provinces</b> .....	177
<b>Interpreting the Terms of Union</b> .....	181
<b>The Terms of Union – The Impact of Specific Provisions</b> .....	189
<b>Fisheries Laws (Term 22)</b> .....	189
<b>Financial Arrangements (Terms 23 – 29)</b> .....	189
<b>Term 31</b> .....	192
<b>Term 32</b> .....	194
<b>Ownership and Management of Offshore Mineral Resources (Term 37)</b> .....	196
Natural Resources .....	196
<b>Term 17</b> .....	198
Education .....	198
<b>Term 46</b> .....	200
<b>Conclusion</b> .....	201
<i>Endnotes</i> .....	203

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# Introduction

On 11 December 1948, Canada and Newfoundland<sup>1</sup> entered into a Memorandum of Agreement establishing the terms under which Newfoundland would join Canada as its tenth province. Referred to as the Terms of Union, their execution marked the culmination of two sets of negotiations between Newfoundland and Canada. The Terms of Union were incorporated into the *Newfoundland Act* passed by the Parliament of the United Kingdom to effect the joining of Newfoundland with Canada<sup>2</sup> which declared that the Terms of Union “shall have the force of law.” The Terms of Union have been described as the “constitutional ground rules”<sup>3</sup> under which Newfoundland would operate as a Canadian province. From this background, a person could not be faulted for assuming that the Terms of Union remain relevant to the political, economic and social issues facing Newfoundland in the 21<sup>st</sup> century.

A significant amount of research has been conducted regarding the political events leading up to the decision of the people of Newfoundland in the second 1948 referendum to choose Confederation instead of returning to Responsible Government. There also have been studies on the negotiations leading to the Terms of Union. This paper analyzes the relevance of the Terms of Union more than 50 years following Newfoundland’s union with Canada. What is the test of “relevance” in 2003 when speaking of the Terms of Union? That must be to focus on the question of whether the Terms of Union can be adapted to deal with the contemporary political, economic and social issues affecting Newfoundland and Labrador. In answering this question, the paper shall:

- give an overview of the negotiations leading to the Terms of Union;
- compare the Terms of Union with the negotiated arrangements leading to British Columbia and Prince Edward Island joining Canada and with the legislation establishing Manitoba, Saskatchewan, and Alberta as Canadian provinces;
- explain modern legal principles governing the interpretation of constitutional documents and how they have been applied to the Terms of Union; and,
- assess the impact of the Terms of Union as a constitutional instrument within the Canadian federation, particularly:
  1. Fiscal arrangements (Terms 23 – 28);
  2. The 8<sup>th</sup> year review of fiscal arrangements (Term 29);
  3. The initial five-year fisheries arrangement (Term 22);
  4. Public services assumed by Canada (Term 31);
  5. Ferry service and railway rate regulation (Term 32); and,
  6. The impact of Term 3 and Term 37 on the issues concerning ownership and management of offshore mineral resources.

The Terms of Union have been interpreted in a number of Court decisions since Confederation. Therefore, any assessment of the continued relevance of the Terms of Union must address how modern legal principles governing the interpretation of constitutional documents have been applied to them.

The paper's conclusion is that the force and effect of the Terms of Union essentially have been "spent". In other words, the Terms of Union have little practical application to current federal-provincial political and financial relationships. Legal principles that have governed, and continue to govern, the interpretation of the Terms of Union will not change this situation. Rather, asserting the Terms of Union in trying to expand Confederation's benefits to the province could result in an interpretation, based on current legal principles, having the opposite effect.

## Negotiation of the Terms of Union

In 1933, the Government of Newfoundland made a formal request to the United Kingdom that it legally suspend Newfoundland's constitution in favour of having its political, social and economic affairs managed by a Commission of Government. The Commission of Government<sup>4</sup> was comprised of a Governor and six Commissioners; three from the United Kingdom and three from Newfoundland. All were appointed by the Government of the United Kingdom. The Commission of Government was to manage Newfoundland's affairs until such time as Newfoundland could support itself financially, whereupon, at the request of the Newfoundland people, Responsible Government would be restored.

The mechanism by which Newfoundland would determine its financial status and its future form of government was announced on 11 December 1945 by the Right Honourable Clement Attlee, Prime Minister of the United Kingdom. He announced that an elected National Convention of Newfoundlanders would be convened to:

“... [C]onsider and discuss amongst themselves, as elected representatives of the Newfoundland people, the changes that have taken place in the financial situation of the Island since 1934, and bearing in mind the extent to which the high revenues of recent years have been due to war time conditions, to examine the position of the country and to make recommendations to His Majesty's Government as to possible forms of future government to be put before the people at a national referendum”<sup>5</sup>

After hearing of Prime Minister Attlee's announcement, Joseph R. Smallwood decided that he would run in the constituency of Bonavista Centre<sup>6</sup> on a platform that sought union with Canada. He would become the Convention's leading advocate of confederation with Canada. While he was supported by others, the majority of the Convention's members favoured a return to self-rule. Nevertheless, Smallwood, through his research of Canada's political and social welfare framework, and his use of broadcasts of the Convention debates to attract the public's attention to the Confederation option, was able to obtain the Convention's support for a resolution to send a delegation to Ottawa to obtain terms under which Canada would be prepared to accept Newfoundland as a province (the “Resolution”). The resolution to send the delegation read:

“RESOLVED that the National Convention desires to send a delegation consisting of the Chairman and six other of its members to Ottawa to ascertain from the Government of Canada what fair and equitable basis may exist for federal union of Newfoundland and Canada.”<sup>7</sup>

While the Resolution did not specify or rank the importance of terms that would form the “fair and equitable basis” for union, financial terms would become the primary focus of the Newfoundland delegation's discussions with Canadian officials. There were minimal, even negligible, discussions relating to Newfoundland, as a Canadian province, maintaining an influence over federal decisions having a significant impact on its economy or society. There were various political and constitutional factors that hindered such negotiations.

As recognized by the Lewis Royal Commission, appointed by the Government of Newfoundland in 1953 to prepare the Province's case under Term 29 (to be discussed further in this paper), the delegation that was sent to Ottawa in 1947 (the "1947 Newfoundland delegation") had no authority to negotiate terms.<sup>8</sup> The convention only authorized the 1947 Newfoundland delegation to ascertain the basis upon which Canada was prepared to accept Newfoundland's entry into the country.<sup>9</sup> This was consistent with the National Convention's decision to send another delegation to London to ascertain accommodations that the United Kingdom was prepared to make with respect to Newfoundland's national debt, the granting of interest free loans, and the future economic position of Newfoundland<sup>10</sup> should there be a return to Responsible Government. Each delegation's role was essentially investigative, with each delegation's primary focus being on the nature of financial assistance that would be available to Newfoundland. This focus was not conducive to the negotiation of complex constitutional arrangements with Canada.

Other factors constrained the negotiation of provisions permitting Newfoundland to have influence over matters falling within federal jurisdiction. One was the Canadian Constitution itself. At the time of the Newfoundland delegation's discussions with the Government of Canada, the *British North America Act, 1867* (later amended to be the "*Constitution Act, 1867*"), which operated as Canada's constitution, could only be amended by the Parliament of the United Kingdom. The powers prescribed to the federal and provincial governments were set out in sections 91 and 92 of the *Constitution Act, 1867*. Those sections have been described as "watertight compartments," meaning that as a province of Canada, Newfoundland could not interfere with the right of the Government of Canada to pass laws on matters reserved to it under section 91 of the *Constitution Act, 1867*. Therefore, if any accommodations were to be made to Newfoundland that were outside this constitutional structure, they would require amendment to the *British North America Act, 1867*.

Although Newfoundland had not joined Nova Scotia, New Brunswick, Ontario and Quebec in the original 1867 union to form Canada, provision for its potential inclusion had not been overlooked. Section 146 of the *Constitution Act, 1867* provided:

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, ***subject to the Provisions of this Act***; and the Provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the Union Kingdom of Great Britain and Ireland.

(emphasis added)

The wording of section 146, permitting the inclusion of Newfoundland as a province under terms and conditions that would be subject to the *Constitution Act, 1867*, discouraged the negotiation of terms with Newfoundland that would result in a derogation of the federal powers

enumerated under section 91. Since the only recourse to amend the *Constitution Act, 1867* was through the British Parliament, the Canadian Government could not unconditionally agree to any constitutionally-guaranteed power transfer or power sharing arrangement that would have to be confirmed by the Parliament of the United Kingdom. Conceptually, the Government of Canada could have agreed to incorporate power sharing arrangements with Newfoundland under the *Newfoundland Act*. However, politically it would have been extremely hesitant to do so where similar permanent provisions had not been established for the other provinces. Prime Minister Mackenzie King and the Minister of External Affairs, Louis St. Laurent, who was the chair of the federal Cabinet Committee negotiating the Terms of Union with Newfoundland, did not want the Terms of Union to be seen to be more generous than existing arrangements with the other provinces.<sup>11</sup> In such a political atmosphere, even if the Newfoundland delegation had asked for any power transfer or sharing arrangements, it was unlikely they would have been accepted by Canada.

The impact of Newfoundland's financial concerns on the 1947 negotiations cannot be underestimated. Financial assistance that the potential Province could expect from the Government of Canada provided the focus for most of the negotiations.

The Government of Canada, prior to the arrival of the 1947 Newfoundland delegation in Ottawa, knew that, even with its assumption of certain public services after union, Newfoundland's public debt and its limited ability to raise revenues would hamper its ability to finance programs and services to a level commensurate with the programs and services provided by the other Canadian provinces. Newfoundland's scattered population, its economy, and the loss of its ability to impose custom tariffs (the latter becoming a federal responsibility after Confederation), would contribute to an estimated minimum annual provincial deficit of \$5 million.<sup>12</sup> These concerns about Newfoundland's finances were such a preoccupation that they prevailed in discussions on Newfoundland's potential to obtain exclusive or shared jurisdiction over a critical sector in its economy, the fishery.

