

1-1-2005

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**NEWFOUND RELIGION: TERM 17(3) OF THE
NEWFOUNDLAND ACT AND ITS CHALLENGE TO
THE CURRENT DISCOURSE ON FREEDOM OF
RELIGION IN THE PUBLIC SPHERE**

MARK HEEREMA[†]

ABSTRACT

Underlying the dominant legal and theoretical approaches to the freedom of religion in the public sphere is a discourse which assumes that religion is a contestable or mutable aspect of public life. As a result of this assumption, our current approach holds that the role of religion may be altered according to the perceived benefits and burdens of its presence. The resulting consensus predominately prefers the absence of religion in the public space where government regulation exists. By amending its constitutional terms of union with Canada to permit religious observances in their public school system, Newfoundland and Labrador has protected activities which, short of their constitutional protections, would certainly be condemned by our current approach. However, denouncing this provision fails to account for the current and historical relationship which religion has had in the education of the citizens of Newfoundland and Labrador. The following discussion examines this discord, a discord which profoundly challenges whether our current approach is based on a faulty premise. It will be submitted that in appropriate circumstance the existence of religion in the public sphere should not be challenged, but rather acknowledged and accepted. In such cases this acknowledgment of religion may need to form the foundation or starting point for our approach to religion.

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I. APPROACHING RELIGION IN SOCIETY

Religion has a dual nature in our society. While able to satisfy questions of meaning and purpose, religion can also create divisions and conflicts which may seem irreconcilable. From families to communities to nations, religious doctrines have the potential to be a significant factor in many disparate types of conflicts. This aspect of religion becomes especially challenging when one considers how religion should be regulated in those currently regulated public spheres of society, a question which the government and the courts must concern themselves with.

In answering this question, courts and theorists have sought to evaluate and determine the desired role of religion. What emerges from our current approach is the task of ascribing a place for religion based on its perceived benefits and burdens to society as a whole. This approach has predominately concluded that the exercise of religious beliefs in the governmentally-regulated public sphere (“public sphere”) of society is more harmful than beneficial. Resulting from our current approach is a consensus that advocates for the absence of religious doctrines in public settings. Notably, the current approach operates despite the varying degrees to which religion may already exist in the public sphere of a particular society.

A fundamental assumption of our current approach is that the existence of religion in the public sphere is properly considered a contestable, or mutable aspect of society. The question arises: When religion appears to be entrenched in the public sphere is it appropriate to consider assigning or re-assigning its place?

Recent constitutional amendments in Newfoundland bring this challenge to bear. Through the current and historical ties between religion and the education system in Newfoundland, the fundamental assumption underlying our current approach to religion in the public sphere is confronted and challenged.

II. NEWFOUNDLAND’S CHALLENGE TO THE CURRENT APPROACH

Term 17(3) of Newfoundland’s Terms of Union with Canada was amended in 1998 to constitutionally protect the role of religious observances in the Newfoundland school system.¹ Newfoundland’s unabashed

allowance of religion in a public aspect of society seems contrary to our current approach to religion in public life; Term 17(3) recognizes religion in the public school system when our current approach would hold that this is inappropriate and unjustifiable. The discord between Newfoundland's experience with religion in education, and the conclusions drawn by the current approach regarding this issue, mandates re-examination of our current approach.

This paper is divided into four parts. Part I will examine the contextual significance of Term 17(3). Viewed in light of the history of the province of Newfoundland, the rationales supporting its enactment become apparent. Allowing for religious observances in a school setting appears to be consonant with Newfoundland history and the collective experience of Newfoundlanders.

Part II examines our current approach to freedom of religion by examining its legal and theoretical underpinnings. Testing Term 17(3) against the prevailing jurisprudence and leading theories demonstrates not only how this provision would be received, but also exposes assumptions and motivations underpinning the current approach to the freedom of religion in Canada. Term 17(3) will be examined against Canadian and American jurisprudence. Generally, the American jurisprudence appears unsympathetic to the nature of Term 17(3) and would condemn it as a violation of the *First Amendment* to their Constitution. In Canadian law the existence of Term 17(3) is more ambiguous. Specifically, the validity of Term 17(3) appears to be fully protected by the jurisprudence arising from s.93 of the *Constitution Act, 1867*. Nevertheless, as the *Canadian Charter of Rights and Freedoms* increasingly follows the American jurisprudence with respect to the freedom of religion, the spirit of Term 17(3) appears problematic.

In Part III, my theoretical analysis will discuss the dominant theories respecting religion in society. In particular, liberalism, deliberative democracy and non-neutrality will be examined as theoretical paradigms addressing the role of religion. A brief review of these paradigms demonstrates how liberal theory is dominating the position of courts on this issue. In line with liberalism, courts tend to hold that religion should be limited to the private sphere.

¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11, Schedule 21 as am. by SI/98-25. Term 17(3) reads as follows: Religious observances shall be permitted in a school where requested by parents.

Finally, Part IV attempts to reconcile the apparent conflict between our current approach to religion and the significance of religion in Newfoundland society. To accede to the spirit of our current approach would suggest a necessary reassignment of the role of religion in the Newfoundland public school system. Yet this conclusion seems unsatisfactory considering Newfoundland's experience with respect to religion and education.

Accordingly, an alternative is presented. It will be suggested that in appropriate circumstances the issue of religion should not be approached with a view to determine what role religion *should* play, but rather, with a view to recognize that the degree to which religion exists in the public sphere may not properly be contested. Where religion appears to be entrenched in public life (as it does in Newfoundland with respect to education) its acknowledgment should form the foundation, or starting point, for any analysis.

III. TERM 17(3) AND NEWFOUNDLAND

A full appreciation of the context surrounding Term 17(3) is crucial to understanding how this constitutional amendment challenges the current approach.

1. Newfoundland's Entrance into Confederation

In 1949, the province of Newfoundland joined Canada, with Terms of Union constitutionally reflecting the confederation compromise between the Federal Government and the Government of Newfoundland.² Specifically, Term 17 preserved the existing denominational school system in Newfoundland.³ This reflected the status quo for Newfoundland; it

² P.W. Hogg, *Constitutional Law of Canada*, 2003 student ed. (Scarborough: Thomson-Carswell, 2003)

at 43; See also, the *Newfoundland Act*, R.S.C. 1985 App. II, No. 32.

