

# BRIEF

to the

## Special Joint Committee on the Constitution of Canada

from

## The Joint Executive of The Denominational Education Committees of Newfoundland

December 1980

BRIEF  
to the  
Special Joint Committee on the  
Constitution of Canada  
from  
The Joint Executive of  
The Denominational Education Committees  
of Newfoundland

December 1980

## CONTENTS

### 1. Introduction and Background:

the Denominational Education Committees of Newfoundland representing the religious denominations recognized under the Department of Education Act of Newfoundland for the purpose of providing public schooling denominationally based.

P.1

### 2. Part I of The Constitution Act, 1980:

Canadian Charter of Rights and Freedoms

P.12

### 3. Part V of The Constitution Act, 1980:

Procedure for Amending Constitution of Canada

P.28

### 4. Pentecostal Education System in Newfoundland:

Request for Amendment to Term 17 of the Terms of Union of Newfoundland with Canada

P.34

1. Introduction and Background:

the Denominational Education Committees of Newfoundland representing the religious denominations recognized under the Department of Education Act of Newfoundland for the purpose of providing public schooling denominationally based.

"We have by law a denominational system of education in the sense that by our own legislation the Churches recognized for educational purposes have certain rights and privileges. These are entrenched in the Terms of Union between Newfoundland and Canada and, therefore, form part of the British North America Act." (Hon. F.W. Rowe, Statement to the House of Assembly, Newfoundland, 1969.)

Educational beginnings in Newfoundland were made under the auspices of the Churches and for over 100 years it was the clergy, the Society for the Propagation of the Gospel, and other British Agencies which supplied education to the people. It was not until 1836, one hundred and ten years after the first school was founded by a clergyman, that the Government awoke to its duties and awarded a sum of money for education. The children of the province, and the province itself, have a deep debt to the various religious denominations who encouraged the early development of education. For over three hundred years, while the colony was ruled directly from England, the United Kingdom Government did not contribute one cent to the

education of the people and it was only after Newfoundland received Representative Government in 1832 that an effort was made by the local legislators to extend and improve the means of education as far as the financial resources then at their disposal would permit.

For over a century before 1836 then, education in Newfoundland was completely sponsored by church agencies. As a result of these early efforts of the churches, the pattern of denominational schools was gradually established in Newfoundland and was given legal status by the Education Act of 1876, the basis on which our educational system continues to rest. A church-state partnership in education thus evolved and, with minor administrative changes, continued in its original form until the reorganization of education brought about by the legislation of 1968-69, which enacted a major re-organization of education within the Province, resulting largely from the recommendations of the Royal Commission on Education and Youth appointed in 1964. Prior to 1968-69, there were Denominational Superintendents in the Newfoundland Department of Education, each essentially an agent of both his Church and the Government, and the activities of the various Superintendents were co-ordinated through the Council of Education. The historic legislation of 1968-69 (The Education Act, and The Schools Act) brought an end to this direct involvement of the Churches in the

Department of Education; the Churches withdrew their representatives from the department and the former Council of Education was abolished.

Provision was made in legislation, however, for the churches to continue to participate in the educational process by the establishment of Denominational Education Committees outside the Department of Education. The churches thus continue to influence educational decisions through participation in the denominational policy commission, the general advisory committee and other committees established from time to time.

While the organizational framework for the administration of education was changed considerably by the 1968-69 legislation, it is clear that the denominational basis of our system did not change, as indeed it could not be changed, without the agreement of the churches.

Through their respective Education Committees, the churches continue to exert influence and give direction to the school system of the province.

With the passing of the 1968-69 legislation, the Provincial Legislature created three separate Denominational Education Committees, each responsible, with the School Boards under their jurisdiction, for the administration of education in the Province: The Roman Catholic Education Committee, the Pentecostal Education Committee and, combining

all other religious denominations in the Province, the Integrated Education Committee.

During the 1979-80 school year, the denominational school system of the Province provided educational services to some 150,382 pupils, taught by 7,731 teachers in approximately 660 schools across Newfoundland and Labrador. According to the Canadian Census of 1971, the religious affiliation of the population of the Province is as follows:

<u>DENOMINATION</u>	<u>PERCENTAGE</u>
Roman Catholic.....	36.6
Anglican.....	27.7
United Church.....	19.5
Salvation Army.....	7.9
Pentecostal.....	5.5
Presbyterian.....	0.6
Jehovah's Witnesses.....	0.4
Baptist.....	0.2
Lutheran.....	0.2
Other.....	1.1
No Religion.....	0.4

Thus, approximately 97% of the population of the Province is affiliated with the major denominational groups recognized in law for educational purposes.

That the education system of Newfoundland is a public school system denominationally based is made clear in The Schools Act (RSN 1970, c. 346). .

Section 63 provides:

"No School Board shall refuse admission to any school under its control to any child solely on the ground that that child is of a religious faith which is not the de-

nomination or one of the denominations of the school if there is no school of his own religious persuasion reasonably available to him."