The Newfoundland Fisheries Board (the "Board") had been established in 1936 to regulate the catching, curing, grading, packing, branding and exporting of fish from Newfoundland. Many of these responsibilities would fall under federal jurisdiction after union. The 1947 Newfoundland delegation was concerned that chaos would erupt in the fishery if the Board, or a similar regime, was not continued following Newfoundland's entry into Canada, as the industry went from a regulated regime to one that, at the time, was not subject to such regulation. However, two Newfoundland delegates, Joseph Smallwood and Gordon Bradley, rejected the option of providing Newfoundland with exclusive provincial jurisdiction over fisheries at a meeting with officials of the federal Department of Fisheries. A memorandum to the Assistant Secretary to the Cabinet indicates that the Newfoundland delegates rejected the option on the basis that it would "deprive Newfoundland of the assistance of the federal department of fisheries, and they did not wish to deprive Newfoundland of these services." The concept of concurrent legislative jurisdiction was rejected due to the federal government's ability to override any provincial legislation.<sup>13</sup> This is not raised to suggest that the federal government was prepared to agree to a constitutional provision ensuring that Newfoundland obtain exclusive jurisdiction over its fishery; however, it does illustrate that financial concerns and realities hindered even simple discussions on issues pertaining to power transfer or sharing.<sup>14</sup>

The Government of Canada offered its terms for accepting Newfoundland into Confederation through a 29 October 1947 letter addressed to the Governor of Newfoundland from Canadian Prime Minister William Lyon Mackenzie King.<sup>15</sup>

Following the delivery of the Government of Canada's offer and two bitterly contested referenda, Confederation with Canada was chosen by the electorate as its preferred form of government. Subsequently, a further seven person delegation was chosen to negotiate the final Terms of Union with Canada (the "1948 Newfoundland delegation"). Additional conditions were negotiated with respect to transitional issues and more favourable terms were negotiated on financial matters. Except with respect to Term 22 concerning Newfoundland Fisheries laws and Term 46 respecting the sale and manufacture of Oleo margarine, there were not any provisions negotiated whereby Newfoundland could influence the application of federal policies to the new province. However, the Government of Canada's agreement in Term 22 to entrench Newfoundland Fisheries laws for a minimum five year period should not be recognized as a constitutional precedent favouring provincial influence on federal policies. Rather, it was simply a transitional provision designed to assist the industry's adjustment to the application of federal fisheries policies. Therefore, except in limited circumstances, the Terms of Union do not provide for provincial influence over matters within federal jurisdiction. Furthermore, again with limited exceptions, the Terms of Union do not have any role in protecting individual or commercial rights or interests.<sup>16</sup>

Criticisms of the Terms of Union at the time did not address the lack of power sharing arrangements with the Government of Canada. A member of the 1948 Newfoundland delegation, Chesley A. Crosbie, refused to sign the Terms of Union. In his 9 February 1949 Minority Report to the Commission of Government, Mr. Crosbie criticized the financial provisions contained in the Terms of Union, particularly Term 24 requiring Newfoundland to use a portion of the surplus accumulated by the Commission of Government to satisfy post-Confederation current account expenditures. Other than a passing reference on the need to protect Newfoundland's secondary industries during a period of readjustment to Confederation, there was no mention of Newfoundland's inability to influence federal initiatives that would affect Newfoundland.<sup>17</sup> Mr. Crosbie's limited critique of the Terms of Union supports the view that the 1948 Newfoundland delegation's primary role was to negotiate Newfoundland's adjustment to Canada's existing political and economic framework. If the intent had been to include more complex constitutional arrangements, then their absence from the finished document should have provoked further criticism from Mr. Crosbie.

## Comparison with Other Provinces

The *Constitution Act, 1867* was amended in 1949 by the Parliament of the United Kingdom to incorporate the Terms of Union within the Canadian Constitution.<sup>18</sup> The reliance on an imperial statute to achieve this result is unique in Canadian constitutional history. British Columbia and Prince Edward Island earlier had negotiated their entry into Canada. The Terms of Union negotiated with Prince Edward Island and British Columbia were incorporated into the *Constitution Act, 1867* by Order-in-Council of the British Privy Council. Pursuant to Section 146 of the *Constitution Act, 1867*, the Parliament of Canada and the Legislature of the province seeking to join Canada had to make a joint address to the British Privy Council requesting the admission of that province into Canada. The process had to be modified in Newfoundland's case because it did not have a legislature in 1949. Nevertheless, the Terms of Union for each of British Columbia, Prince Edward Island and Newfoundland is a constitutional document.<sup>19</sup>

Despite differences in the process used to incorporate their respective Terms of Union into the Constitution, Newfoundland, British Columbia, and Prince Edward Island share the unique history of negotiating the terms under which they joined Canada. Nova Scotia, New Brunswick, Ontario and Quebec formed Canada under the terms of the original *Constitution Act, 1867*. Each of Manitoba, Saskatchewan and Alberta was established by statutes passed by the Canadian Parliament, and each of these respective statutes forms part of the Canadian constitution. Provisions contained in the legislation mirror many seen in the Terms of Union that have been negotiated with the Government of Canada by Newfoundland, British Columbia and Prince Edward Island. The statutes provide the subsidies referenced in each set of Terms of Union to finance the operation of provincial governments and legislatures. The statutes also provide financial assistance beyond that provided to British Columbia and later to Newfoundland. The further financial assistance reflected their pre-provincial status as territories that had formed part of Canada. As federally administered territories, ownership of Crown Land lay with the federal Crown. Following the creation of provinces from these federally-administered lands, Crown Land remained under federal control. The provinces therefore would not be able to sell or develop Crown Land to generate revenues, and so additional federal subsidies were provided to compensate these provinces for their inability to raise revenues in this manner. The precedent for this form of additional assistance may have arisen from the Prince Edward Island Terms of Union. Prince Edward Island also did not hold any Crown Lands upon entering Confederation. In its case, the Government of Canada agreed to advance Prince Edward Island money which could be used by the province to purchase privately-held land.

Unlike the Terms of Union for Prince Edward Island, British Columbia and Newfoundland, the statutes establishing Manitoba, Saskatchewan and Alberta do not have any particular clauses addressing the maintenance or operation of specific public services. The absence of such clauses might be explained by the history leading to the formation of these provinces as against the entry of British Columbia, Prince Edward Island and Newfoundland into Canada. The Prairie provinces were formed by the Government of Canada's constitutional power, established by the *Constitution Act, 1871*, to establish new provinces from any territory forming part of Canada. Through the Rupert's Land and North-Western Territory Order of 23 June 1870, the Governor in Council of the United Kingdom ordered the admission of these

territories into Canada. Manitoba, Saskatchewan and Alberta were formed from portions of these territories. As a result, there would have been no opportunity for these statutorily-created provinces to negotiate a federal response to special needs and concerns. These provinces were formed under the constitutional model, including the division of powers, established by the *Constitution Act, 1867*. The manner in which British Columbia, Prince Edward Island and Newfoundland entered Confederation provided these provinces with an opportunity not available to the Prairie provinces to obtain federal financial assistance and influence federal policies to address their unique problems and concerns.

A review of the terms governing the entry of each of Prince Edward Island and British Columbia into the country reveals that neither is a complicated or long document. Like Newfoundland's Terms of Union and the legislation establishing each of Manitoba, Saskatchewan and Alberta, each set of Terms address representation in the Canadian Parliament and the establishment of a provincial executive and legislature. The Prince Edward Island Terms of Union addresses Canada's assumption of the Island's debt, the provision of grants and loans from Canada to the Island, Canada's assumption of various public services, including the requirement that Canada establish and maintain an "Efficient Steam Service for the conveyance of mails and passengers" between the Island and mainland Canada. The Terms of Union for British Columbia embody many of the same provisions as those embodied in the Prince Edward Island Terms of Union. There are, however, some provisions that are unique to each of those Terms.

The Government of Canada committed to the construction of a railway to connect the British Columbia coast to the railway system that was operating within what was then Canada. British Columbia was entitled to maintain its imposition of customs, tariff and excise duties until such time as the railway was completed. British Columbia was also able to secure a commitment from the Government of Canada to continue a "policy as liberal as that pursued by the British Columbia Government" with respect to its aboriginal peoples and to provide such tracts of land as appropriate for that purpose. Where there was disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the dispute would be referred to an independent arbitrator (*i.e.*, the British Secretary of State for the Colonies).

The British Columbia Terms of Union temper the argument that section 146 of the *Constitution Act, 1867*, prevented a voluntary derogation by the Government of Canada of its powers under section 91. While the imposition of tariffs by British Columbia fell within the Government of Canada's power to regulate Trade and Commerce under section 91(2), the British Columbia Terms of Union permitted, albeit on a temporary basis, the province to raise revenues through that means. Furthermore, while under section 91(24), the Government of Canada had exclusive constitutional authority to deal with "Indians, and Lands reserved for the Indians," the British Columbia Terms of Union provided a mechanism to ensure the Government of Canada, following union, did not adopt policies that the British Columbia Government felt would diminish that which had been in place prior to union. More so than the Prince Edward Island Terms of Union, the British Columbia Terms of Union provided Newfoundland with a precedent to exert influence on policy within areas that, following union with Canada, would fall under federal jurisdiction. Subject to the arguable exceptions of Term 22 (Newfoundland Fisheries Laws) and Term 46 (Oleo margarine), no similar initiatives are contained in Newfoundland's Terms of Union.

Like Prince Edward Island and British Columbia, Newfoundland's Terms of Union primarily established conditions under which the new province would operate within the legal and political framework of Confederation. They set financial arrangements and subsidies comparable to those received by the other provinces at the time of Newfoundland's union, addressed services that would be taken over by the Government of Canada, and addressed benefits for civil servants (and retirees) who became (or would have been under an earlier union) federal employees.

There were issues addressed within Newfoundland's Terms of Union that were not relevant to British Columbia or Prince Edward Island at the time of their respective unions with Canada. The Newfoundland Terms of Union addressed the payment of income tax as of the year of union (which had not been in place at the time of British Columbia or Prince Edward Island's entry into Confederation) and the provision of Unemployment Insurance benefits as of union (which was not a federal program at the time of British Columbia's or Prince Edward Island's entry into Confederation). In each case, however, the Terms of Union arguably were primarily designed to assist the incoming province to adjust politically and financially to the new status of a Canadian province.

In Newfoundland's case, many terms designed to address political issues upon its entry into Confederation are of continuing importance: Newfoundland's representation in the Canadian Parliament is guaranteed to be six senators and seven members of the House of Commons by Term 4. Its territory is defined by Term 2 thereby confirming the 1927 ruling of the Judicial Committee of the Privy Council establishing the Labrador boundary. Others were clearly designed solely to ease Newfoundland's transition to being Canada's tenth province. Terms 20 through 22 addressed uncertainties regarding the status of decisions taken with respect to patents, trademarks and fisheries prior to Confederation. Terms 18 and 19 addressed uncertainties governing interim supply for provincial government operations. Even financial terms were designed to assist Newfoundland to raise monies to finance provincial services after Confederation. Term 28 specifically addressed "transitional grants" designed to assist Newfoundland to become a financially self-sustaining province. Although Term 28's language will be explored further through a review of Term 29, its reference to "transitional grants" implies that a less-than-permanent obligation was meant to be imposed on the Government of Canada.