³ At the time of admittance into confederation the following denominations benefited from this constitutional protection: The Roman Catholic, Anglican, United Church, Congregational, Presbyterian, Seventh Day Adventists and the Salvation Army denominations. The Pentecostal Assembly was added by *Constitution Act, 1982*, being Schedule B to the *Canada Act (U.K.)*, 1982, c. 11, Schedule 21 as am. by SI/88-11.

was the Church which founded the education system in Newfoundland, and which still governed them at the time of Confederation.⁴ Preserving the role of the Church in education was a significant issue for Newfoundland and was regarded as a crucial aspect of joining Confederation. The first Premier of Newfoundland described the importance of this issue as follows:

I was terribly conscious of these fears of the Roman Catholic Church in Newfoundland, and I was implacably determined to see that the terms and conditions of Newfoundland's union with Canada would contain absolute protection of the existing rights of the churches to public funds for the operation of their schools. In short, I vowed that the status quo should be maintained in the most unalterable way that could be found and that this should be covered within the actual terms of union.⁵

By enacting Term 17 specifically in lieu of s.93 of the *Constitution Act, 1867*, it was intended that this constitutional provision would protect and insulate the existence of the pre-existing denominational schools.⁶

⁴ See for e.g., John P. McEvoy, "Denominational Schools and Minority Rights: *Hogan v. Newfoundland (Attorney General)* Case Comment on *Hogan v. Newfoundland (Attorney General)* (2001), N.J.C.L. 449. See also R. I. McAllister ed., *Newfoundland and Labrador: The First Fifteen Years of Confederation* (St John's: Dicks & Co. Ltd., 1964).

⁵ Joseph Roberts Smallwood, *I Chose Canada: the memoirs of the Honorable Joseph R "Joey" Smallwood* (Toronto: MacMillan of Canada, 1973) at 306.

⁶ Section 93 of the *Constitution Act, 1867* constitutionally preserved the existing denominational school system at the time of Confederation. By standing in lieu of s.93, Term 17's relies on s.93's constitutional ability to protect its provisions. Part II of this paper will consider this issue in greater detail. Section 93 of the *Constitution Act, 1867* reads as follows:

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

2. The Evolution of Term 17

The constitutional protection of the denominational school system in Newfoundland ended in the late 1990's after a series of amendments. Following a Royal Commission and a provincial referendum, *Constitutional Amendment, 1997 (Newfoundland Act)* effectively reduced the role of churches in the governance of the school system by increasing government representation on the school boards.⁷ The 1997 amendment did not remain in force for long and, following an unsuccessful attempt by the Government of Newfoundland to use this new provision to create inter-denominational school boards, another referendum was conducted.⁸ Following this referendum, the existing Term 17 was repealed and replaced in 1998 by the current Term 17.⁹

On January 8, 1998, the current Term 17 came into force. It now reads as follows:

17. (1) In lieu of section ninety-three of the *Constitution Act, 1867*, this Term 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.¹⁰

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

⁷ *Constitution Act, 1982*, being Schedule B to the *Canada Act (U.K.)*, 1982, c. 11, Schedule 21 as am. by SI/97-55.

⁸ The referendum asked whether the electorate would support a single school system with opportunities for religious education and observances. 72.7% of the votes supported this, see *supra* note 4.

⁹ For a more detailed review of the history of Term 17 see McEvoy, *supra* note 4.

¹⁰ *Supra* note 1.

The constitutionality of the current Term 17 was affirmed by the Newfoundland Court of Appeal in *Hogan v. Newfoundland (Attorney General)*.¹¹ The litigants in this case were adherents to the Roman Catholic Church, who advanced several grounds in an attempt to render the amendments unconstitutional. Of principle concern for the litigants was the collapse of the denominational school system. Cameron J.A., who delivered a unanimous judgment for the court, affirmed that the amendments were validly enacted pursuant to the amending formula. In addition, the court declared that the *existence* of the new Term 17 was immune from *Charter* review by virtue of standing in lieu of s.93.¹²

3. The Legal Effect of Term 17

Effectively, Term 17 now achieves three things. First, Term 17(1) affirms that Term 17 stands in lieu of s.93. Secondly, Term 17(2) creates a non-denominational school system while ensuring the existence of non-denominational courses in religion. Lastly, Term 17(3) permits religious observances in a school where requested by parents.

Considerable controversy was generated by the creation of a “public school” system in a province which historically had only contained denominational schools.¹³ By protecting the right to have religious observances, Term 17(3) is fairly seen as an attempt to mitigate this dramatic change:

The proposed amendment will enable government to create a school system where all are treated equally, where each and every person in the Province will be able to participate equally in the governance of education, *and where all parents will be able to exercise the right to access religious education and religious observances for their children.*¹⁴

¹¹ [2000] N.J. No. 54 (C.A.) [*Hogan*] leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 191. See also a case comment on this decision, McEvoy *supra* note 4.

¹² *Hogan*, *ibid.* at para 92.

¹³ For many such an amendment was seen as a setback for these constitutionally protected religious minority groups, for e.g., see “Submissions to the Special Joint Committee on the Amendment to Term 17 of the Terms of Union of Newfoundland” online: The Evangelical Fellowship of Canada <<http://www.evangelicalfellowship.ca/pdf/Education - Nfld Brief 97.pdf>>.

¹⁴ Newfoundland and Labrador, Legislative Assembly, “Education Reform in Newfoundland and Labrador” by Roger Grimes available online: Government of Newfoundland and Labrador <<http://www.gov.nf.ca/releases/1997/edu/Term17.htm>> [emphasis added].

Religion continues to play a central and vital role in Newfoundland life; in a 2001 census, only a mere 2.5% of their population declared that they had no religious affiliation.¹⁵ Considering this contextual background, the right to religious observances contained in 17(3) appears quite unremarkable and perhaps a natural corollary to a shift from a denominational school system to a public school system. This may demonstrate why the right to religious observances has garnered little attention. While Term 17(3) may seem unremarkable, its conflict with the current legal and theoretical approaches to religion warrants attention.

Before examining how Term 17(3) would be interpreted by our current approach, it is important to highlight some of its salient features. Again, it reads as follows:

(3) Religious observances shall be permitted in a school where requested by parents.¹⁶

The wording of this provision is extremely inclusive.¹⁷ First, “religious observances” as a descriptor is exceptionally broad. No qualifying language precedes or follows it; it is not, for example, restricted to *reasonable* or *generally accepted* religious observances, but simply “religious observances.” Secondly, it is important to note the use of the mandatory “shall”. The absence of more contingent language, such as “may”, necessarily implies that religious observances must be permitted if requested by parents. Third, “requested by parents” is also unqualified, and beyond having two or more parents in agreement, no limiting standard is imposed. Lastly, and of critical significance, is the constitutional status of Term 17. Being part of Newfoundland’s Terms of Union, the right to religious observances arises under the Constitution of Canada, a crucial factor in its legal interpretation.

¹⁵ See Michael Valpy, “Old-time religion gives way to diversity” *The Globe and Mail* (29 November 2004) at A6.

¹⁶ *Supra* note 1.

¹⁷ For additional commentary, see Bernie Bennett “‘No’ lawyer cites flaw in new Term 17” *Telegram* (29 August 1997) at 2.

IV. LEGAL AND THEORETICAL ANALYSIS OF TERM 17(3)

At present, courts in Canada have not opined to any great extent on the existence of Term 17(3).¹⁸ Further, there is little by way of academic commentary on its existence. Accordingly, this part of the paper aims to provide a thorough analysis of the current discourse underlying our approach to religion and discuss how it applies to Term 17(3).