Section 64 provides:

"No person shall, in any college or school aided by money granted under this Act, impart to any child attending it any religious instruction which may be objected to, in writing, by the parent or guardian of that child."

The latter provision was first enacted into the educational legislation of Newfoundland in 1876 and has been re-enacted in all such succeeding legislation; in 104 years, there is no instance on record of this provision of the Act ever having been violated by any school in Newfoundland.

When the terms of the union of Newfoundland with Canada were negotiated in 1948, great care was taken by those negotiating on behalf of Newfoundland to ensure that the historic denominational rights in education in Newfoundland would be fully recognized, protected and strongly entrenched in the Constitution of Canada. Term 17 of the Terms of Union is the result. It would not be an exaggeration to say, so important was the issue in the minds of Newfoundlanders, that the absence of a Term 17 might well have resulted in a majority of Newfoundlanders voting in the second referendum not to enter into union with Canada.



The Terms of Union of Newfoundland with Canada (British North America Act, 1949, 12-13 Geo. VI, c. 63, U.K.) constitute a contract, a covenant, between sovereign peoples, and carry great solemnity as a consequence. These terms should not be repealed, altered, amended or prejudicially affected by other legislation save by mutual consent; this is especially true of Term 17, which strongly entrenched denominational rights in education in Newfoundland by providing that the Legislature of Newfoundland would 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 further provided for the allocation of public funds for education on a non-discriminatory basis. Term 17 is as follows:

#### Education

17. In lieu of section ninety-three of the British 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.

In the same year, 1949, the Parliament of the United Kingdom passed the British North America (No. 2) Act (13 Geo. VI, c.81) which added a new class to section 91 of The British North America Act, 1867. Section 91 is the section of the B.N.A. Act which sets forth the powers of the Parliament of Canada. The 1949 amendment to section 91 is as follows:

1. Section ninety-one of the British North America Act is hereby amended by renumbering Class 1 thereof as Class 1A and by inserting therein immediately before that Class that following as Class 1:

"1. The amendment from time to time of the constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class or persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House; provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House. (Emphasis added).

Thus, the B.N.A. Act, as amended in 1949, made it clear that the Parliament of Canada had no authority to amend the Constitution of Canada insofar as any such amendment would relate to matters affecting "any class of persons with respect to schools."

Since 1949, then, denominational rights in Newfoundland have been strongly entrenched in that the Legislature of

Newfoundland has no authority "to make laws prejudicially affecting any right or privilege with respect to denominational schools..." etc., and the Parliament of Canada has no right to amend the constitution in any way that would affect "any class of persons with respect to schools."

It is realized, of course, that these entrenchments are not totally sacrosanct in that the British Parliament could be asked, at any time prior to repatriation of the Constitution of Canada, to amend the B.N.A. Act to change these safeguards but, from a practical point of view, it is unlikely that any such request would be made in specific terms. Unless the United Kingdom Parliament was asked, and agreed, to change the existing legislation, the only bodies having legislative authority in the matter, the Parliament of Canada and the Legislature of Newfoundland, are now both specifically precluded by the B.N.A. Act from exercising any legislative jurisdiction in the area, a total exclusion in the case of the Parliament of Canada and a partial exclusion in the case of the Legislature of Newfoundland in that the Legislature, while it has authority and jurisdiction to enact laws relating to education, is expressly precluded from enacting legislation which would prejudicially affect denominational rights in education.

While denominational "rights and privileges" in education now held in Newfoundland are not enumerated in any detail in the statutes, they certainly include the following:

- a) the right of the denominational school system to exist and to continue its work;
- b) the right of the denominations to preserve and promote their interests and fundamental rights in education;
- c) the right to provide and operate schools in accordance with the spiritual and religious tenets of the denominational groups;
- d) the right to non-discriminatory allocations of public funds for education.

Quite clearly, a number of concomitant rights and privileges derived from both law and practice flow from each of such fundamental "rights" (eg. establishment and alteration of school district boundaries, appointment of school board members, certification and employment of teachers, religious education programmes, etc.).

At a meeting of the Joint Executive of the Denominational Education Committees held on November 14, 1980, a sub-committee consisting of Archbishop A.L. Penney, D.D., (Chairman); the three Executive Secretaries: Mr. M. Riggs, Integrated Education Committee, Dr. J.K. Tracey, Catholic Education Committee, Pastor A.E. Batstone, Pentecostal Education Committee; and Mr. J.J. Greene, Q.C., was set up to make representation to the appropriate authorities concerning the continued entrenchment of rights and privileges with respect to denominational schools as now exist in law in the Province of Newfoundland.

The mandate of this sub-committee is to seek to have the Canadian Constitution 1980 afford protection for the rights and privileges with respect to denominational schools to no lesser extent than these are now protected in the Constitution of Canada for the Province of Newfoundland and Labrador.