Other terms addressing education (Term 17), the continuation of Newfoundland's Fisheries Laws (Term 22), financial arrangements (Terms 23 – 27, Term 29), Canada's assumption of various services (Term 31), Canada's maintenance of a North Sydney – Port-aux-Basques ferry service (Terms 32(1)), the regulation of railway rates (Terms 32(2) and 32(3)), the ownership of Crown lands and of mines and minerals (Term 37), and protection granted to the manufacture and sale of Oleo margarine (Term 46) had longer term implications. Even so, events succeeding Confederation, the wording used in these Terms, and judicial decisions regarding the interpretation of constitutional documents have further diminished the relevance of Newfoundland's Terms of Union since Confederation. Of these factors, the most significant may be the development of judicial precedents governing the interpretation of constitutional documents, including the Terms of Union.

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# Interpreting the Terms of Union

There are principles in Canadian case law fundamental to the legal interpretation of constitutional documents. Perhaps the most significant case in Canadian constitutional law is the 1929 decision of the Judicial Committee of the British Privy Council (the “Privy Council”) in *Edwards v. A.G.-Can.*<sup>20</sup>

In 1928, the Supreme Court of Canada was asked to determine whether the words “qualified persons” contained in section 24 of the *Constitution Act, 1867*, permitted the Governor General to appoint women to the Canadian Senate. Since women could not hold public office at the time that the *Constitution Act, 1867*, was passed, the Court held that its drafters could not have intended women to serve in the Canadian Senate.

The Privy Council was then the final appellate Court for any legal question arising within Canada. In its decision, the Privy Council agreed that the Parliament of the United Kingdom would not have intended, when using the word “qualified” in section 24 of the *Constitution Act, 1867*, to make women eligible for appointment to the Canadian Senate. The Privy Council nevertheless decided that the appointment of women to the Senate was constitutionally permissible. In finding that constitutional statutes passed by the Parliament of the United Kingdom, such as the *Constitution Act, 1867*, held a special status against other statutes, Lord Sankey of the Privy Council wrote:

“The *British North America Act* **planted in Canada a living tree capable of growth and expansion within its natural limits.** The object of the Act was to grant a constitution to Canada.

‘Like all written constitutions it has been subject to development through usage and convention’.

The Lordships do not conceive it to be the duty of this Board – it is certainly not their desire – to **cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation** so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent but within certain fixed limits, are mistresses in theirs ... the Lordships are concerned with the interpretation of an Imperial Act but with an Imperial Act which creates a constitution for a country ... **the question is not what may be supposed to be intended, but what has been said.**”<sup>21</sup>

(emphasis added to highlight the sections frequently quoted in subsequent decisions).

In its decision, the Privy Council introduced the “living tree” doctrine to govern the interpretation of the Canadian Constitution. The doctrine’s basic principle is that a constitution should not be interpreted like a contract or statute. Furthermore, the interpretation of general wording is not to be based solely on the intent of those who developed its provisions. Such wording is to be interpreted broadly and liberally and in a manner that enables the constitution to respond to changes in society and values. This method of constitutional interpretation, now accepted as a basic tenet of constitutional law, is sometimes referred to as “progressive

interpretation”. Constitutional scholar Peter Hogg has commented on the principle of “progressive interpretation”.

“The doctrine of progressive interpretation is one of the means by which the *Constitution Act, 1867* has been able to adapt to the changes in Canadian society. What this doctrine stipulates is that the general language used to describe the class of subjects (or heads of power) is not frozen in the same sense in which it would have been understood in 1867 .... [T]he words of the Act are to be given a “progressive interpretation”, so that they are continuing to adapt new conditions and new ideas.”<sup>22</sup>

Professor Hogg has further elaborated upon the benefits underlying the application of such a doctrine of interpretation:

“The idea underlying the doctrine of progressive interpretation is that the Constitution Act, 1867, although undeniably a statute, is not a statute like any other: It is a “constituent” or “organic” statute, which has to provide the basis for the entire government of the nation over a long period of time. An inflexible interpretation, rooted in the past, would only serve to withhold necessary powers from the parliament or legislatures. It must be remembered too that the *Constitution Act, 1867* like other federal constitutions, differs from an ordinary statute in that it cannot be easily amended when it becomes out of date, so that its adaptation to changing conditions must fall to a large extent upon the Courts.”<sup>23</sup>

The “living tree” or “progressive interpretation” doctrine provides Canadian Courts with a vital role in the interpretation of constitutional language. The judiciary is free from being confined to a determination of the intentions of the drafters of the constitution and being bound to those intentions. The judiciary has been given flexibility and discretion in shaping constitutional rights and obligations. Historical meaning or precedent at the time of the constitution’s drafting is of limited importance and any inferences drawn from this information may be given little weight. Furthermore, an attempt to ‘freeze’ the meaning of general wording within the constitution will, more often than not, be improper.

Canadian Courts, including the Supreme Court of Canada, continue to endorse this method of constitutional interpretation:

“It has been stated repeatedly on high authority that a constitutional document must remain flexible and elastic, in the words of Lord Sankey in *Edwards v. The Attorney General of Canada* ... a living tree capable of growth and expansion within its natural limits. There is nothing static or frozen, narrow or technical, about the Constitution of Canada.”<sup>24</sup>

Besides applying the concept of a “living tree” or “progressive interpretation” to the originally-formulated provisions of the constitution, Canadian Courts have recognized that it also applies to its amendments, including to those provisions guaranteeing individual rights and freedoms under the *Canadian Charter of Rights and Freedoms*.<sup>25</sup> The “progressive interpretation” doctrine also has been recognized as being applicable to the interpretation of the Terms of Union established for Prince Edward Island<sup>26</sup> and British Columbia.<sup>27</sup>

When Newfoundland joined Canada in 1949, the “progressive interpretation” doctrine had become an integral part of Canadian constitutional law. Despite this, the Terms of Union, when reviewed by Courts, have not been interpreted in a progressive, liberal or broad manner. Nor have the Terms of Union of Prince Edward Island or British Columbia been interpreted in such a manner. The explanation for this is simple: A review of each Terms of Union shows that each addresses specific issues. They used precise language to identify specific obligations. The “progressive interpretation” concept applies to general words in the constitution. It allows Courts to place the most favourable construction to a set of circumstances where there is some ambiguity in the constitutional language used. Constitutional documents may be written in general terms by design so that an abstract and broadly-worded document will not become obsolete with political, economic and social developments.<sup>28</sup> However, specific language does not invite a similar treatment; otherwise, the meaning of such specific terms could be stretched to force potentially unreasonable interpretations.

Subsequent judicial decisions also have suggested that the “progressive interpretation” doctrine was never meant to infringe on the essential provisions concerning the division of powers between the federal government and the provinces. In a decision of the Privy Council, Lord Atkin, when determining whether the federal government’s power of treaty making could override areas of provincial jurisdiction, provided the following metaphor to illustrate that the “progressive interpretation” doctrine could not be employed to expand or contract powers granted under sections 91 and 92 of the *Constitution Act, 1867*:

“While the ship of state now sails on larger ventures and into foreign waters, she still retains the watertight compartments which are an essential part of her original structure.”<sup>29</sup>

Although the ‘watertight compartment’ metaphor has been criticized in its approach to the Canadian constitution’s interpretation, arguably it was influential in the immediate years following Lord Atkin’s decision. Its contemporaneous relevance to the interpretation of constitutional documents, including Newfoundland’s Terms of Union, should not be ignored. According to Gordon A. Winter, a member of the 1948 Newfoundland delegation, the final Terms of Union had been drafted with the expectation that the clear wording of its provisions would not be challenged.<sup>30</sup> While the Canadian delegation did not express concern for the potential manner by which the Terms of Union might be interpreted,<sup>31</sup> the impact of the leading House of Lords decisions of that time would have encouraged the use of unambiguous language and rigidity in the recognition of the existing division of powers.

While the ‘watertight compartment’ metaphor may have fallen into disfavour, certainly Lord Sankey’s affirmation that the interpretation of constitutional documents must not ignore the text’s wording has not. Its relevance to the interpretation of constitutional documents continues to be recognized by the Supreme Court of Canada:

“Although constitution terms must be capable of growth, constitution interpretation must none the less begin with the language of the constitutional law of the provision in question ... regard must first be had to the language of the provision to be interpreted.”<sup>32</sup>

The cases that have interpreted specific terms within the Newfoundland Terms of Union reflect the constraint that regard “must be had to the wording of the provision to be interpreted”.

Thus, a former employee of the Government of Newfoundland, upon taking employment with the Government of Canada, could not, pursuant to Term 39 of the Terms of Union, gain any additional pension rights beyond the entitlement granted by that Term.<sup>33</sup> Under Term 31 of the Terms of Union, all property of the Newfoundland Railway immediately after Union became the property of Canada, regardless of whether it was used for railway purposes at the time that the federal government assumed responsibility for the service. Thus, when the provincial government granted a lease of lands forming part of a branch line abandoned by the Newfoundland Railway in 1939, the lease was declared a nullity on the basis that, pursuant to Term 31, Newfoundland no longer owned any property of the former Newfoundland Railway.<sup>34</sup>

In *Re Bowater's Nfld. Pulp & Paper Mills Ltd.*,<sup>35</sup> the Supreme Court of Canada had its first opportunity to interpret Newfoundland's Terms of Union. This case dealt with the question whether pre-Confederation statutes were repealed, abolished or altered by union with Canada. Bowater's had been exempted from certain taxes and duties under Newfoundland legislation which was in force as of the date of union. Counsel for Bowater's Newfoundland Pulp and Paper Mills, Limited ("Bowater's") argued that Term 18(3) applied to continue the exemptions. Term 18(3) provides that the Parliament of Canada may "with the consent of the Legislature of the Province of Newfoundland repeal any law in force in Newfoundland at the date of Union." Bowaters argued that so long as pre-Confederation Newfoundland legislation addressed matters that post-Confederation fell within provincial jurisdiction, it could not, even where the legislation also addressed matters that fell within federal jurisdiction, be repealed except with the consent of the provincial legislature. Bowaters argued that until Newfoundland agreed to the repeal of the favourable exemptions enacted before union with Canada, it was immune from federal legislation eliminating those exemptions.

The Government of Canada took the position that it had the power by itself to enact laws which, in effect, could repeal pre-Confederation Newfoundland statutes, as long as such laws fell within federal jurisdiction under the *Constitution Act, 1867*. It argued that a 1949 amendment to the federal *Income Tax Act* that denied Bowater's the exemptions it enjoyed prior to Confederation was a valid exercise of its federal powers.