The following analysis will be three-pronged. First, a review of the relevant Canadian jurisprudence will be undertaken. Secondly, a consideration of relevant American jurisprudence will be provided to investigate how a similar provision would be received in the United States. Lastly, the current theoretical perspectives on freedom of religion will be examined.

1. Applicable Canadian Jurisprudence

i) Introduction

A full understanding of the significance of Term 17(3) in Canadian law mandates drawing attention to two distinct structures in the Canadian Constitution: the *Canadian Charter of Rights and Freedoms* and s.93 of the *Constitution Act, 1867*. At a basic level, the *Charter* protects the fundamental rights and freedoms of people in Canada, including the freedom of religion. Section 93, on the other hand, protects the role of existing denominational schools at the time of Confederation. While these elements of the Constitution are quite distinct, both are relevant to Term 17(3).

ii) Section 93

By protecting the existing denominational school systems in the new Canadian provinces, s.93 was one of the primary sites for recognizing

¹⁸ At present Term 17(3) specifically has not been subject to challenge. The only judicial comment to date has been the challenge to Term 17's general inception into the Constitution in the *Hogan* decision.

the role of religion in Canadian society at the time of Confederation.¹⁹ As Term 17 stands in lieu of s.93, s.93 jurisprudence has a direct application to Term 17(3).²⁰

With the adoption of the *Charter* (and its protection of the freedom of religion and the right of equality), it was unclear how the guarantees in s.93 would subsist. These speculations were largely answered by the Supreme Court of Canada in *Reference Re Bill 30*.²¹ At issue in this decision was the constitutionality of a bill of the Ontario legislature, which proposed to increase funding for Roman Catholic secondary schools. It was alleged that this bill supported one religious group to the exclusion of others. In upholding the bill the majority of the Court focused on the inviolable nature of the historic compromise that s.93 represented. Section 93 was enacted to protect existing denominational schools at the time of confederation, which included the protection of the Roman Catholic education system in Ontario. Wilson J., writing for the majority, stressed how Canadian courts should strive to give meaning to s.93:

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.²²

Of more significance is the holding that the *Charter* is impotent to impinge on the guarantees established by s.93:

It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution, particularly a

¹⁹ See Elizabeth Shilton, “Religion and Public Education in Canada after the Charter” in John McLaren & Harold Coward eds., *Religious Conscience, the State, and, the Law* (Albany: State University of New York Press, 1999) 206 at 206 where the author describes s.93 as being the most important “span” of the bridge that joins religion and education. Due to subsequent amendments and differences in the educational systems pre-Confederation, there is a patch work of s.93 applicability across Canada. For a review of the differing applications of s.93 across Canada see M.H. Ogilvie, *Religious Institutions and the Law in Canada* 2nd ed. (Toronto: Irwin Law Inc., 2003) at 127-128.

²⁰ *Supra* note 1, where Term17(1) states, “In lieu of section ninety-three of the *Constitution Act, 1867*, this Term shall apply in respect of the Province of Newfoundland”.

²¹ *Reference Re Bill 30, an Act to amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148 [Bill 30].

²² *Ibid.* at para 29.

provision such as s.93 which represented a fundamental part of the Confederation compromise.²³

After the decision in *Bill 30*, the Supreme Court faced the subsequent issue in *Adler v. Ontario* of whether the *Charter* requires equal funding for separate schools in Ontario.²⁴ Iacobucci J., writing for a majority of the Court, again affirmed the immunity of s.93 with respect to *Charter* claims:

s.93 is a comprehensive code with respect to denominational school rights. As a result, s. 2(a) of the *Charter* cannot be used to enlarge this comprehensive code. Given that the appellants cannot bring themselves within the terms of s.93's guarantees, they have no claim to public funding for their schools.²⁵

The majority judgment clearly acknowledges and accepts that the s.93 guarantees may not accord with the spirit of the guarantees enumerated in the *Charter*. Despite this concession, it was again affirmed that the *Charter* remains incapable of invalidating another part of the Constitution, a holding carried forward from *Bill 30*. This case acknowledges that these two components of the Canadian Constitutional structure may stand separately despite the tension which apparently exists between them.

It appears well settled that s.93, the “historic compromise,” is impermeable with respect to the *Charter*.²⁶ Borrowing an American term, academics have suggested that the rights and guarantees protected by s.93 may amount to being “established” and immune to challenge outside the context of a constitutional amendment.²⁷

²³ *Ibid.* at para 63.

²⁴ *Adler v. Ontario*, [1996] 3 S.C.R. 609 [*Adler*].

²⁵ *Ibid.* at para 35. Also see, Gonthier J. speaking for a unanimous court in *Reference re Education Act (Que.)*, [1993] 2 S.C.R. 511 where he describes s.93 as follows:

Section 93 is unanimously recognized as the expression of a desire for political compromise. It served to moderate religious conflicts which threatened the birth of the Union.

²⁶ See Iacobucci and Bastarache JJ.'s majority judgment in *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para 34.

²⁷ M.H. Ogilvie, “What is a Church by Law Established” (1990) 28 Osgoode Hall L.J. 179 at 188-189.

iii) *The Impact of S.93 on Term 17(3)*

Term 17 stands in lieu of s.93. By direct implication it would appear that religious observances pursuant to Term 17(3) may not be subject to the *Charter*. It is this component of the Canadian structure (and its judicial interpretation) that the Government of Newfoundland relied on when drafting Term 17(3).²⁸

By virtue of the s.93 jurisprudence alone, Term 17(3) may constitutionally allow for any conceivable religious observance. Indeed, the breadth of Term 17(3) is seemingly without limits.²⁹ However, this begs the question of whether or not this means that *any* religious observances would be allowed. While Christmas pageants and school plays generally stir little controversy, what about less benign examples? For example: What about religious observances portraying subservient roles for females; what about ceremonial daggers; what about animal sacrifices,³⁰ or perhaps observances condemning homosexuality?

Quite simply, it is unlikely that courts will not impose some degree of limitation on the range of religious observances allowed. Directly or indirectly, the most likely source of these limitations will be the freedom of religion guarantee included in the *Charter*.

iv) *The Charter*

The *Canadian Charter of Rights and Freedoms* protects the freedom of religion in s. 2(a) as it states:

²⁸ The Government of Newfoundland and Labrador have posted on their website opinions of leading Constitutional scholars, John Crosbie and Ian Binnie, declaring that the Constitutional status of 17(3) would render it immune from *Charter* purview online: Government of Newfoundland and Labrador <<http://www.gov.nf.ca/currentevents/referend/excerpt.html>>.

See also, Deanna Stoke Sullivan, "Tobin comes to terms with wording" *Telegram* (26 August 1997) at 1 where the author states,

Both Binnie and Crosbie have said the Term would provide Constitutional protection for religious observances and nothing in the Charter of Rights and Freedoms or Constitution could invalidate the rights set out in the Term.

²⁹ See Campbell Morrison, "Federal Conservatives shift Term 17 strategy" *Telegram* (24 November 1997) at 1 where the author cited the Tory whip, Noel Kinsella who after commenting on term 17(3)'s breadth stated, "Newfoundland and Labrador is opening up a Pandora's box of legal challenges".