2. Part I of The Constitution Act, 1980:

Canadian Charter of Rights and Freedoms

Introduction:

The proposal to entrench a Charter of Rights and Freedoms in the new Constitution of Canada has ramifications which raise considerable concerns for the Denominational Educational Committees of Newfoundland. As noted in the first section of this Brief, the educational system in Newfoundland has had from its very inception strong ties with organized religion and its denominational character is not only perceived as being fundamental to the system itself but is also seen as an integral component of the very social fabric of our province. From the fact, as earlier noted, that approximately 97% of the population of the Province of Newfoundland is affiliated with the major denominational groups recognized in law for educational purposes, there is widespread acceptance of the present system. Implicit in this acceptance is the desire to retain and preserve that system. However, it is feared that the proposed Charter of Rights and Freedoms as presently structured may, if entrenched, prove detrimental to the very survival of the denominational public school system in Newfoundland. While recognizing that the guarantee of "freedom of religion" and "freedom of conscience" and the other rights and freedoms set forth in the Charter will inevitably work to the advantage of individuals in Canadian society, those citizens who today enjoy entrenched group rights

under the Constitution have serious concerns and reservations about effects which the guarantee of such fundamental rights and freedoms to individuals will have on the integrity of the denominational education system. The Denominational Education Committees express grave reservations about the effects in the future, if amendments to Part I of the Constitution Act, 1980, are not made.

Judicial Interpretation:

The ambiguity and uncertainty which pervade certain sections of the Charter may eventually give rise to judicial interpretations unforeseen and contrary to the intentions of the framers of the document. It is feared that such interpretations might erode the basic rights and privileges guaranteed to Newfoundland under Term 17 of the Terms of Union with Canada.

The enactment of the proposed Charter in a constitutional document of great authority will have a most wide-ranging effect on Canadian society. Among other important effects, it will give to the judges of this country the authority to declare unconstitutional, and, therefore, void and illegal, any action or inaction of any person, group or institution that the Court considers to have interfered with any of the rights and freedoms enumerated in it.



An entrenched Charter would result in a shift of power from the Parliament of Canada to the Supreme Court of Canada, a body which is not subject to public pressure. As final arbiters, the Court would have the last say with regard to any legislation passed by Parliament. The only check upon the exercise of power by the Supreme Court would, in effect, be its own sense of self-restraint.

The American experiences vis-a-vis constitutional law affords us little encouragement as to the exercise of power by the judiciary. Professor Raoul Berger in his recent book, Government by Judiciary, (Harvard Univ. Press, 1977), in discussing the history of judicial decision-making in the area of the Fourteenth Amendment to the American Constitution, states as follows:

The court, it is safe to say, has flouted the will of framers of the American Bill of Rights and substituted an interpretation in flat contradiction of the original design ... it has done this under cover of the so-called "majestic generalities" of the [Fourteenth] Amendment - "due process", "equal protection" - which it found "conveniently vague", without taking into account the limited aims those terms were meant to express. When Chief Justice Warren asserted that "we cannot turn back the clock to 1868", he in fact rejected the framers' intention as irrelevant. On that premise, the entire constitution merely has such relevance as the Court chooses to give to it, and the Supreme Court is truly a "continuing Constitutional Convention" constantly engaged in revising the Constitution, a role clearly withheld from the Court. Such conduct impels one to conclude that the Justices are become a law unto themselves. P.408. (Emphasis added).

A similar situation can also be gleaned from the example of Australia. In that country, which like Canada has strong roots in British tradition, an American style Bill of Rights has been "constitutionalized". Already, it is being invoked against denominational public schools on the grounds of separation of church and state. Further, one fundamental and extremely important distinction between the American Bill of Rights and the proposed Canadian Charter must be recognized.

The U.S. Bill of Rights only prohibits the enactment of laws by Government abridging freedom of religion. Non-Governmental institutions and individuals are not prohibited. Thus, an institution in the United States, which is non-Governmental, cannot be, strictly speaking, guilty of infringing the constitutional right of freedom of religion of a U. S. citizen.

By contrast, the Charter would give to each individual Canadian the right of freedom of conscience and religion - not only as against governmental interference, but apparently as against all individuals, groups and organizations in Canadian society.

Thus it would be open to a Canadian citizen to argue that his rights of freedom of religion, conscience and free speech, etc. had been violated by a school board exercising denominational rights in education. Such a claim by a U.S. citizen would not be supported by the wording of the U. S.

Bill of Rights.

The significance of this distinction vis-a-vis denominational schools in Canada is not easy to assess because the values of judges in future generations and the political climate years hence cannot now be assessed.

Since the Charter of Rights and Freedoms will be a law of parallel authority with the constitutional rights with respect to denominational schools, the Courts will have to decide how the two intermesh. As the proposal stands now, it is impossible to predict what policy choices the Courts will make in fixing the line of demarcation between denominational school rights on the one hand and the freedoms and liberties of individuals on the other hand. Where the line will be drawn is completely dependent on the policy choices which a majority of the judges of the Supreme Court of Canada make at the time that the particular issues are put before them.