In separate decisions, members of the Supreme Court reviewed the potential impact of Term 18(1) and Term 18(3) on federal legislation. Term 18(1) states that all laws enforced in Newfoundland at or immediately prior to the date of Union shall continue as if the Union had not been made, "subject nevertheless to be repealed, abolished or altered by the Parliament of Canada or by the legislature of the Province of Newfoundland according to the authority of the Parliament or of the Legislature under the (*Constitution Act, 1867-1940*)...". Term 18(3) stated:

"Notwithstanding anything in these Terms, the Parliament of Canada may with the consent of the Legislature of the Province of Newfoundland repeal any law in force in Newfoundland at the date of Union."

The Chief Justice Rinfret held that reference to "authority" in Term 18(1) referred to sections 91 and 92 of the *Constitution Act, 1867*. Specifically, the Chief Justice held that "by force of Term 18(1) the Parliament of Canada is thereby given the authority to repeal, abolish or alter any and all laws in force in Newfoundland at or immediately prior to the date of Union, which deal with subject matters in Section 91..." It was his position that amendments

to the *Income Tax Act*, passed by the Parliament of Canada within its legislative jurisdiction, constituted a valid repeal of Newfoundland's laws that had granted deductions, exemptions, immunities and privileges to Bowater's.

In a separate but concurring judgment, Justice Estey rejected Bowater's argument that Term 18(3) required the consent of Newfoundland before Canada could repeal the exemptions granted to Bowaters prior to Confederation with Canada. In doing so, Justice Estey relied on the fact that Term 18(1) specifically indicated that the *BNA Act (i.e., Constitution Act, 1867)* would apply to Newfoundland except insofar as varied by the Terms of Union. The reference in Term 18(1) to section 91 of the *BNA Act* indicated that Parliament was within its jurisdiction to repeal the Newfoundland law. He rejected Bowater's argument regarding Term 18(3). He held that any requirement to obtain Newfoundland's consent to the repeal of its pre-Confederation statutes wherever they dealt with matters of mixed federal and provincial jurisdiction should have been reflected through more specific language in Term 18(3).

In another concurring decision, Justice Locke noted that prior to Confederation, Newfoundland was a unitary state in which the property and revenues of the Dominion were vested in the sovereign. He stated that since Union, the "powers, executive and legislative, and the right to dispose of the said revenues were distributed between the new Province and Canada in the manner defined by sections 91 and 92 of the *British North America Act*, subject, however, to the terms of the amendment of 1949." He held, however, that Parliament had not tried to repeal the pre-Confederation statutes in question in their entirety, but merely had amended the law in respect to matters within the jurisdiction of the Canadian Parliament. The legislation therefore was consistent with Term 18(1) and did not offend Term 18(3).

The Bowater's decision revealed the Supreme Court's reluctance to diminish federal powers through a broad and liberal interpretation of provisions contained in a province's Terms of Union. This approach has not been confined to the interpretation of Newfoundland's Terms of Union.

The Supreme Court of Canada has adopted a consistent approach in interpreting the British Columbia Terms of Union.

In 1994, the Supreme Court was asked to determine whether the federal government could discontinue passenger services on two sections of the British Columbia railway that had been declared uneconomical. Opposition to the abandonment of the rail lines relied on Term 11 of the British Columbia Terms of Union. Term 11 stated:

The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union.

After confirming that regard must first be had for the language of the provision to be interpreted, the Supreme Court held that the wording of Term 11 did not contain any reference to the operation of the railways, perpetual or otherwise. Term 11 provided for the railway's construction, not its operation. Accordingly the Court held that the service could be discontinued.<sup>36</sup>

Importantly, the Court in the B.C. railway case also made a further statement that brought into question the extent to which the “progressive interpretation” could be applied to the terms under which a province joined Canada. While choosing not to decide whether the “progressive interpretation” doctrine applied to such terms, the Court noted that such terms are unique constitutional documents in that they were drafted to address specific problems and concerns rather than for the broad purposes of forming a government. By characterizing Terms of Union as documents meant to address specific problems and concerns, the Supreme Court of Canada has diminished the likelihood that they can be adapted to changing political, social and economic climates. Adaptation is integral to a constitutional document that is designed to survive changing conditions and ideas. The “progressive interpretation” doctrine is more difficult to apply to specific language that attempts to resolve a particular problem or concern. Regardless of whether the proposed resolution contained in a given term succeeds in addressing the problem or concern, the Courts cannot go beyond the specific language of the document to identify alternate means to resolve them.

Using the Terms of Union as a means to address or resolve specific problems provides the Courts with a basis for distinguishing such constitutional provisions from those protecting individual rights, as expressed in the *Canadian Charter of Rights and Freedoms*, or the validity of laws passed pursuant to the governing powers that are contained in sections 91 and 92 of the *Constitution Act, 1867*. This distinction can be seen in the *Société de Acadian v. Association of Parents for Fairness in Education*.<sup>37</sup> In that case, Beetz J. of the Supreme Court of Canada stated:

“Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the Charter, are so broad as to call for frequent judicial determination.

Language rights, on the other hand, although some of them have been enlarged and incorporated into the Charter, remain none the less founded on political compromise.

This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the Courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the Court should approach them with more restraint than they would in construing legal rights.”<sup>38</sup>

The Supreme Court of Canada later reviewed the ruling of Mr. Justice Beetz in Ref: *Re Ontario Education Act*.<sup>39</sup> In considering the interpretation of s. 93 of the *Constitution Act, 1867*, the Supreme Court’s majority decision interpreted the statements of Justice Beetz as not ruling out a more expansive approach being taken in certain circumstances:

“While due regard must be paid not to give a provision which reflects a political compromise too wide an interpretation, it must still be open to the Court to breathe life into a compromise that is clearly expressed.”<sup>40</sup>

Regardless of the Supreme Court's apparent willingness to "breathe life" into political compromises, the two decisions clearly differentiate between approaches in interpreting constitutional provisions based on their characterization. Provisions of the constitution reflecting a political compromise, generally speaking, will be given a more restrictive interpretation than other provisions regarding individual and public rights. While there can be a purposive approach in interpreting those clauses within a province's Terms of Union that reflects political compromise, judicial caution will be exercised in the use of the "progressive interpretation" doctrine to expand their influence to situations not contemplated by the wording.

Viewing the Terms of Union as unique constitutional documents designed to address specific problems and concerns discourages any interpretation that favours extending provincial influence in any matter falling within section 91 of the *Constitution Act, 1867*. In the *Bowater's* decision, Chief Justice Rinfret relied on Term 3 of the Terms of Union to discourage such an interpretation. Term 3 states:

"The *British North America Acts, 1867-1946*, should apply to the Province of Newfoundland in the same way and to the like extent as they apply to the provinces heretofore comprised in Canada, as if the Province of Newfoundland had been one of the provinces originally united, except insofar as varied by these Terms and accepts such provisions as are in terms made or by reasonable intendment may be held to be especially applicable only to affect one or more and not all of the provinces originally united."

Term 3 contemplates that the Terms of Union must contain express language impacting federal jurisdiction before there can be a derogation of powers over matters enumerated in section 91 of the *Constitution Act, 1867*. The *Bowater's* case confirmed this interpretation. The Government of Canada retained sole jurisdiction over those matters enumerated in section 91 where there was not any constraint imposed by the Terms of Union. While this is clear conceptually, it has not always resulted in the Government of Canada exercising its jurisdiction, particularly with respect to aboriginal peoples living within the province.

An example can be seen in the Government of Canada's historical hesitancy to assert its jurisdiction over Newfoundland aboriginal peoples. Upon Newfoundland entering Confederation, aboriginal people living within the province (the Mi'Kmaq, Inuit and Innu) became subject to Canada's legislative and executive powers under section 91(24) of the *Constitution Act, 1867*, relating to "Indians, and Lands reserved for Indians."<sup>41</sup> The Terms of Union did not address jurisdictional responsibility for the extension of federal programs and services to Newfoundland's aboriginal peoples following Confederation. Following Confederation, federal programs and services could have been directed to Newfoundland's aboriginal people through the *Indian Act*. The ability to extend *Indian Act* benefits was dependent on the Governor-in-Council recognizing "bands" of aboriginal peoples for the purpose of the legislation. Recognition would provide "band" members with benefits under that legislation. While the *Indian Act* was in place at the time Newfoundland joined Canada, there was no constitutional obligation on the Government of Canada to recognize "bands" within the province so as to extend the *Indian Act* to its aboriginal people. The Terms of Union did not constrain the exercise of federal jurisdiction under section 91(24). Neither did it impose any

obligation on the Government of Canada to extend benefits and services to Newfoundland's aboriginal peoples that were extended to other aboriginal people in the country.

The absence of a specific provision within the Terms of Union extending the *Indian Act* to Newfoundland's aboriginal people left the decision to do so at the discretion of the federal Governor-in-Council. No such decision was made. Instead, commencing in 1954, federal-provincial "Native Peoples Agreements" were negotiated to provide and expand public services to Newfoundland's Innu and Inuit. The original 1954 Agreement was later renewed and expanded. In 1973, it was extended to Mi'Kmaq living in Conne River. Ultimately, in 1981, a federal-provincial agreement providing financial assistance solely to the Mi'Kmaq living in and contiguous to Conne River was signed. These Agreements have historically excluded a significant portion of Newfoundland's aboriginal people. Originally all Mi'Kmaq in the province were excluded. After 1973, Mi'Kmaq outside of Conne River continued to be excluded from these Agreements.

Until June 1984, the Government of Canada did not recognize any Indian band within Newfoundland for the purpose of registering its members under the *Indian Act*. On 28 June 1984, it recognized the Conne River (Miawpukek) Band. Negotiations continue that could see the recognition of Innu bands in Labrador. Negotiations also are underway that could see the provision of direct federal financial assistance to Mi'Kmaq residing outside Conne River.

These developments arguably reflect a recognition by the Government of Canada that, upon Confederation, it assumed legal responsibilities to provide programs and services to all of Newfoundland's aboriginal peoples. A proliferation of litigation defining the nature of the Government of Canada's responsibilities towards Canada's aboriginal peoples may have contributed to these developments. These responsibilities, such as those arising from the existence of a fiduciary relationship between the Government of Canada and Canada's aboriginal peoples, existed at the time of Newfoundland's entry into Confederation. The absence of language in the Terms of Union recognizing this federal responsibility or outlining the financial benefits to be provided to Newfoundland's aboriginal people cannot explain the failure to meet obligations that existed in 1949. The Terms of Union did not impede the Government of Canada from assuming its responsibilities in a timely fashion. Arguably, language outlining benefits to be delivered to Newfoundland's aboriginal people may have accelerated the delivery of federal programs or the timing of decisions relating to band recognition for *Indian Act* purposes. Had the Government of Canada readily accepted its responsibilities, however, such language should not have been necessary.