³⁰ While animal sacrifices may seem over-the-top see *Church of the Lukumi Babalu Aye v. Hialeah*, 113 U.S. 2217 (1993) a decision of the United States Supreme Court which discusses the traditions of animal sacrifices in numerous religious traditions.

2. Everyone has the following fundamental freedoms
 - (a) freedom of conscience and religion³¹

The leading case on this provision is *R. v. Big M Drug Mart*,³² a 1985 decision of the Supreme Court of Canada.³³ In this case, which challenged the constitutionality of Sunday-observance legislation, the Court expounded the meaning of freedom of religion. Dickson C.J., writing for the majority stated as follows:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.³⁴

This oft-cited quote demonstrates that the concept of freedom of religion has been given an expansive interpretation in Canada.³⁵ A similarly wide interpretation can be found for religion. In its latest decision on religion, the majority of the Supreme Court described “religion” as follows:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.³⁶

The Supreme Court has actively embraced the ability of an individual to espouse the religious convictions of their choice. Yet correlatively, the

³¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11, s. 2(a) [*Charter*].

³² [1985] 1 S.C.R. 295 [*Big M*].

³³ See Hogg, *supra* note 3 at 902, where Professor Hogg calls it the “leading case on freedom of religion”.

³⁴ *Big M*, *supra* note 32 at para 94.

³⁵ See e.g., *Syddicat Northwest v. Amselem*, [2004] S.C.J. No. 46 [*Syndicat*] at para 40 where Iacobucci J. for the majority affirms, “This court has long articulated an expansive definition of freedom of religion”

³⁶ *Ibid.* at para 39.

Supreme Court has paired this *ability* with an *inability*. Religious freedom equally protects individuals from coercion into specific religious observances:

Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice.³⁷

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of “the tyranny of the majority.”³⁸

The court thus emphasizes the correlative right to be free from religious indoctrination or compulsion.

To restate, the court essentially states: *Be what you believe you should be, but not in a manner which prevents another from freely determining what they believe.*³⁹ This tight-rope walk is difficult, as the court’s enthusiasm appears axiomatically strong for both aspects of the right – as we continue to recognize the value of your beliefs, we increasingly see the need to protect your ability to reach your beliefs in a manner that is uninfluenced or un-coerced: freedom *for* and freedom *from* religion.⁴⁰

v) *The Impact of the Charter on Term 17(3)*

The difficulties of this balancing act become evident in addressing the role of religion in public education. Considering the dual nature of the right, the real issue becomes: Does “freedom of religion” act to protect religious exercises in education, or does it operate to protect people from exposure to religious observances and practices in the classroom?

³⁷ *Big M*, *supra* note 32 at para 122.

³⁸ *Big M*, *supra* note 32 at para 96.

³⁹ See *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at para 99 where the paradox is described as “freedom to manifest one’s own religious beliefs” and “freedom from conformity to religious dogma”.

⁴⁰ See M.H. Ogilvie, “The Unbearable Lightness of *Charter* Canada” (2002) 3(2) *Journal of the Church Law Association of Canada* 201.

The leading decisions on this issue come from the Ontario Court of Appeal.⁴¹ In separate decisions, the court struck down regulations mandating that public schools open or close with some form of religious exercise.⁴² In both decisions the court found the legislation to unconstitutionally impose a pressure to conform on religious minorities. It was held that provisions allowing students to be excused from these exercises were not sufficient to protect against the potential for religious compulsion and coercion. Accordingly, religious exercises such as the recitation of the Lord's Prayer were considered unconstitutional. Quite clearly, these decisions have drawn a *Charter* line in the sand – beyond mere education about religion, religious exercises should not be permitted in a public school setting.

It appears well established that the *Charter* would invalidate any law protecting religious exercises in a public school. Any religious components which extend beyond education about religion has been judicially characterized as including the unconstitutional purpose of religious indoctrination or compulsion.⁴³ These findings have operated despite the presence of exemption clauses which have allowed students not to partake.

In the event Term 17(3) was subject to the *Charter*, it seems almost certain that it would be considered unconstitutional under s. 2(a) and s. 1. Term 17(3)'s acceptance of religious observances extends well outside the realm of religious education by allowing devotional activities, and despite the presence of statutory exemptions being in place, it seems likely that it would easily be ruled unconstitutional.⁴⁴

⁴¹ To date the Supreme Court had not directly addressed this issue.

⁴² *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 65 D.L.R. (4th) 1 (C.A.); *Zylberberg v. Sudbury Board of Education (Director)*, [1988] 65 O.R. (2d) 641 (C.A.) [*Zylberberg*].

⁴³ See Carol A. Stephenson, "Religious Exercises and Instruction in Ontario Public Schools" (1991) 49(1) U.T. Fac. L.R. 82; See also Banafsheh Sokhansanj, "Our Father Who Are in the Classroom: Exploring a *Charter* Challenge to Prayer in Public Schools" (1992) 56 Sask. L.R. 47 at 50 where the author states, "it becomes evident that the *Charter* can be a powerful tool for opponents of school prayer."

⁴⁴ See *Schools Act, 1997*, S.N.L. 1997 c. S-12.2 s. 10(1) which states:

Where a student's parent requests in writing, the principal of a school shall excuse that student from participation in a course in religion or a religious observance conducted in the school.

vi) *Term 17(3) - Section 93 and the Charter*

In Canadian law, Term 17(3) appears to be a quagmire. On the one side, *Charter* jurisprudence condemns it, while on the other side, s.93 jurisprudence defends its existence as the product of compromise.

Term 17(3) represents a point of uncertainty in Canadian law, and resolution will likely depend on the court's normative assessment for future direction. As the jurisprudence seems to intersect, the need to choose a direction emerges. In our global world, courts and scholars are increasingly turning their attention to foreign jurisdictions for guidance. Konrad Zweigert and Hein Kotz, leaders in comparative law studies, aptly describe the rationale and motivation as follows:

[I]t is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system.⁴⁵

With respect to freedom of religion, it is the American experience that informs and shapes Canadian law with the greatest strength.

2. Applicable American Jurisprudence

i) *Why the United States of America?*

In *Big M*, Dickson, C.J. seemingly declared that American jurisprudence on religion would be of limited relevance to Canadian law:

Recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion under the Charter.⁴⁶

Notably, there are significant differences with respect to the “freedom of religion” in Canada and the United States which would support Dick-

⁴⁵ Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law* 3rd ed. (Oxford: Clarendon Press, 1998) at 15.