Thus, the constitutional entrenchment of the Canadian Charter of Rights and Freedoms gives to the Courts of this and future generations the power to interpret the Constitution in novel and unexpected ways in light of the evolving value systems of Canadian society as interpreted and applied by the judges then presiding.

The "majestic generalities" of the Canadian Charter of Rights and Freedoms, as it presently stands, will leave

considerable room for interpretation and, in future generations, reinterpretation of its provision.

It will be perfectly open to any Court to state that the British Parliament intended, by enacting Sections 2 and/or 15 of the Charter, that "reasonable limits" be placed on constitutional denominational school rights in the interest of the civil liberties of the individuals in Canadian society.

It is therefore evident that a very real danger exists if the Supreme Court of the land is put in a position as the final arbiter and as a consequence becomes the law maker of our country. It is conceivable that, adopting Senator Forsey's reference to the Privy Council, the Supreme Court will become, whether or not by design, the "Stepfathers" of our new Constitution.

Mere intention, in the absence of clear and concise language aimed at the protection and preservation of denominational education rights and privileges, is not enough. Such absence of clarity and precision has provided the Courts with ample opportunity since 1867 to re-interpret the Constitution and in effect derogate from the original "intention" of the B.N.A. Act.

Consequently it is the view of the Denominational Education Committees of Newfoundland that every effort must

must be taken to ensure that the rights and privileges of denominational schools, now constitutionally entrenched, be explicitly mentioned and given full weight in the Charter of Rights. It is something of an anomaly that the rights and privileges recognized under Section 93 of the B.N.A. Act and its substitutes (Term 17 for Newfoundland), which are really specific rights regarding the free exercise of religion, are not recognized under the proposed Charter of Rights and Freedoms. Although the rights and freedoms enumerated therein do not pretend to be exhaustive, (see Section 24), they cover a wide range, including some very particular rights and freedoms, such as the analogous provisions regarding the educational rights of a linguistic minority. In fact, many of the provisions of the B. N. A. Act which respect matters that could be construed as general or minority rights have now been brought specifically under the Charter of Rights and Freedoms. Indeed, it may be possible that the rights and privileges recognized under Section 93 and its substitute provisions are the only such constitutional rights and freedoms not now guaranteed under the Charter.

It is significant to note that while the Constitution Act, 1980, makes specific reference in the Charter to most of the "classes of subjects" now enumerated in Section 91 of the B.N.A. Act, the one class of subjects, now in Section 91, which is not specifically dealt with in the Constitution Act, 1980, is the subject of "any class of persons with respect to schools".

It would appear only just, therefore, that a guarantee of recognized denominational educational rights and privileges should now be given under the Charter. This would accord such rights, as the Charter does for similar rights, a positive constitutional guarantee in the place of the constitutional recognition they now enjoy by virtue of the limitation of the legislative authority of the Provinces. Furthermore, to bring such rights and privileges under the Charter would avoid the possibility of a conflict of law between the provisions of the Charter and the provisions of Section 93 and its substitutes. It could also ensure that Section 93, etc. would be amended only in a manner similar to the Charter, which is one of the most stringently protected areas of the Constitution.

Specific Provisions of the Charter:

Section 2(a) of the proposed Charter provides that everyone has certain "fundamental freedoms" including "the freedom of conscience and religion". Section 15(1) provides that:

"Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of ... religion."

In neither of these Sections is there inserted a saving clause which would exempt certain groups now enjoying constitutional protection, eg. denominational rights in education now provided by Section 93 of the B.N.A. Act and its successor amended versions for some of the Provinces - Term 17 for Newfoundland. This failure of the Charter to include saving clauses stands in strong contrast to



comparable provincial legislation in Newfoundland. The Newfoundland Human Rights Code, (RSN 1970, c.262), provides in Section 4(2) that:

"This Act shall be construed and interpreted so as to ensure that no provision thereof shall prejudicially affect any right or privilege with respect to denominational schools, common (amalgamated) schools or denominational colleges, that any class or classes of persons had by law in the province at the date of Union of Newfoundland with Canada, or any such right or privilege hereafter by law acquired by the Pentecostal Assemblies of Newfoundland."

This provision operates to reaffirm Term 17 of the Terms of Union of Newfoundland with Canada; nothing as explicit is expressed in the proposed Charter of Rights and Freedoms.

It is possible that the Courts, applying Sections 2(a) and 15(1), might interpret them so as to limit or even abrogate the constitutional rights and privileges guaranteed by Term 17. This is especially so when Section 1 of the Charter is considered, the section providing that the rights and freedoms set out in the Charter are "subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government."

This Brief has already made the points that, in applying these sections, it will be open to the Court to hold that the British Parliament, in enacting these sections, "intended" that "reasonable limits" be placed on constitutional denominational rights in education in the interest of the civil liberties of

individuals and that where the line will be drawn will be completely dependent on the policy choices which a majority of the judges of the Supreme Court of Canada make from time to time on particular issues before them.