In retrospect, Newfoundland's aboriginal people would have benefited from language within the Terms of Union defining the Government of Canada's obligations towards them. The British Columbia Terms of Union existed as a precedent for the embodiment of such language. Even a general statement that Newfoundland's aboriginal peoples should receive federal benefits equivalent to those received by other aboriginal peoples within Canada might have been beneficial. The absence of such language restricted the ability of Newfoundland's aboriginal people to be treated on an equal footing with other aboriginal groups throughout the country. Where there is an absence of language creating or clarifying constitutional obligations, the Terms of Union do not provide any mechanism whereby the Government of Canada can be compelled to address matters clearly falling within its section 91 powers.

# **The Terms of Union – The Impact of Specific Provisions**

A review of various terms within the Terms of Union reveals that many have no or limited influence on the current political, economic and social affairs of the province. The review that follows explores a number of specific terms to determine whether they continue to play a meaningful role.

## **Fisheries Laws (Term 22)**

Term 22 provided for a series of Newfoundland statutes, pertaining to the regulation of the Newfoundland fishery, to operate for a period of five years from the date of Union and thereafter until the Parliament of Canada otherwise provided. It also permitted the Newfoundland Fisheries Board, established pursuant to 1936 legislation of the Commission of Government, to continue administering these laws within this same time frame. While initially this may appear to be a form of constitutional cooperation between the Government of Canada and the Province with respect to the management of a key provincial industry, the five year limit imposed on Term 22's operation and a unilateral ability within the Parliament of Canada to declare whether the laws would be continued following the five year limit suggest that federal altruism was not the motivation for the provision.

The Newfoundland fisheries laws provided for the regulation of an industry that, under Canadian law at that time, was unregulated by comparison. According to Gordon A. Winter, both the 1948 Newfoundland delegation and the Canadian Government were concerned that Confederation would result in a *de facto* deregulation of Newfoundland's fishery. Sudden deregulation potentially would cause industrial and market chaos, and therefore financial uncertainty, within Newfoundland's key industry. Term 22 was therefore developed as a transitional constitutional provision designed to either ease the Newfoundland fishery into the Canadian de-regulated regime or to allow Canadian legislation to fill that field.<sup>42</sup>

After 1954, the Government of Canada faced no constitutional impediment to amend or repeal the Newfoundland fisheries laws. The first legislation repealing any of the statutes referenced in Term 22 was passed in 1959.<sup>43</sup> All remaining Newfoundland fisheries laws were repealed in 1960.<sup>44</sup> Term 22 contemplated that such laws could operate after 1954 but solely at the discretion of the federal government. With the 1960 legislation, that discretion was exercised to bring Term 22's influence on the regulation of the Newfoundland fishery to an end.

## **Financial Arrangements (Terms 23 – 29)**

Newfoundland's financial ability to sustain provincial services and programs upon entering Confederation occupied much of the discussions between the Government of Canada and the

two Newfoundland delegations negotiating the Terms of Union. Terms 23 through 29 of the Terms of Union were the fruit of that labour.

Term 23 dealt with Canada's assumption of Newfoundland's debt upon its entering Confederation. Term 24 dealt with the manner in which Newfoundland's surplus existing at the time of its union with Canada would be applied against future provincial deficits and economic development initiatives. Term 25 allowed the Province of Newfoundland to retain interest payments it received on any loans made by it prior to union. Term 26 set out subsidies Canada would pay to the Province of Newfoundland upon its entry into Confederation. Term 27 provided for the province's potential entry into a tax agreement similar to offers made to other provinces.

Of these five terms, only Term 26 can be interpreted as establishing an ongoing obligation upon the Government of Canada to provide financial support to Newfoundland. The obligation in Term 26(a) mirrored that assigned to the Government of Canada in section 118 of the *Constitution Act, 1867* (since repealed), the Terms of Union with British Columbia and Prince Edward Island, and provisions contained in the legislation establishing Manitoba, Alberta, and Saskatchewan. Term 26(a) provided an annual subsidy of 80 cents per capita and a further \$180,000 to support the provincial government and legislature. Term 26(b) provided a \$1.1 million annual subsidy payable for purposes akin to those under legislation providing subsidies to the Maritime provinces, and to recognize Newfoundland's special problems caused by geography and a sparse and scattered population. While these obligations were subsumed into a tax agreement entered into under Term 27(5), this only changed the mode by which the obligation was to be met. It does not necessarily relieve the Government of Canada of the obligation to ensure that Newfoundland receives the benefits promised by Term 26.

Term 28 set out transitional grants which were to be paid to the Province over a 12 year period in order to "facilitate the adjustment of Newfoundland to the status of a province of Canada and the development by the Province of Newfoundland of revenue producing services." Without further elaboration, its effect was meant to be temporary. Only Term 29 could be interpreted as potentially offering Newfoundland the prospect of continued or new financial assistance initiatives beyond those stated elsewhere in the Terms of Union.

Term 29 specified that a federal Royal Commission would be appointed by the Government of Canada within eight years of the date of union to review the Province's financial position and to recommend the form and scale of additional assistance, if any, that may be required by the Province of Newfoundland to enable it to:

“. . . continue public services at the levels and standards reached subsequent to the date of Union, without resorting to taxation more burdensome, having regard to capacity to pay, than that obtained generally in the region comprising the Maritime Provinces of Nova Scotia, New Brunswick, and Prince Edward Island.”

In his book *I Chose Canada*, Joseph R. Smallwood stated that one of the major concerns surrounding Newfoundland's entry into Canada was the uncertainty of whether the financial assistance contained in Terms 23 through 27, other payments from the Government of Canada, and provincial government revenues would be sufficient to enable the new provincial government to carry on its responsibilities. Term 29 was intended to address that concern:

“In Term 29, we were confident we had the solution: It provided for a full-scale review of the province’s finances before the eight years were up and for recommendations about the aid that might continue to be necessary.”<sup>45</sup>

To prepare to make its case to the federal Royal Commission, the Province of Newfoundland appointed its own Commission, chaired by Philip Lewis, a Newfoundland lawyer (the “Lewis Commission”), to determine whether further financial assistance was required, and the level of that assistance, to continue public services at the levels achieved following union. As part of its analysis, the Lewis Commission interpreted Term 29 to have the following potential impact:

“If the inquiry establishes that to continue the public services of Newfoundland at the levels and standards which requires more burdensome taxation, having regard to capacity to pay, than that prevailing in the Maritime Provinces, the Government of Canada is committed under Term 29 to provide such additional financial assistance to Newfoundland as will enable it to continue the services without resorting to more burdensome taxation than prevails in the Maritime Provinces.”<sup>46</sup>

The Lewis Commission’s analysis did not specify the nature of the financial assistance that could be provided nor did it identify parameters beyond which financial assistance was not to be provided. It felt the federal Royal Commission could recommend such forms of financial assistance that were necessary in order to allow Newfoundland to provide public services without resorting to taxation more burdensome than that faced in the Maritime provinces.

The federal Royal Commission was established under the chair of New Brunswick Chief Justice John B. McNair (the “McNair Commission”).<sup>47</sup> Legal counsel appointed by the Government of Canada provided the McNair Commission with a narrow interpretation of Term 29’s language. The opinion, written by Roland A. Ritchie,<sup>48</sup> relied on Lord Sankey’s statement from the “Edwards case” that “the question is not what they may supposed to have been intended but what has been said,” to conclude that Term 29 only related to the continuation of the transitional payments provided by Term 28:

“When the seven financial Terms are read together, it is apparent that the task posed for the Commissioners appointed under Term 29 is confined to a review of the years “subsequent to the date of Union”, and that its objective is to determine the amount of “additional financial assistance, if any” which Newfoundland may require to complete the period of adjustment contemplated in Term 28, and to reach a point from which it can continue into the future as a Province of Canada, the financial position of which is defined by Terms 23 to 26.

It is obvious that when the Terms of Union were settled, neither of the contracting parties contemplated the creation of a perpetual special position for the Province of Newfoundland, but rather provision was made for a transitional period during which Newfoundland would have an opportunity to adjust itself to full Provincial status, after which it could stand on its own ground, side by side with the other Canadian Provinces and be treated in the

same manner, subject to the agreed financial stipulations contained in Terms 23 to 27.”<sup>49</sup>

The McNair Commission’s recommendation suggests that it agreed with Mr. Ritchie’s interpretation of Term 29. It recommended that the transitional grants, embodied in Term 28, be raised to eight million dollars to the year 1962 and that same amount be paid annually thereafter.<sup>50</sup> In limiting its recommendation to an adjustment of the transitional grant, an opportunity for Newfoundland to obtain other forms of financial assistance was lost. Term 29 only provided for a single federal Royal Commission. Once the McNair Commission’s recommendations were made, that Term, too, ceased to be operative.

The McNair Commission’s recommendation was not initially accepted in total by the Government of Canada. It announced that eight million dollars a year would be paid only to 1962.<sup>51</sup> Ultimately, following the Diefenbaker Government’s defeat in 1963, the Pearson Government decided to extend payments indefinitely. In 1996, the provincial government negotiated a lump sum payment to relieve the federal government of its obligation until 2016.<sup>52</sup> The one-time payment addressed a potential shortfall in the Province’s revenues over expenditures.

While the Government of Canada’s commitment to make payments supposedly will be resurrected in 2016, there is no constitutional obligation that it resume the payments. There never was such an obligation. Payments since the McNair Commission report, and any others to come, have been made pursuant to government policy decisions. If the policy in 2016 is not to resume the payments, the final remnant of Term 29’s relevance will disappear.

## **Term 31**

Term 31 listed a series of services within Newfoundland that would be taken over so as to relieve the Province of the costs related to their operation. Term 31 provided:

31. At the date of Union, or as soon thereafter as practicable, Canada will take over the following services and will as from the date of Union relieve the Province of Newfoundland of the public costs incurred in respect of each service taken over, namely,

- (a) the Newfoundland Railway, including steamship and other marine services;
- (b) the Newfoundland Hotel, if requested by the Government of the Province of Newfoundland within six months from the date of Union;
- (c) postal and public-owned telecommunication services;
- (d) civil aviation, including Gander Airport;
- (e) customs and excise;
- (f) defence;
- (g) protection and encouragement of fisheries and operation of bait services;

- (h) geographical, topographical, geodetic, and hydrographic surveys;
- (i) lighthouses, fog alarms, buoys, beacons, and other public works and services in aid of navigation and shipping;
- (j) marine hospitals, quarantine, and the care of ship-wrecked crews;
- (k) the public radio broadcasting system; and
- (l) other public services similar in kind to those provided at the date of Union for the people of Canada generally.