⁴⁶ *Big M*, *supra* note 32 at para 105.

son C.J.'s statement.⁴⁷ Some of the central distinctions between our constitutional structures are as follows: the protection of "freedom of conscience;"⁴⁸ the protection of multiculturalism;⁴⁹ the existence of a saving provision;⁵⁰ the existence of the "notwithstanding" clause,⁵¹ and finally, the absence of an "anti-establishment" clause. However, despite these differences, and the assertion from Dickson, C.J., it is undeniable that American jurisprudence on freedom of religion has been extremely influential in Canada. In addition to scholars,⁵² a survey of the major freedom of religion cases in Canada clearly indicates a reliance on the American experience.⁵³

It is not surprising that Canada leans on the American experience. Despite the differences noted above which would make its blind reception unthinkable, the similarity of culture and an increasingly diverse religious population are common elements of the two societies which make American holdings on the subject relevant. In addition, in contrast to the *Charter's* relatively immature jurisprudence, the American jurisprudence on freedom of religion is well-established and carries with it a long history of development.

ii) U.S. Constitutional Fundamentals

In the United States of America, religion is protected by the First Amendment to the Constitution, which reads as follows:

Congress shall make no law respecting an establishment of religion,
or prohibiting the free exercise thereof...⁵⁴

⁴⁷ See Stephenson, *supra* note 43 at 88.

⁴⁸ *Charter*, *supra* note 31, s. 2(b).

⁴⁹ *Charter*, *supra* note 31, s. 27.

⁵⁰ *Charter*, *supra* note 31, s. 1.

⁵¹ *Charter*, *supra* note 31, s. 33.

⁵² For e.g. See Lorraine E. Weinrib, "The Religion Clauses: Reading the Lesson" (1986) 8 Sup. Ct. L.R. 507.

⁵³ For e.g., see *Syndicat*, *supra* note 35 where the majority Supreme Court borrowed extensively on the American jurisprudence for grappling with objective criterion for religious beliefs; See *Zylberberg*, *supra* note 42 where the majority and dissenting judgment of the Ontario Court of Appeal focused heavily on American jurisprudence; See also *R. v. Jones*, [1986] 2 S.C.R. 284 where Wilson J. (the majority on the religion issue), expressly adopts aspects of the "anti-establishment" jurisprudence.

⁵⁴ U.S. Const. amend. I. While the *First Amendment* only addresses "Congress", by 1947 by virtue of the due process clause of the *Fourteenth Amendment*, the *First Amendment's* religious clauses also bound the "States" as well.

Notably within this provision, there are two clauses pertaining to religion – the “anti-establishment” clause, and “the free exercise clause”. Reconciling two clauses that seemingly pull in different directions has been a major challenge for courts in the United States.⁵⁵ The United States Supreme Court defined the nature of the task as follows:

To find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.⁵⁶

Courts have mitigated this inherent tension in a few ways. In addition to developing common doctrines made applicable to both clauses,⁵⁷ courts have tended to invoke one clause over the other depending on the context. A survey of the major cases involving religion in public schools demonstrates that the anti-establishment clause is the clause which dominates the court’s attention in this context.

iii) Philosophical Underpinnings

Before examining American decisions relevant to Term 17(3), an appreciation must be gained of the philosophies underlying the “anti-establishment” clause.

First, the anti-establishment clause has been said to mandate a separation between Church and state. Relying on themes expounded by James Madison and Thomas Jefferson, the United States Supreme Court has deciphered the intention of this clause to require a “wall of separation.”⁵⁸ Functionally, this doctrine requires the state to avoid religious involvement and refrain from entering, or appearing to enter, the religious arena. Government is distinct from the Church. However, this judicial interpretation of history has been widely criticized. Some argue that the drafters never intended this result, but rather intended only

⁵⁵ See Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* 3rd ed. Vol 5 (St Paul: West Group, 1999) [Rotunda and Nowak] at 2 where the authors describe this pull-and-push relationship as follows, “There is a natural antagonism between a command not to establish religion and a command not to inhibit its practice.”

⁵⁶ *Walz v. Tax Commission*, 397 U.S. 664, at 668-669 (1970).

⁵⁷ See Laurence H. Tribe, *American Constitutional Law* 2nd ed. (New York: The Foundation Press, Inc., 1988) at 1157 [Tribe].

⁵⁸ See *Everson v. Board of Education*, 330 U.S. 1. (1947).

that the state should not reach in and regulate religions.⁵⁹ Despite the criticism, the doctrine of separation remains a powerful force in First Amendment jurisprudence.

Secondly, the anti-establishment clause has been held to require Government neutrality. This principle was clearly stated in *Abington*: “[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality.”⁶⁰ This principle manifests itself in different ways, creating a “coat of many colours.”⁶¹ For example, government should not favour non-religious organizations over religious organizations; government should not favour one denomination over another denomination; and finally, government should not favour holding or not-holding religious beliefs. This *religion-blind* approach remains an influential underpinning of American jurisprudence.

Lastly, the anti-establishment clause mandates a position of non-endorsement by government with respect to religion. If the government’s actions or purposes can be seen to “favour” or “promote” a particular religious belief they will fall afoul of the establishment clause, by unconstitutionally “endorsing” that religion.⁶² A secular purpose must underlie government actions and its absence will be sufficient to condemn it as an endorsement of religion.

Separation of church and state, neutrality and non-endorsement shape the approach to the anti-establishment clause. Collectively, American courts refer to this analysis as the “*Lemon Test*,” a test that incorporates these philosophies when considering whether a law will be found unconstitutional.⁶³

iv) American jurisprudence with respect to Religion in Public Schools

A full understanding of this issue first necessitates an appreciation of how the United States Supreme Court has guarded public schools from

⁵⁹ For e.g., see Stephen L. Carter “Reflections on the Separation of Church and State” (2002) 44 *Ariz. L. Rev.* 293.

⁶⁰ *School District of Abington Township v. Schempp*, 374 U.S. 203 at 226 (1963) [*Abington*].

⁶¹ Steven D. Smith, “Non establishment Under God? The Nonsectarian Principle” (Lecture for the Public Law and Legal Theory Research Paper Series, University of San Diego School of Law Spring 2004) online: Bepress Legal Repository <<http://law.bepress.com/sandiegolwps/plll/art8>>. See also Tribe, *supra* note 57 at 1188 who describes there being three main forms of neutrality, “strict neutrality”, “political neutrality” and “denominational neutrality”.

⁶² *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 at 764 (1995).

⁶³ *Lemon v. Kurtzman* 403 U.S. 602 (1971).

religious activities with an extra sense of diligence. As stated in *Lee v. Weisman*:

[Religious] exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, *but it is most pronounced there*.⁶⁴

The fear of increased coercion in the public school system has greatly influenced decisions of the Court. For example, as Derek H. Davis highlights, it appears quite anomalous that prayers are not allowed in school classrooms or at school sporting events, but are allowed in Congress, or that the Ten Commandments are not allowed to be posted in a public school, yet the Supreme Court Chambers has a portrait of Moses holding the Ten Commandments displayed on its walls.⁶⁵

The flagship decision of the Supreme Court of the United States in this area is *Wallace v. Jaffree*.⁶⁶ In this case, the Court struck down an Alabama statute authorizing a one-minute period of silence in their public school system “for meditation or voluntary prayer.” The Supreme Court determined there to be a lack of secular purpose to this statute, as highlighted by the legislative history and the inclusion of the word “prayer,” a word deemed to be an inherently religious term. For the court, the lack of a secular purpose to this statute axiomatically evidenced an attempt to endorse religion, and accordingly the statute was rendered unconstitutional.