Consequently, we repeat that every effort must be taken to make certain that the rights and privileges of denominational schools, now included in the Constitution, and intended to be continued by the Constitution Act, 1980, be explicitly mentioned and given full weight in the Charter of Rights.

Furthermore, it is vitally important to note that Section 25 of the Charter provides that any law that is inconsistent with the provisions of the Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

Section 25 makes no reference to other provisions of the Canadian Constitution or to laws that are outside the Constitution. Thus, it is quite possible that the Courts might interpret Section 25 as being of paramount importance and thus capable of over-riding other provisions of the Constitution, including Section 93 of the B.N.A. Act and its successor amended versions for some of the Provinces; in the case of Newfoundland, Term 17.

As a result of adoption by the Courts of such canons of interpretation, any provision might be interpreted in the light of the standards of an individual's rights of "freedom of



conscience and religion" (including the "freedom of the person who chooses to have no religion") and of "equal protection of the law without discrimination because of ... religion ...".

The inherent danger in such a wide interpretation is that individual rights such as freedom of religion and freedom of conscience might prevail over the freedom of organized religion to protect the denominational integrity of the educational system and to retain the rights and privileges recognized by law. As a result of such an interpretation, rights presently held, for example, by School Boards in relation to hiring policies and practices as well as certification of teachers would be severely jeopardized. Already, with regard to individual human rights, litigation has taken place in Alberta, British Columbia and Ontario, involving the relationship between constitutional denominational rights in education and provisions of provincial human rights laws. As a rule, at least at higher court levels, the primacy of the B.N.A. Act protection has been upheld, but this situation, however, would be quite different under the proposed Charter where all such rights would, at best, enjoy equal standing.

The Pepin-Robarts Task Force foresaw such problems and tried to deal with them by distinguishing "individual" rights and "group" rights, with priority to the former; "individual" would mean every Canadian; "group" would mean Canadian workers,

Canadian Indians, Canadian denominations covered by a right of association. But these intellectual pigeon holes do not necessarily correspond to reality. Francophone rights, for example, are not merely individual or communal (self-determination); they are primarily historical. And so they would be the object of a specific, if limited, entrenchment, just as denominational rights have been since Confederation and should remain so.

It must be realized that no individual right or freedom exists in absolute terms. Some individual rights must give way to and be superseded by larger rights, that of "the greater good of the greatest number"; if this were otherwise, chaos would result and democracy would be imperiled.

Those who would wish to argue the adequacy of the proposed Charter of Rights would undoubtedly point to Section 24, which provides:

"The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada including any rights or freedoms that pertain to the native peoples of Canada."

This section, it might be argued, gives considerable weight to the view that the existing constitutional protections afforded to denominational rights in education cannot be whittled away by claims made by litigants to the rights and or freedoms enumerated in the Charter.

However, inevitably the Courts will have to decide what the constitutional rights in education are in a particular situation and the bold enumeration of the rights and freedoms of Canadians in the Charter may very well affect what the Courts perceive the denominational education rights to have been prior to the Charter's enactment, rights which may well be assessed through a "filter" of values held by the judges of future generations. This "filter" will be much influenced by a system of legal education giving the highest importance to the "majestic generalities" of the Charter - the supreme document of the Canadian Constitution proclaiming the most fundamental values of Canadian society.

As now drafted, Section 24 is too vague and uncertain to assuage the fears and concerns expressed in this Brief about the proposed Charter of Rights.

There has existed, and continues to exist, the unquestioned rights of the people of Newfoundland, or those who choose to exercise that right, to have their children educated in a system which, while following a normal academic program, is permeated throughout with the goal and intention of developing in the students taught in this denominational public school system the knowledge, love and practice of their particular faith. A distinctive characteristic of the education system in Newfoundland is the totality of education both in regard to truths communicated to students as well as the preoccupation with their complete growth and development for the society in which they live.

However, such a guaranteed right may not be allowed to continue. As noted earlier in this Brief, since the Charter of Rights and Freedoms will be a law of parallel authority with the constitutional rights under Section 93 (Term 17 for Newfoundland), the Courts will decide how the two intermesh. As the proposed Charter now stands, it is impossible to predict what policy decisions the Courts will make in fixing the line of demarcation.

We also note that Section 26 of the Declaration of Human Rights of the United Nations states that parents have the prior right to choose the kind of education they wish for their children. The Canadian Charter of Rights and Freedoms should state this fundamental right in clear and unambiguous language. Such a statement would allow parents to exercise their choice with freedom and with the necessary public funds to make such a choice practical and feasible.

Conclusion:

It must be remembered that the agreement which brought Newfoundland into the Canadian federation was a solemn covenant between two proud peoples. Paramount amongst the concerns of Newfoundlanders at that time was the safeguarding of their denominational public school system. Without such assurance, it is most unlikely that the Union would have been effected. To deny or jeopardize that guarantee, whether directly or by judicial interpretation in generations to come, is tantamount to a betrayal of trust.