Many of these services have been discontinued, reduced, or transferred back to the Province, sometimes with monetary payments to reflect either the cost to provide infrastructure to replace the eliminated service (such as the \$800 million Roads-for-Rails agreement) or to assist the Province in handling the financial obligations following its assumption of the service (the Labrador ferry). The existence of such agreements and the reduction of services such as lighthouses (referenced under Term 31(i)) suggest that, while specifically mentioned in the Terms of Union, the Government of Canada is not operating under any constitutional obligation to maintain the services.

The Supreme Court of Canada's 1994 decision regarding the Government of Canada's right to abandon the uneconomical rail lines in British Columbia supports the conclusion that, depending on wording chosen, provincial Terms of Union cannot guarantee continued federal operation of such services or federal financial support for their provision. Without language that guarantees continued operation of or support for the services listed in Term 31, their continued operation remains at the discretion of the Government of Canada.<sup>53</sup>

A further example can be found in a 1990 Federal Court of Appeal decision concerning the operation of the Prince Edward Island railway. That Court rejected an argument that the Prince Edward Island Terms of Union obligated the Government of Canada to maintain and operate a rail service on the Island. The Term in question read:

“That the railways under contract and in the course of construction for the Government of the Island, shall be the property of Canada.”

In reviewing the language relating to railways, the Court, again relying on Lord Sankey's *caveat* to the “progressive interpretation” doctrine in the Edwards case, found that the language did not impose such an obligation to maintain and operate a railway in perpetuity.<sup>54</sup>

Language in Newfoundland's Terms of Union states that Canada will “take over” the services listed in Term 31 and “relieve the Province of Newfoundland of the public costs incurred in respect of each service taken over.” This would have to be read, under current principles of constitutional interpretation, as an obligation merely to assume operational costs for those services that otherwise, except for the Hotel Newfoundland, would fall under federal jurisdiction according to section 91 of the *Constitution Act, 1867*. Having regard first to the language used, there is not any wording used to connote an obligation to maintain the operation of the Term 31 services. An argument that their inclusion in Term 31 obligates continuous federal operation of or financial support for the services ignores judicial findings made on similar issues in British Columbia and Prince Edward Island.

## Term 32

Term 32 addresses the operation of freight and passenger steamship service between North Sydney and Port aux Basques and the regulation of railway rates. It reads:

32. (1) Canada will maintain in accordance with the traffic offering a freight and passenger steamship service between North Sydney and Port aux Basques which, on completion of a motor highway between Corner Brook and Port aux Basques, will include suitable provision for the carriage of motor vehicles.
- (2) For the purpose of railway rate regulation the Island of Newfoundland will be included in the Maritime region of Canada, and through traffic moving between North Sydney and Port aux Basques will be treated as all-rail traffic.
- (3) All legislation of the Parliament of Canada providing for special rates on traffic moving within, into, or out of, the Maritime region will, as far as appropriate, be made applicable to the Island of Newfoundland.

Unlike Term 31, Term 32(1) uses the word “maintain” in respect of the ferry service to be provided, qualified only by language that the level of service shall be determined by demand. In this case, even with the *caveat* to the ‘progressive interpretation’ doctrine, the word “maintain” can be interpreted to impose positive obligations on the Government of Canada with respect to the service’s continuous operation.

In 1976, the Federal Court of Appeal considered whether the Prince Edward Island Terms of Union obligated the Government of Canada to operate a ferry service between that province and the mainland. The term regarding the ferry service read:

“That the Dominion Government shall assume and defray all the charges for the following services’

Efficient Steam Services for the conveyance of mails and passengers to be established and maintained between the island and the mainland of the Dominion, Winter and Summer, thus placing the island on continuous communication with the Intercolonial Railway and the railway system of the Dominion.”

The Federal Court of Appeal held that the term respecting the ferry service created a legal duty requiring the Government of Canada to ensure the continuous, year-round operation of a ferry service between Prince Edward Island and the mainland.<sup>55</sup>

Except for the fact that Newfoundland’s Terms of Union provide that there be a ferry service, the Government of Canada’s ability to make operational decisions remains relatively unfettered. Besides the obligation to maintain a ferry service, there is a qualification that the level of service is to be based on demand. There is arguably an obligation, therefore, that the service must address demand for its use.

There is no allowance, however, for provincial input on operational decisions. Potential enforcement of the obligation also presents problems. Any interruption or modification of

service contrary to the conditions of Term 32(1) may only provide a right to seek damages. In a split 1978 decision of the Federal Court of Appeal, the Court held that where a strike interrupted ferry service to Prince Edward Island, the breach of the obligation contained in the Terms of Union conferred a right on the Province to be compensated in damages.<sup>56</sup> While the decision recognizes the ability of the Province to seek a remedy arising from a breach of Term 32(1), whether damages can fairly compensate it for the loss of the service, even for short durations, is questionable.

Unlike Term 32(1), Terms 32(2) and 32(3) do not impose continuing obligations with respect to railway rate regulation. In 1949, railway rate regulation was pervasive throughout Canada. Rail freight to the Island of Newfoundland had to be moved from North Sydney, Nova Scotia, to Port aux Basques by water. Once rail freight arrived in Newfoundland, additional problems arose from the fact that the railway on the Island of Newfoundland was narrow gauge, not standard gauge as it was elsewhere in Canada. Reacting to the potential cost consequences associated with these problems, Newfoundland sought the protection of Terms 32(2) and 32(3). They provided that freight rates for the Province of Newfoundland would be set from freight rates established for the Maritime region. By tying freight rates to those set for the Maritime region, Newfoundland received a buffer against higher costs associated with the geographic and technological constraints of moving freight by rail to and within Newfoundland.

Commencing in 1987, the railway industry underwent substantial deregulation. In 2001, a complaint was lodged before the Canadian Transportation Agency in respect of a freight dispute between an individual, Gordon Moffatt, and the Canadian National Railway with respect to the rates charged to transport goods and containers to Newfoundland. The grievance sought to confirm that the rates charged had to be the same as those applicable in the Maritime region of Canada. The Canadian Transportation Agency agreed with the grievance. The Federal Court of Appeal overturned that ruling.

The Federal Court of Appeal held that the Canadian Transportation Agency had no jurisdiction to review the grievance in the absence of rate regulation that had some relevance to the setting of rates in Newfoundland. The Court held that deregulation had resulted in the removal of a regulatory basis to require a railway company to maintain a Maritime rate structure. Without such a rate structure, there was no existing railway rate regulation that could be engaged pursuant to Term 32(2) to determine rates within Newfoundland. It further held that Term 32(3) would only guarantee Newfoundland access to special rates provided to the Maritime region where the Canadian Parliament had enacted legislation establishing such special rates. Where there was no such legislation, Term 32(3) would have no application. Neither Term 32(2) nor 32(3) would be relevant to the establishment of freight rates for Newfoundland so long as Parliament chose not to enact legislation establishing special railway rates to the Maritime region.

The Federal Court of Appeal also held that “progressive interpretation” doctrine could not be stretched to require a reduction of rates to reflect those charged in the Maritime region. The Court relied on the precise wording of Terms 32(2) and 32(3) to find that, without any regulatory regime governing the establishment of Maritime rates, they were inapplicable to the setting of rates charged on freight shipped to Newfoundland. In the Court’s words: “The living tree doctrine cannot be stretched to animate a provision that is a practical anachronism.”<sup>57</sup> As a result, unless a future Parliament deems it worthy to prescribe a Maritime freight rate structure,

Term 32(2) and Term 32(3) will continue to have no applicability to railway rates charged to ship freight to Newfoundland.

## **Ownership and Management of Offshore Mineral Resources (Term 37)**

In 1983 and 1984, the Newfoundland Court of Appeal and the Supreme Court of Canada respectively, on separate references from the provincial and federal governments, addressed whether the Province of Newfoundland or Canada could claim the right of ownership and management of offshore mineral resources lying on or under the continental shelf contiguous to the province's coastline. One of the issues relating to the determination of that question was whether Term 37 had any applicability. Term 37 states:

### **Natural Resources**

37. All lands, mines, minerals, and royalties belonging to Newfoundland at the date of Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the Province of Newfoundland, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

The Supreme Court of Canada gave short shrift to the argument that Term 37 assisted Newfoundland's argument that it had retained any rights to the Continental Shelf. The Supreme Court of Canada stated:

“Our conclusion that Term 37 would not have assisted Newfoundland in retaining whatever pre 1949 Continental Shelf rights it might have acquired is based on different considerations.

We do not attribute the same significance as did the Court of Appeal in Newfoundland to the specific inclusion of Term 37 nor to the absence of the words “in which the same are situate or arise”. The Terms of Union fully dealt with property division, though much of it could be characterized as superfluous. There are certain things that could not be covered by the *Constitution Act, 1867*, such as the Gander Airport and the property of Newfoundland Broadcasting Corporation, but many other transfers in the Terms of Union had direct parallels in the *Constitution Act, 1867*, for example railways or public harbours. There seems to have been a desire to collect all the provisions relating to property division in one place against the inclusion of Term 35 and 37 in addition to Term 3.

As for the words “in which the same are situate or arise” in Section 109, these are grammatically necessary because the section dealt originally with three former colonies becoming four provinces. They have no further purpose or effect.”<sup>58</sup>

The Court then went on to find that it could not apply Term 37 to the Continental Shelf in any event. The Court held that Continental Shelf rights are not proprietary rights, but arise from assertions of external sovereignty, and therefore do not fall within the subjects addressed by the Terms of Union.

The Supreme Court briefly considered Term 7. Term 7 stated:

The Constitution of Newfoundland as it existed immediately prior to the sixteenth day of February, 1934, is revived at the date of Union and shall, subject to these Terms and the *British North America Acts*, 1867 to 1946, continue as the Constitution of Newfoundland from and after the date of Union, until altered under the authority of the said Acts.

In this regard, the Province's argument was that if it had lost external sovereignty during Commission of Government, it nevertheless entered Canada with the same external sovereignty it had in 1934 on account of Term 7. The Supreme Court accepted that Term 7 had the effect of reviving Newfoundland's Constitution but only as it had been amended to recognize Newfoundland as a Canadian province. Consequently, even if the Continental Shelf rights existed as international law prior to Union, Newfoundland, upon becoming a Canadian province, could not assert them. Such rights only could be asserted as incidents of sovereignty and therefore only by sovereign states.