The *Wallace* decision closely followed the holding of *Abington*, a 1963 decision of the Supreme Court.⁶⁷ In *Abington* the Court rendered unconstitutional the reading of biblical passages in public schools despite parents having the option to exempt their children. The Court stressed the lack of a secular purpose, and noted that while education about religion is permissible, religious devotion is not.⁶⁸

⁶⁴ *Lee v. Weisman*, 505 U.S. 577 (1992) at 593 [emphasis added].

⁶⁵ Derek H. Davis, “Separation Integration and Accommodation: Religion and State in America in a Nutshell” 43(1) *J. of Church and State* 5 at 5.

⁶⁶ 472 U.S. 38 (1985).

⁶⁷ *Abington*, *supra* note 60.

⁶⁸ Note that the Ontario Court of Appeal in *Zylberberg* relied on the holding on this case. In *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004) Rehnquist J. at 2319-2320 stresses that it is religious exercises which, due to their endorsing nature, cause them to run afoul of the *First Amendment*.

The impressionable nature of students, peer pressure and the appearance of state-endorsement have been compelling factors for the United States Supreme Court in addressing the role of religion in public schools. When children are in a public school setting, the Supreme Court has effectively shielded them from religious exercises, not chancing religious coercion despite the presence of exemption clauses. Nowak and Rotunda describe the current state of the law as follows:

Absent a significant change in the membership of the Court, the Justices will not accept the argument that government may authorize or endorse religious prayers, readings, or teachings in the public schools as a part of the official school day or school ceremonies.⁶⁹

By way of caveat, it should be noted that the Supreme Court has taken a different approach for the use of schools during *non-school* hours.⁷⁰ The use of school buildings during private hours does not, in the Court's perception, present the same dangers. As attendance for "after-school" programs requires parental consent, the same coercion concerns are not present. Further, as other non-religious organizations are allowed to use school grounds, neutrality is preserved, and endorsement avoided. For example, in *Good News Club* the Supreme Court held that allowing a religious club to meet after hours at a school did not violate the *First Amendment*:

[W]e have never extended our Establishment Clause jurisprudence to foreclose *private* religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present.⁷¹

v) *An American Position on Term 17(3)*

In discussing Term 17(3), there is a possible interpretation of the terminology which should be addressed. When Term 17(3) says "religious observances shall be permitted *in a school*", there is room to argue that this refers merely to "a school building after school hours." If this interpretation were to be adopted, Term 17(3) may be held not to violate

⁶⁹ Rotunda and Nowak, *supra* note 55 at 94.

⁷⁰ See Tribe, *supra* note 57 at 1175.

⁷¹ *Good News Club v. Milford Cent. Sch.* 533 U.S. 98 (2001) at 116 [emphasis added].

the spirit of the *First Amendment*. The contextual history of Term 17(3) clearly shows that the Newfoundland Government intended religious observances to be permitted in schools *during* the school day.

The purpose of Term 17(3) is to allow requested religious exercises to be observed in the public school system during school hours. A survey of American jurisprudence confirms that the *First Amendment* is simply unreceptive to such a purpose. Condemnation would be swift. Newfoundland's purpose underlying this Term is not secular, and by that virtue alone would be considered an unconstitutional endorsement of religion. Further, such observances serve to place the authority of the Government of Newfoundland behind the furtherance of sectarian goals. Permitting these exercises no longer puts the Newfoundland government in a neutral position with respect to holding religious beliefs, but rather, promotes religious devotion. In addition, these observances create "bridges" rather than "walls" between Newfoundland and religion. Exemptions to religious exercises are not a solution to the concerns – the solution is the extrication of them from the Newfoundland public school system.

V. THEORETICAL ASSESSMENT OF TERM 17(3)

As demonstrated, Term 17(3)'s unfettered acceptance of religious observances appears to conflict with the spirit of both the Canadian *Charter* and American *First Amendment*. As mentioned, the presence of s.93 jurisprudence (and its protective covering) *could* insulate this Term. Ultimately, courts in Canada will need to determine to what degree they will deviate from s.93 jurisprudence and accede to the spirit of the *Charter* and *First Amendment*.

In addition to the jurisprudence, courts often consider theoretical arguments for guidance. Theoretical approaches form an integral part of the current discourse as they often inform and guide the decision making process for the courts. In this vein, attention needs to be paid to the major theoretical approaches to the freedom of religion. By examining these paradigms we not only see which theories hold sway in the courts but also gain a greater appreciation for rationales underlying judicial decisions.

Three theoretical paradigms will be examined: liberalism, deliberative democracy, and non-neutrality. In reality, tidy divisions are rare and theories and theorists often overlap. Similarly, the legal and theoretical analysis is unavoidably intertwined. Here, however, an attempt is made to present three fairly distinct views with respect to religion in society, and more particularly, religious exercises in public schools.

1. Liberalism

i) Basic Tenets

Understanding liberalism requires understanding its foundational premise. As opposed to a defined and agreed upon truth, there is no one path to what is true.⁷² It is from this basic premise that the theory develops. Because truth is discoverable, everyone should be free to find their own path and free to define their own ‘good’ and their own ‘truth’. Accordingly, policy and polity should not comment directly or indirectly on what is the good life, but rather secure conditions which preserve the ability of individuals to resolve this in a manner free from external interference:

I begin by sketching a simple and straightforward view of liberalism’s aims with respect to normative diversity. This simple picture sees the role of a liberal legal system as that of providing an ordering framework to allow individuals to pursue their freely chosen – and extra-politically defined – purposes.⁷³

According to this perspective, rights in a liberal democracy are intended to preserve a sort of level playing field for citizens who are viewed as inherently equal, and equally deserving of dignity. Liberalism prevents citizens from restricting others from exercising self-determination; in a

⁷² This basic claim of liberalism as a philosophical notion often receives little attention. In Paul Horwitz, “The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond” 1996 54 U.T. Fac. L.R. 1 at 4 the author suggests that as a way of interpreting human existence, liberalism’s claim may be no more deserving of legitimacy than any faith-based claim.