Both the Prime Minister and the Minister of Justice have, in public statements, assured the people of Newfoundland that it is not intended that the Constitution Act 1980 will adversely affect existing denominational rights in education, now constitutionally entrenched. The Denominational Education Committees of Newfoundland accept that statement of intention but respectfully submit that, in order to implement that intention in future practice so as to preserve intact the present group rights of denominational education, more explicit wording must be included in the proposed Charter of Rights.

Amendment Proposals:

For the consideration of the Special Joint Committee on the Constitution of Canada, we propose the following draft amendments for inclusion in appropriate places in Part I of the Constitution Act, 1980:

ANY RIGHT OR PRIVILEGE WITH RESPECT TO DENOMINATIONAL, SEPARATE OR DISSENTIENT SCHOOLS GRANTED OR SECURED UNDER SECTION 93 OF THE CONSTITUTION ACT, 1867, (FORMERLY NAMED THE BRITISH NORTH AMERICA ACT, 1867), AS AMENDED, OR UNDER ANY PROVISION OF THE CONSTITUTION OF CANADA IN SUBSTITUTION THEREOF, SHALL BE A RIGHT OR FREEDOM GUARANTEED BY THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS.

THE GUARANTEE IN THIS CHARTER OF CERTAIN RIGHTS AND FREEDOMS SHALL NOT BE CONSTRUED OR INTERPRETED AS ABROGATING OR DEROGATING FROM ANY RIGHT OR PRIVILEGE WITH RESPECT TO DENOMINATIONAL, SEPARATE OR DISSENTIENT SCHOOLS GRANTED OR SECURED UNDER SECTION 93 OF THE CONSTITUTION ACT, 1867 (FORMERLY NAMED THE BRITISH NORTH AMERICA ACT, 1867), AS AMENDED, OR UNDER ANY PROVISION OF THE CONSTITUTION OF CANADA IN SUBSTITUTION THEREOF.

3. Part V of The Constitution Act, 1980:

Procedure for Amending Constitution of Canada

A further serious concern to the Denominational Education Committees of Newfoundland is the proposed procedure for future amendments to the Constitution of Canada. The proposed Constitution Act 1980 makes no specific change to the educational status quo of Newfoundland (but see the section of this Brief on the proposed Charter of Rights and Freedoms for our concerns about the effect of the Charter in its proposed form); however, the amending formulae proposed could well be used in future years to make actual changes to, impair, derogate from or even totally abrogate, Term 17.

It is the strong view of the Joint D.E.Cs. that any future amendments to the Constitution of Canada intended, directly or indirectly, to change, impair or abrogate Term 17 should be made only with the express consent of

1. The Senate and House of Commons;
2. The Legislature of Newfoundland; and
3. The denominations in Newfoundland which would be affected by the amendment.

As to the third consent referred to above, the Joint D.E.Cs. expresses its concern that an amendment to Term 17 not be used to affect the rights in denominational education of any one or more denomination out of the totality of the denominations now enjoying such rights without the consent of those denominations. By way of example, we hypothecate a situation where the legislature of



Newfoundland, acting on the request of, let us say, some but not all of the denominations in Newfoundland now recognized for educational purposes, passed a resolution to amend Term 17 and requested the Parliament of Canada to effect such change. In such circumstances, we urge that provision be made in the Constitution to the effect that such changes would affect only those denominations which agreed to such changes, leaving intact the rights of any denominations which did not wish such changes to be made.

If the amendments to Part I: Canadian Charter of Rights and Freedoms proposed by Joint D.E.Cs. in an earlier section of this Brief, whereby Section 93 or substitute denominational rights in education (Terms 17 for Newfoundland) would be stated to be rights or freedoms guaranteed by the Charter, are accepted, we suggest for the consideration of the Special Joint Committee on the Constitution of Canada a new sub-section (h) to the proposed Section 50 which would bring Section 93 and its substitutes (Term 17 for Newfoundland) under the strictest provisions for amendment in the Constitution Act 1980, namely:

50. AN AMENDMENT TO THE CONSTITUTION OF CANADA IN RELATION TO THE FOLLOWING MATTERS MAY BE MADE ONLY IN ACCORDANCE WITH A PROCEDURE PRESCRIBED BY SECTION 41 OR 42:

- - - - -

(h) SECTION 93 OF THE CONSTITUTION ACT, 1867, (FORMERLY NAMED THE BRITISH NORTH AMERICA ACT, 1867), AS AMENDED, AND ANY PROVISION OF THE CONSTITUTION OF CANADA IN



SUBSTITUTION THEREOF, PROVIDED ALWAYS THAT NO AMENDMENT IN RELATION TO THIS MATTER SHALL APPLY TO ANY PROVINCE UNLESS IT IS AUTHORIZED BY RESOLUTION OF THE LEGISLATIVE ASSEMBLY OF THAT PROVINCE, AND PROVIDED FURTHER THAT NO AMENDMENT IN RELATION TO THIS MATTER SHALL APPLY TO ANY CLASS OF PERSONS HAVING RIGHTS AND PRIVILEGES IN RELATION THERETO IN THAT PROVINCE WITHOUT THE CONSENT OF ANY SUCH CLASS OF PERSONS.