In considering Newfoundland's mineral rights outside of its internal waters, the Supreme Court of Canada gave less deference to the Terms of Union than did the Newfoundland Court Appeal. The latter gave consideration and deference to a number of the Terms of Union. The Court of Appeal started by acknowledging the effect of Term 3 which allowed for the application of the *British North America Acts* (i.e. the *Constitution Acts*) to Newfoundland except insofar as they were varied by the Terms of Union. Its conclusion was that due to Term 3, Newfoundland's rights with respect to natural resources could differ from those of other provinces.

The Court of Appeal also considered the potential impact of Term 37. It addressed Term 37 in light of s. 109 of the *Constitution Act* (which also addresses the matter of lands, mines, minerals and royalties). The Court applied basic principles of statutory interpretation and reasoned that if it were intended on union with Canada that Newfoundland's ownership of natural resources was to be governed by s.109, then Term 37 would be meaningless. As such, the Court held that both of these constitutional provisions could be reconciled by the acknowledgement that, in the case of Newfoundland, Term 37 operated to vary the effect of s.109. The result was that the sovereign rights to the bed and subsoil territorial waters off Newfoundland, that were vested in Newfoundland at union, remained so after Confederation under the provisions of Term 37 of the Terms of Union. Term 37 did not assist in a claim with respect to the Continental Shelf however. The Court held that since Newfoundland did not have rights to the Continental Shelf prior to Confederation, no such rights could be preserved by the operation of Term 37.<sup>59</sup> In this respect, the Court of Appeal decision mirrored that of the Supreme Court of Canada.

The Province and the Government of Canada appealed the Court of Appeal's decision. The subsequent Supreme Court of Canada decision on the Government of Canada's reference and the Atlantic Accord reduced the decision's significance. Consequently the appeal did not proceed. The Court of Appeal's conclusion regarding Newfoundland's ownership of resources

within its pre-Confederation territorial sea therefore must be viewed warily considering that it has not been assessed by the Supreme Court of Canada. The decision is inconsistent with the legal principle that rights within a state's territorial sea accrue solely to that state through the assertion of external sovereignty over that territory. Upon Newfoundland joining Confederation, only Canada could assert sovereignty over the territorial sea. Neither natural resources within the territorial sea, nor lands underneath the sea, could belong to Newfoundland once it became a province. While Canada could assign the benefits accruing from its assertion of external sovereignty to Newfoundland, Term 37 would have to be interpreted to effect such an assignment. Yet Term 37 does not contain language describing an assignment of Canada's rights. Should there be another occasion to consider the impact of Term 37 or Newfoundland's "ownership" of the territorial sea, the Supreme Court of Canada may reach a different conclusion.

Both Courts nevertheless used a strict construction approach to diminish the meaning of Term 37. It is unlikely that there would be many provisions in the *Constitution Act, 1982*, that the Supreme Court of Canada would describe as "superfluous". These decisions reflect the futility associated with relying on the Terms of Union to assert provincial jurisdiction over matters not contemplated at the time of Newfoundland's entry into Confederation. It discourages any thought that they can be adapted to support provincial assertions of jurisdiction over matters not specifically addressed therein.

## Term 17

The *Constitution Act, 1867*, gave provinces exclusive jurisdiction over education except that it protected denominational rights existing in law in 1867 and a federal role in protecting those rights. Term 17, unlike those provisions, provided constitutional guarantees to seven different religions. It read:

### Education

17. In lieu of section ninety-three of the *British North America Act, 1867*, the following Term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland provided for education,

- (a) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools

then being conducted under authority of the Legislature;  
and

- (b) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

Educational rights existing at the date of Union had been established by Newfoundland's 1927 *Education Act*. Those rights permitted denominationally-based school boards to own and operate schools, appoint and dismiss teachers, receive public funds on a non-discriminatory basis, and establish denominational colleges.<sup>60</sup>

While Term 17 entrenched denominational educational rights in Newfoundland as part of the Constitution of Canada, its genesis may have been political in nature. In order to assuage concerns regarding the effect of Confederation on denominational education as it existed in Newfoundland, the 1948 Newfoundland delegation insisted on its inclusion.<sup>61</sup> The Cabinet Committee appointed to negotiate with the Newfoundland delegation did not object. There really was no reason to do so where the provision addressed education, an area in which the province had exclusive rights to make laws under section 93 of the *Constitution Act, 1867*. There would not be any derogation of federal powers through its inclusion in the Terms of Union.

Term 17 remained a political issue into the 1980s. Newfoundland joined other provinces to question the impact that the *Charter of Rights and Freedoms* would have on constitutional provisions relating to denominational education or separate schools. The following provision was introduced to the *Constitution Act, 1982*, to protect those rights, including those derived from Term 17:

- 29. Nothing in this Chapter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominationally separate or dissentient schools.

Term 17 was amended in 1987 to extend the rights contained therein to the Pentecostal denomination. In 1996 an attempt to balance denominational education rights against financial pressures to fund denominational schools resulted in an amendment to Term 17. Interdenominational school boards were established under a legislative regime that would require them to allocate resources to denominational and non-denominational schools. The effort failed. A Court injunction was issued to halt the allocation as it was ruled contrary to the denominational rights still protected by the revised Term 17.<sup>62</sup> The provincial government did not challenge the injunction but sought public support through a referendum for a further amendment to Term 17. The new Term 17, overwhelmingly supported in the referendum, read:

- 17. (1) In lieu of section ninety-three of the *Constitution Act, 1867*, this section shall apply in respect of the Province of Newfoundland.
- (2) In and for the Province of Newfoundland, the Legislature shall have exclusive authority to make laws in relation to

education, but shall provide for courses in religion that are not specific to a religious denomination.

- (3) Religious observances shall be permitted in a school where requested by parents.

The amendment removed the remnants of all rights established by the Newfoundland *Education Act of 1927*, and protected by the original Term 17. While providing for non-denominational religious studies as part of the curriculum of a publicly funded and operated system, Term 17 no longer has the same influence on Newfoundland society and educational budgets that it once had. Changing values led to the elimination of denominational rights. Under the last amendment to Term 17, its influence on Newfoundland society came to an end.

## Term 46

Term 46 is a unique provision in that it protected a local industry against the impact of federal policy.

Federal legislation at the time of Newfoundland's entry into Confederation regulated the manufacture and sale of margarine. By limiting competition with the sale of butter, the legislation promoted a federal policy to support Canada's dairy industry. Applying that policy to Newfoundland had potential consequences. The first was that the cost of butter exceeded the cost of margarine. The 1948 Newfoundland delegation was concerned that the public not associate Confederation with an increase in the cost of living. The second was that a lack of serviceable roads made transportation of commodities difficult, particularly in winter when foodstuffs may have to be stored for the season. Margarine, not only being cheaper, would not spoil as readily. These concerns resulted in Newfoundland's margarine industry being protected by Term 46.<sup>63</sup>

While limited to a single industry, Term 46 established a precedent for the protection of local industry against the impact of federal policies and the vagaries associated with their change. With this precedent and the concerns addressed through Term 22, a similar approach could have been incorporated to protect the fishery from federal initiatives that would have been potentially harmful to the industry. Undoubtedly federal concerns that Newfoundland not obtain a special status or influence with respect to the application of federal policy, particularly on an industry key to another province (*i.e.*, Nova Scotia), would have made such a provision difficult, if not impossible, to obtain.

With changes to federal policies regarding the sale and manufacture of margarine, the need for Term 46 has passed. It stands as a testament, however, to the potential that existed to protect local industries against the impact of Confederation.

## Conclusion

In retrospect, the Terms of Union have not had a durable impact on economic development within Newfoundland. Term 17 had a greater impact on Newfoundland society but with its most recent amendment, its influence, too, has declined.

The Terms of Union established the political and constitutional framework under which Newfoundland became a Canadian province. This was their primary purpose. Except in the limited circumstances of Term 17, Term 22 and Term 46, they did not address individual rights or provide mechanisms to protect or enhance the development of local industries. Once Newfoundland's transition from a suspended self-governing Dominion to a province was achieved, legal principles governing the Terms' interpretation limited the ability to adapt them to changing economic and social conditions. As an agent for economic development, the Terms of Union, for the most part, became irrelevant once the McNair Commission, appointed pursuant to Term 29, had reported.

The "progressive interpretation" doctrine of constitutional interpretation was well-known in 1947 and 1948 when the two Newfoundland delegations went to Ottawa to first receive and then negotiate the Terms of Union. Despite this, directions specifying that the Terms of Union should be interpreted in a broad and liberal manner are not contained in the document. Neither is general language used to assert Newfoundland's right to challenge the application of federal policies as there was in the British Columbia Terms of Union regarding the application of federal policies to Indians and Indian lands. Neither is there language used, as in Term 32, to ensure continued provision of various public services within the province. The absence of such language supports the contention that the Terms of Union were intended to have limited long-term relevance and utility.

Whether broader language could have been achieved so as to give Newfoundland greater influence in policy decisions affecting its economy and society is a matter of conjecture. The political concerns of establishing a special status for Newfoundland, with powers to have input on matters that would normally fall within the federal sphere, would have been as difficult to achieve in 1948 as it would be now. The potential creation of distinct rights for certain provinces to influence federal policy, even on specific areas, arguably led to the rejection of the Meech Lake and Charlottetown Accords.

On matters solely affecting the province, the ability to amend or renegotiate the Terms of Union exists without the need to seek the consent of other provinces. Identifying areas in which this can be done is difficult. Any initiative designed to give one province influence over matters falling within federal constitutional jurisdiction is likely to be shown to have a potential direct or indirect political, economic and/or social impact on another province. Without agreement to revise them, many of the terms within the Terms of Union will remain effectively "spent" in respect of their constitutional relevance. Representation within Parliament, the definition of its territory, and the provision of ferry services to the mainland stand as exceptions. Any agreement to revise the Terms of Union may be difficult to achieve. An agreement, however, provides the only means to develop Terms that are relevant to the resolution of current issues facing Newfoundland and Labrador.