⁷³ Stephen Macedo, “Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism” (1998) 26(1) Political Theory 56 at 56.

liberal state, citizens are restrained from actions which directly or indirectly suggest the actor is intrinsically superior to another.⁷⁴

ii) Application of Liberalism to Religion's Role in Society

As a theoretical construct, liberalism is a very broad ideology, and differing approaches to religion can certainly be entertained within its scope.⁷⁵ However, certain basic conclusions are possible. First, religions which purport to define an incontestable truth stand in opposition to the foundational premise of liberalism – an express rejection of absolute truth. Second, while individuals are fully autonomous to reach their own conclusion about the “good life” and develop religious beliefs, they cannot restrict another’s ability to do the same.⁷⁶ Religious beliefs and practices as a private pursuit are quite acceptable, but a line is drawn when they have the effect of impinging on others. Further, the state should be neutral with respect to religion by refraining from passing judgment on the various forms of religion. It is the path of secularism which has been held to best equip a state in maintaining its neutrality.⁷⁷

Liberal theorist John Rawls expresses a particularly hostile view towards religion in public society.⁷⁸ So long as religious doctrines are permitted in society, he argues, they only serve to undermine liberalism by precluding non-believers from attaining an equal sense of dignity. The solution is that in the public sphere, religious doctrines must be expressed and converted into secular justifications. Unlike religious doctrines, secular justifications based on rationality and reason, by their universal nature, are able to include all members of society equally. Therefore, when in the public sphere, reliance should be placed primarily on reason and rationality.⁷⁹

⁷⁴ Robert Audi, “Religious Values, Political Action and Civil Discourse” 2000 75 Ind. L.J. 276.

⁷⁵ See e.g. see James Eberle, *Religious Convictions in Liberal Politics* (New York: Cambridge University Press, 2002) where the author attempts to elucidate a more religion-friendly liberalism.

⁷⁶ This liberal rationale has been repeatedly invoked in Canadian cases, for e.g., see Dickson C.J.’s discussion of the freedom of religion in *Big M*, *supra* note 32.

⁷⁷ For a good review of “secularism” see Iain T. Benson, “Notes towards a (Re)definition of “Secular”” (2000) 33 U.B.C. L. Rev. 519.

⁷⁸ See e.g. John Rawls, “The Idea of Public Reason Revisited” (1997) 64 U. Chicago L.R. 765.

⁷⁹ Richard W. Garnett, “Christian Witness, Moral Anthropology, and the Death Penalty” (2003) 17 Notre Dame J.L. Ethics & Pub. Pol’y. 541 where at 546 the author describes the Rawlsian view as reserving religious views and convictions solely for the private realm.

Stephen Macedo, another leading theorist, offers the following denunciation when speaking of the ills of religion-based views and convictions in the public sphere:

We have good reason to hope that there will be fewer families raising such children in the future.⁸⁰

Liberalism's generally less-than-receptive attitude⁸¹ toward religious convictions in the public sphere is driven by a fear that when religion becomes public, it serves to frustrate recognition of the idea that humans are equal and equally capable of determining what is best for themselves. Religious doctrines are not neutral in respect to this principle and, if allowed to run riot, they cast and eventually set those opposed to their doctrines and teachings as inherently lesser.

iii) The Liberal View of the Role of Religious Exercises in Public Schools

From a liberal point of view, Term 17(3) is flawed on numerous levels. From a liberal perspective, religious exercises in public schools are fundamentally problematic. Allowing such exercises promotes a non-secular and non-reason based epistemology in the public sphere, the effects of which serve to denigrate non-believers or non-followers into a category of people less deserving of dignity. Furthermore, by allowing such observances, Newfoundland would be seen (explicitly and implicitly) to take a position on the good life, and thereby jeopardize the individual's ability to do the same.

2. Deliberative Democracy

i) Basic Tenets

As a theoretical paradigm, deliberative democracy⁸² holds that epistemology and legitimacy may best be dealt with through public discourse

⁸⁰ *Supra* note 73 at 72. Macedo's harsh line on the role of religion has been heavily criticized.

⁸¹ See Michael W. McConnell, "Why is Religious Liberty the "First Freedom" (1999-2000) 21 *Cardozo L. Rev.* 1243 where at 1244 the author states, "In many circles today, religion is seen as an essentially illiberal phenomenon in our public life."

⁸² Sometimes also referred to as "discursive democracy."

and participation.⁸³ At a basic level, this theoretical approach suggests that if conditions for meaningful public participation are created, public discourse can lead to a normative consensus and corresponding legitimizing of the resultant legal framework.⁸⁴ Therefore, for deliberative democracy, unlike liberalism, state-endorsed comments about the “good life” are permissible so long as they are products of informed public participation. Further, legitimizing laws through participation not only promotes respect for policy and polity, but also counteracts civil disenfranchisement and alienation.

Deliberative democracy places vital importance on meaningful participation. Just as only *perfect* practice makes perfect, perfect participation is the goal. This type of participation involves two basic components. The first component is securing the right to participate for all citizens.⁸⁵ The second is to ensure that this participation takes place amongst equals. Habermas describes this as the need for “symmetry relations,” a condition largely consistent with the liberal conception of equal worth and equal dignity.⁸⁶ In other words, participation for all on equal footing.

⁸³ See Frank I. Michelman, “How Can the People Ever Make the Laws? A Critique of Deliberative Democracy” in James Bohman and William Rehg, eds., *Deliberative Democracy* (Cambridge: MIT Press, 1997) 145 at 149 where Michelman describes the basic tenets as follows: “Deliberative democracy”, in sum, I take to be our name for a popularly based system or practice of fundamental lawmaking that meets a threshold standard of overall deliberativeness. The term names a system or practice whose combined organizational, motivational, discursive and constitutive attributes are such, we judge, as to qualify its legislative outputs as approvable in the right way by all who stand to be affected.

Also see e.g. Jurgen Habermas, “Between Facts and Norms: An Author’s Reflections” (1999) 76(4) *Denver Law Review* 937 at 940 the author provides the following endorsement, The discourse-approach explains the legitimacy-generating force of the process with a democratic procedure that grounds a presumption of the rational acceptability of outcomes.

⁸⁴ See e.g., Seyla Benhabib, “Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jurgen Habermas” in Craig Calhoun, ed., *Habermas and the Public Sphere* (Cambridge: The MIT Press, 1992) 73 at 74 the author states, “The strength of the Habermasian model...is that questions of democratic legitimacy in advanced capitalist societies are central to it.”

⁸⁵ See Habermas, *supra* note 83 at 939. Also see Jurgen Habermas, “Further Reflections on the Public Sphere” in Craig Calhoun, ed., *Habermas and the Public Sphere* (Cambridge: The MIT Press, 1992) 421 at 449 where Habermas states,

This implies the institutionalization of legal procedures that guarantee an approximate fulfillment of the demanding preconditions of communication required for fair negotiations and free debates. These idealizing preconditions demand the complete inclusion of all parties that might be affected, their equality, free and easy interaction, no restrictions of topics and topical contributions, the possibility of revising outcomes, etc.