If the amendment to the Charter, proposed earlier in this Brief, is not made, the Joint D.E.Cs. suggest for consideration the addition of a new part to Section 50 of the Constitution Act 1980 to provide that:

AN AMENDMENT TO SECTION 93 OF THE CONSTITUTION ACT, 1867, (FORMERLY NAMED THE BRITISH NORTH AMERICA ACT, 1867), AS AMENDED, OR TO ANY PROVISION OF THE CONSTITUTION OF CANADA IN SUBSTITUTION THEREOF, MAY BE MADE ONLY BY PROCLAMATION ISSUED BY THE GOVERNOR GENERAL UNDER THE GREAT SEAL OF CANADA WHERE SO AUTHORIZED BY RESOLUTIONS OF THE SENATE AND HOUSE OF COMMONS AND BY RESOLUTIONS OF THE LEGISLATIVE ASSEMBLY OF EACH PROVINCE, PROVIDED THAT NO AMENDMENT IN RELATION TO THIS MATTER SHALL APPLY TO ANY CLASS OF PERSONS HAVING RIGHTS AND PRIVILEGES IN RELATION THERETO IN A PROVINCE WITHOUT THE CONSENT OF ANY SUCH CLASS OF PERSONS.

If neither of the foregoing amendments to Section 50 of the Constitution Act 1980 is accepted (either because the Charter is not amended as proposed by the Joint D.E.Cs. or for other reasons), we propose, as a further alternative, that Section 43 only of the Constitution Act 1980 be used to amend Section 93 of the Constitution Act 1867 and substitute provisions (Term 17 for Newfoundland), i.e. that neither Sections 41 and 42 be used for that purpose.

It can be argued that the intention is that Section 43, and that Section only, would be used where the amendment proposed would be "in relation to any provision that applies to one or more, but not all, provinces" and that an amendment to the said Section 93 and its substitutes would be such a provision. With respect, it is the opinion of the Joint D.E.Cs. that such an intention is unclear and ambiguous on the present wording of Section 43. To make it clear and put it beyond doubt that neither Section 41 or Section 42 could be used, for example, to amend or repeal Term 17 of the Terms of Union of Newfoundland with Canada (i.e. might be amended or repealed without the specific authority of the Newfoundland Legislature), we would propose that Section 43 be amended to read:

43. NOTWITHSTANDING SECTION 41 AND 42, an amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made ONLY by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House

of Commons and of the legislative assembly of each province to which the amendment applies.

The Joint D.E.Cs. are also somewhat concerned with the proposed wording of Section 47, and, while realizing that the intent of the section is to make it clear that the Constitution of Canada is not "writ in stone" and that the amending formulae now proposed may themselves in future be changed, ask that consideration be given to adding wording to make it clear that any future changes to Section 43 (which deals with amendments "in relation to any provision that applies to one or more, but not all, provinces") would only apply to such of the provinces whose Legislatures authorized such change by resolution.

Finally, the Joint D.E.Cs. of Newfoundland are concerned with Section 49 of the Constitution Act, 1980:

49. Subject to section 50, the legislature of each province may exclusively make laws amending the constitution of the province.

A possible interpretation of Section 49 might be that it empowers a Provincial Legislature to amend, impair or repeal Section 93 of the Constitution Act, 1867 (formerly named the British North America Act, 1867) or the relevant substitute in a particular Province (Term 17 in Newfoundland). To preclude such an interpretation, we recommend that the proposed Section 49 by re-numbered Section 49(1) and that the following be added:

49(2) THIS SECTION SHALL NOT BE DEEMED TO AUTHORIZE  
AN AMENDMENT TO SECTION 93 OF THE CONSTITUTION  
ACT, 1867 (FORMERLY NAMED THE BRITISH NORTH  
AMERICA ACT, 1867), AS AMENDED, OR ANY OTHER  
PROVISION IN SUBSTITUTION THEREOF.

4. Pentecostal Education System in Newfoundland:

Request for Amendment to Term 17 of the Terms of Union of Newfoundland with Canada.

POTENTIAL IMPACT OF CURRENT CANADIAN CONSTITUTIONAL PROPOSALS OF FEDERAL GOVERNMENT AS IT APPLIES TO PENTECOSTAL EDUCATIONAL SYSTEM IN NEWFOUNDLAND

The Pentecostal Education Committee recognizes that the denominational rights of the Pentecostal Assemblies of Newfoundland are not part of the Original Terms of Union but rather were recognized by provincial statute in 1954. However, in our view, the thrust of the Constitutional proposals as a whole directly affect the rights of all denominations in the Province of Newfoundland.