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## Endnotes

- <sup>1</sup> Pursuant to a constitutional amendment, the province's proper name is the Province of Newfoundland and Labrador, at the time of the negotiation of the Terms of Union, all references were to Newfoundland. For ease of reference only, this paper shall use "Newfoundland" to describe pre-Confederation negotiations with Canada on the Terms of Union and the post-Confederation effects of those Terms.
- <sup>2</sup> *British North America Act*, 1949 (U.K.), [since renamed: *Newfoundland Act*, R.S.C. 1970, Appendix II, No. 30].
- <sup>3</sup> D. Mackenzie, "The Terms of Union in Historical Perspective." (Fall 1998) 14: 2 Newfoundland Studies 220 at 220.
- <sup>4</sup> Newfoundland "abdicated self-government" according to J. E. Fitzgerald, "The Confederation of Newfoundland with Canada, 1946-1949." Unpublished MA Thesis, Memorial University, 1992.
- <sup>5</sup> A statement by the Prime Minister of Great Britain, contained in a 14 December 1945 dispatch from Vincent Massey, High Commissioner of Great Britain to the Secretary of State for External Affairs, *Documents and Relations between Canada and Newfoundland*, Vol. 2, 1940-1949, P. Bridle, ed. (Ottawa: Supply and Services Canada, 1984) at 198.
- <sup>6</sup> J. R. Smallwood, *I Chose Canada – The Memoirs of the Honourable Joseph R. "Joey" Smallwood*, (Toronto: MacMillan Company, 1973) at 225-232, for J. R. Smallwood's account of the decision to run as a Confederate in Bonavista Centre.
- <sup>7</sup> The Resolution is contained in a 20 March 1947 dispatch from the Government of Newfoundland to High Commissioner in Newfoundland, *Documents and Relations between Canada and Newfoundland*, Vol. 2, 1940-1949, P. Bridle, ed. (Ottawa: Supply and Services Canada, 1984) at 413.
- <sup>8</sup> Report of Newfoundland Royal commission for the Preparation of the Case of the Government of Newfoundland for the Revision of the Financial Terms of Union, May 1957, Part II, Section I, at 1.
- <sup>9</sup> 08 September 1947 telegram from Members of the National Convention of Newfoundland, *Documents and Relations between Canada and Newfoundland*, Vol. 2, 1940-1949, P. Bridle, ed. (Ottawa: Supply and Services Canada, 1984) at 198.
- <sup>10</sup> Motion of Malcolm Hollett is contained in a 27 February 1947 telegram from the Canadian High Commissioner in Newfoundland to the Secretary of State for External Affairs, *Documents and Relations between Canada and Newfoundland*, Vol. 2, 1940-1949, P. Bridle, ed. (Ottawa: Supply and Services Canada, 1984) at 399-400.
- <sup>11</sup> The 1947 Newfoundland delegation was accused by anti-confederate supporters as having engaged in negotiations in developing Canada's offer for Terms of Union, a circumstance seen to have been beyond the delegation's mandate.

- <sup>12</sup> 25 November 1946 memorandum by Executive Assistant to the Governors, Bank of Canada, *Documents and Relations between Canada and Newfoundland*, Vol. 2, 1940-1949, P. Bridle, ed. (Ottawa: Supply and Services Canada, 1984) at 343.
- <sup>13</sup> 08 September 1947 memorandum from Second Political Division to Assistant Secretary to the Cabinet, *Documents and Relations between Canada and Newfoundland*, Vol. 2, 1940-1949, P. Bridle, ed. (Ottawa: Supply and Services Canada, 1984) at 628-629.
- <sup>14</sup> Gordon A. Winter, a member of the 1948 Newfoundland delegation, stated in a 2 January 2003 private interview that he had raised the potential of Newfoundland obtaining a right to be consulted in respect of fishery-related matters. The suggestion found little enthusiasm amongst the other members of the 1948 Newfoundland delegation whose focus was on obtaining constitutional entrenchment for federal programs and spending.
- <sup>15</sup> 29 October 1947 letter from W.L. Mackenzie King to the Governor of Newfoundland, *Documents and Relations between Canada and Newfoundland*, Vol. 2, 1940-1949, P. Bridle, ed. (Ottawa: Supply and Services Canada, 1984) at 682-714.
- <sup>16</sup> The exceptions are Term 17 (denominational education rights) and Term 46 (relating to the manufacture and sale of Oleo margarine). The Government of Canada agreed to embody these provisions into the Terms of Union on the basis of arguments from the Newfoundland delegation that their embodiment was necessary to placate various concerns in the province of Newfoundland on the availability of denominational education and the low cost of substitute butter: 2 January 2003 Gordon A. Winter interview, St. John's, Newfoundland and Labrador.
- <sup>17</sup> Chesley A. Crosbie's report to the Governor of Newfoundland is contained in a 15 February 1949 telegram from the Canadian High Commissioner in Newfoundland to the Secretary of State for External Affairs, *Documents and Relations between Canada and Newfoundland*, Vol. 2, 1940-1949, P. Bridle, ed. (Ottawa: Supply and Services Canada, 1984) at 1514-1518.
- <sup>18</sup> *Supra*, note 2.
- <sup>19</sup> (i) *Canada v. P.E.I.* [1978] 1 F.C. 533 (C.A.).
- (ii) *Friends of the Island Inc. v. Canada* [1993] 2 F.C. 229 (T.D.); rev'd in part (1995) 131 D.L.R. (4<sup>th</sup>) 285 (F.C.A.).
- (iii) *Re: Waters & Water Powers*, [1929] S.C.R. 200.
- (iv) *A.G.B.C. V. A.G.-Can.*, [1994] 2 S.C.R. 41.
- <sup>20</sup> *Edwards v. A.G.-Can.*, [1930] A.C. 123.
- <sup>21</sup> *Supra*, note 21, at 136.
- <sup>22</sup> P.W. Hogg, *Constitutional Law of Canada*, 4<sup>th</sup> ed. (Toronto: Carswell, 1992), at 420.
- <sup>23</sup> *Ibid.*, at 421.

- <sup>24</sup> *Canada Trust co. v. A.G.B.C.*, [1980 2 S.C.R. 466. See also *Re: Residential Tenancies Act*, [1981] S.C.R. 341; *Skapinker v. Law Society of Upper Canada*, [1984] S.C.R. 284.
- <sup>25</sup> *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.
- <sup>26</sup> *Friends of the Island Inc. v. Canada* (1993), 102 D.L.R. (4<sup>th</sup>) 696 (F.C.T.D.); *P.E.I. v. Can.*, [1978] 1 F.C. 533 (C.A.); *P.E.I. v. C.N.R.*, [1991] 1 F.C. 129 (C.A.).
- <sup>27</sup> *A.G.B.C. v. A.G.-Can.*, [1994] 2 S.C.R. 41.
- <sup>28</sup> A.W. MacKay “The Supreme Court of Canada and Federalism: Does/Should anyone care anymore?” (2001) 80 C.B.R. 241, at 242.
- <sup>29</sup> *A.G.-Can. v. A.G.-Ont (Labour Conventions)*, [1937] A.C. 326 (P.C.).
- <sup>30</sup> 2 January 2003 Gordon A. Winter Interview, St. John’s, Newfoundland and Labrador.
- <sup>31</sup> *Ibid.*
- <sup>32</sup> *Supra*, note 27.
- <sup>33</sup> *Pollock v. R.*, [1955] 5 D.L.R. 698 (Ex. Ct.).
- <sup>34</sup> *Reid v. March* (1965), 51 D.L.R. (2d) 186 (Nfld. T.D.).
- <sup>35</sup> *Re: Bowater’s Nfld. Pulp & Paper Mills Ltd.*, [1950] S.C.R. 608.
- <sup>36</sup> *A.G.B.C. v. A.G.-Can.*, *supra*, note 29.
- <sup>37</sup> *Société des Acadiens v. Ass. of Parents for Fairness in Education*, [1986] 1 S.C.R. 549.
- <sup>38</sup> *Id.*, at 578.
- <sup>39</sup> Ref: *Re Ontario Education Act Amendment*, [1987] 1 S.C.R. 1148
- <sup>40</sup> *Id.*, at 1176.
- <sup>41</sup> *Re: Eskimos* [1939] S.C.R. 104.
- <sup>42</sup> 2 January 2003 Gordon A. Winter interview, St. John’s, Newfoundland and Labrador.
- <sup>43</sup> An Act to repeal certain Fisheries Laws in force in the Province of Newfoundland respecting the Exportation of Salt Fish, 7-8 Elizabeth II, c. 49.
- <sup>44</sup> An Act to repeal certain Fisheries Laws of Newfoundland, 8-9 Elizabeth II, c. 15.
- <sup>45</sup> Smallwood, *supra*, note 6, at 417.
- <sup>46</sup> *Supra*, note 8, Part II, Section 2. p. 4.
- <sup>47</sup> The other members of the McNair Commission were economist John Deutsch and Sir Albert J. Walsh, Chief Justice of Newfoundland, former Lieutenant Governor of Newfoundland and former Chair of the 1948 Newfoundland delegation.
- <sup>48</sup> Roland A. Ritchie later was appointed to the Supreme Court of Canada.

- <sup>49</sup> R.A. Ritchie, “Memorandum on Behalf of the Government of Canada: Royal Commission on Newfoundland Finances under the Terms of Union of Newfoundland with Canada”, at 19-20.
- <sup>50</sup> Smallwood, *supra*, note 6, at 420.
- <sup>51</sup> Smallwood, *supra*, note 6, at 421.
- <sup>52</sup> John Ottenheimer news release, “1998 Budget Built Flimsily on One-time Budgetary Measures,” 13 April 1998.
- <sup>53</sup> *Supra*, note 27.
- <sup>54</sup> *P.E.I. v. C.N.R.*, *supra*, note 26.
- <sup>55</sup> *A.G. P.E.I. v. A.G.-Can.* [1976] 2 F.C. 712 (C.A.).
- <sup>56</sup> *P.E.I. v. Canada*, *supra*, note 26.
- <sup>57</sup> *CNR v. Moffatt* (2001), 278 N.R. 83 (F.C.A.).
- <sup>58</sup> Ref: *Re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86.
- <sup>59</sup> *Re: Mineral and Other National Resources of the Continental Shelf (1983)*, 145 D.L.R. (3d) 9 (Nfld. C.A.).
- <sup>60</sup> Report of the Special Joint Committee on the Amendment to Term 17 of the Terms of Union of Newfoundland, December 1997.
- <sup>61</sup> 2 January 2003 Gordon A. Winter interview, St. John’s, Newfoundland and Labrador.
- <sup>62</sup> *Hogan v. Nfld.* (1997) 154 Nfld. & P.E.I.R. 121 (Nfld. S.C., T.D.).
- <sup>63</sup> 2 January 2003 Gordon A. Winter interview, St. John’s, Newfoundland and Labrador.

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