Newfoundland's Terms of Union provide expressly for protection of the denominational education system in Newfoundland.

The Newfoundland Human Rights Code contain a general prohibition against discrimination on the basis of religion but expressly exempts the educational system from the application of the code.

However, there are certain aspects of the Constitutional proposals and in particular, the charter of Human Rights that casts great doubt on the protection available to the denominational education system and even with respect to the protection given under the "Terms of Union."

Section 15(1) of the "Proposed Constitutional Act 1980" clearly provides that there shall be non-discrimination based on religion. There is no exception as in the Newfoundland Human Rights Code with respect to the educational system.

In addition to that, Section 25 provides that "any law that is inconsistent with the provisions of this Charter, is, to the extent of such inconsistency, inoperative and of no force or effect,"

Section 29(1)(b) indicates that the Charter of Human Rights applies to all matters within the legislature of each Province.

The Pentecostal Education Committee is of the opinion that the current proposed constitutional legislation could provide the practical opportunity to a citizen to ask a Newfoundland Court of competent jurisdiction to declare that the absence of non-denominational schools is discriminatory based on religion and even more specific, it is possible for a teacher to challenge the teacher certification process and hiring preference of school board with respect to denominational philosophy, as being discriminatory based on religion. Should such an appeal be upheld the denominational system with its long history would have a very insecure future.

The Pentecostal Education Committee recommends that we request the Federal Government to include such wordings in the Constitution particularly in Article, 1, 15, 25 and 43 so as to clearly ensure that our right under Term 17 of the British North America Act is not prejudicially affected.

With respect to the amending of Term 17 to include the Pentecostal Assemblies of Newfoundland thus entrenching their rights, we urge upon the Federal Government to now respond to the request of the Newfoundland Legislature of 1968.

In 1968, the Newfoundland House of Assembly unanimously endorsed a Government resolution to amend Term 17 to include the Pentecostal Assemblies of Newfoundland and thus grant our people the same constitutional rights as other classes (Religious denomination) operating schools in the Province.

On October 25, 1971, in the House of Commons, Ottawa, the following Notice of Motion having been called was transferred to Government Orders for consideration at the next sitting of the House pursuant to Standing Order 21(2).

That a humble Address be presented to Her Majesty the Queen in the following words:

To the Queen's most Excellent Majesty:

Most Gracious Sovereign:

We your Majesty's most dutiful and loyal subjects, the Commons of Canada in Parliament assembled, humbly approach Your



Majesty praying that You may graciously be pleased to cause a measure to be laid before the Parliament of the United Kingdom to be expressed as follows:

An Act to amend the British North  
America Act, 1949

Whereas Canada has requested, and consented to, the enactment of the following provisions, and the Senate and House of Commons of Canada in Parliament assembled have submitted an Address to Her Majesty praying that Her Majesty may graciously be pleased to cause a measure to be laid before the Parliament of the United Kingdom for that purpose:

Be it therefore enacted by the Queen's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

- (1) Term 17 of the Terms of Union of Newfoundland with Canada set out in the Schedule to the British North America Act, 1949 is repealed and the following substituted therefor:

"17. (1) 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 had by law in Newfoundland at the date of Union, or any like right or privilege with respect to such schools or colleges that any other class or classes of persons have had by law in Newfoundland after the date of Union as members of a religious denomination or one of a group of religious denominations that, by or under the Schools Act of Newfoundland, is or at any time has been recognized as being organized for educational purposes 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.

(2) In this term, "Schools Act of Newfoundland" means the Schools Act, 1969, being the Act No. 68 of 1969 (Statutes of Newfoundland), as amended from time to time, or any Act substituted therefor as amended from time to time."

2. For greater certainty, the provisions of Term 50 of the Terms of Union of Newfoundland with Canada set out in the Schedule to the British North America Act, 1949, in so far as those provisions relate to the approval and coming into force of the said Terms, do not apply to or in respect of the amendment set out in section 1 of this Act.

3. This Act may be cited as the British North America Act, 1972; and the British North America Acts, 1867 to 1965, and this Act may be cited together as the British North America Acts, 1867 to 1972.

We wish to impress upon the Federal Government that for 10 years the request of the Government of Newfoundland respecting the rights of the Pentecostal people of Newfoundland has not been honored. We therefore now request that this matter be addressed to the satisfaction of the Pentecostal people of Newfoundland -- that is, that the proposed amendment be effected before the Constitution is patriated to Canada.

Respectfully submitted,

Alphonsus L. Penney, D.D., Ll.D., Archbishop of St. John's;  
Chairman, Denominational Education Committees Joint Executive

A.E. Batstone, B. Ed., Pastor; Executive Secretary, Pentecostal  
Education Committee

Max Riggs, B. Ed.; Executive Secretary, Integrated Education  
Committee

J. Kevin Tracey, Ph.D.; Executive Secretary, Roman Catholic  
Education Committee

James J. Greene, Q.C.; Counsel