⁸⁶ Jurgen Habermas, “Remarks on Legitimation through Human Rights” (1998) 42 *Philosophy & Soc. Crit.* 157 at 169.

ii) *Application of Deliberative Democracy to Religion's Role in Society*

Like liberalism, deliberative democracy can find aspects of religion problematic in the public sphere. A similar derision for religious doctrines as rationales in public participation as found in Rawls, can be found in Habermas:

The awareness is growing, first of all among the intellectuals, that one's own religious truths must be brought into conformity with publicly recognized secular knowledge and defended before other religious truth-claims in the same universe of discourse.⁸⁷

Habermas, as an individual theorist, is particularly known for his disdain of religion: "Habermas's pronouncements on religion offer little encouragement to those persons, from professionals theologians, to observant citizens, who take religion seriously."⁸⁸

However, a deliberative democratic view may also recognize that if religions can increase public participation, they may be of value. As religions hold the attention of many citizens, engendering them into the conversation may correlatively increase the level of public participation. In fact, notwithstanding Habermas's thoughts, by including religions, an inroad may be provided for increased, rather than decreased, participation.

iii) *Deliberative Democracy's View of Religious Exercises in Public Schools*

Deliberative democracy can be seen to find potentially redeeming, and potentially injurious, aspects of Term 17(3).

Conceivably, Term 17(3) could produce increased levels of public participation. With this provision parents may now have an increased ability and desire to participate in school governance. Depending on how Term 17(3) is administered, it may provide and create new sites for parents to discuss with each other, and school administrators, what observances shall be provided, what should be provided, and why. Indeed,

⁸⁷ *Ibid.* at 169.

⁸⁸ See Brian J. Shaw, "Habermas and Religious Inclusion: Lessons from Kant's Moral Theology" (1999) 27 *Political Theory* 634 at 637.

one could easily imagine ways in which Term 17(3) could be administered to potentially raise participation, and create meaningful deliberations. Problematically, Term 17(3) provides no such procedural or implementational guarantees, and increased participation may only be incidental to it, but legally speaking, not required.

Similar to the concern of liberalism, deliberative democracy may be concerned with the propagation of religious doctrine and rationales in the public sphere. A Habermasian view would reject religious doctrines as being an unacceptable part of public participation and, from this point of view, any promotion of religion may be troubling.

3. Non-Neutrality

i) Tenets of “Non-Neutrality” and its View of the Role of Religion in Society

The final theoretical paradigm that will be considered in this paper will be referred to as non-neutrality. This approach is less prescriptive than it is reactive as it largely responds to liberalism’s allegedly neutral treatment of religion.

At a general level, this perspective challenges the contents of the prescribed public and private spheres in society. In particular, it rejects the liberal banishment of religious convictions into the private realm and, alternatively, welcomes religious beliefs and convictions into the public sphere.

The rationales advanced for promoting and allowing religion into the public sphere vary. Perhaps most frequently asserted is that anything less derogates the role, value and importance of religion in people’s lives. Stephen L. Carter characterized the perceived dangers of keeping religion in the private sphere when he stated:

The great risk lying a bit further down this path is that religion, far from being cherished, will be diminished, and that religious belief will ultimately become a kind of hobby: something so private that it is as irrelevant to public life as the building of model airplanes.⁸⁹

⁸⁹ Stephen L. Carter, “Evolutionism, Creationism, and Treating Religion as a Hobby” (1997) Duke L.J. 977 at 978.

A non-neutralist approach would suggest that by preferring to keep religion in the private sphere, liberalism implicitly passes judgment on the quality of religious convictions – *if you want to believe in that, that's fine, but we will not let you get in the way of "rational" thought.*⁹⁰ Accordingly, liberalism's neutrality towards religion is seriously called into question.⁹¹ Members of society with religious convictions are said to be left in a bind; if they want to join the "public arena," they must check their religious hang-ups at the door, and grab the how-to-be-rational binder on the way in. Non-neutrality asks: By keeping religion private, how many people are we keeping out of the public space?

Adherents to this approach would stress that society needs to accept that rationality and reason are not the only modes of existence. Humans are not machines. Humans believe in things they cannot see, cannot prove, or cannot rationally articulate, but that should not render them less worthy of public contribution.⁹²

While non-neutrality has railed against liberalism's cold shoulder, and has demonstrated liberalism's deficiencies, solutions seem scarce with no major comprehensive alternatives finding support.

ii) Non-neutrality's Approach to Term 17(3).

As stated above, non-neutrality as a paradigm is largely a response to liberalism and by that virtue offers little criteria for how to assess initiatives.

Yet assuredly this approach embraces how Term 17(3) permits religion to enter the public arena. Term 17(3) legitimizes the role of religious observances, and helps take such manifestations of belief out of the closet. It is not so much what Term 17(3) specifically permits, or en-

⁹⁰ See Horwitz, *supra* note 72 at 64 where the author states:

Given liberalism's emphasis on "the rational, empirical, and factual," the more ethereal virtues of religion, and the still more inexpressible call of religious duty, are all too liable to be shrugged aside as individual values and choices that must give way to secular progress.

⁹¹ See e.g., Steven D. Smith, "The Pluralist Predicament: Contemporary Theorizing in the Law of Religious Freedom", (Lecture for the Public Law and Legal Theory Research Paper Series, University of San Diego School of Law Spring 2004) online: Bepress Legal Repository <<http://law.bepress.com/sandiegolwps/pllt/art8>> where the author clearly argues that liberalism's claim of neutrality should be seen for what it is: a non-neutral view of religion which attempts to suppress it into the private sphere.

⁹² See e.g., Ogilivie, *supra* note 40 at 231.

dorses, but rather the underlying recognition of the relevance of religion in Newfoundland which this paradigm embraces.

VI. CURRENT DISCOURSE AND CHANGE

1. Content of the Current Discourse

While the preceding three theoretical paradigms offer distinct approaches and prescribe different ends, it is liberal theory that has held the attention of the courts with respect to freedom of religion; it is liberalism that dominates the discourse underlying our current approach to religion in public society.

Through the *First Amendment* and the *Charter*, the Supreme Courts in the United States and Canada have attempted to minimize the presence of religion in the public sphere. A clear example of this can be seen in how the courts have strived to keep religious beliefs out of the public school system. The rationale underlying these holdings has been a genuine fear of religious coercion and compulsion.

It is difficult to deny that religious beliefs have often been invoked in support of patently unacceptable acts, from restricting equal participation to widespread persecution and even, in extreme circumstances, genocide. Courts rightly look with disdain upon such effects, and in largely adopting a liberal view to equality and equilibrium, they have acceded to liberalism's sense that religions, through irrational and mystic justifications, perpetuate a public social ordering that, by virtue of not being rationale or reason-based, is unfair to all citizens. In good faith, courts have attempted to preserve equal conditions by assigning religious devotions, observances and justifications to the private sphere. Yet, as noted by non-neutralists, this approach has had the practical effect of limiting the role of religion in the public space.⁹³

2. Deconstructing the Current Discourse

Understanding how we approach religious freedom requires understanding the nature of the basic question underlying it. As discussed above,

⁹³ See Part II of this paper.

what underpins our current approach to religion is a simple question: What role should religion should play in society? A fundamental assumption underlying this question is that the role of religion is *contestable*. By embracing such a philosophical assumption the current discourse adopts a mandate designed to find the appropriate role and place of religion.

Accordingly, the discourse underlying our approach to religious freedom presupposes that the role of religion may be altered. However, the propriety of this is challengeable where its existence in the public sphere is entrenched, a possibility that Term 17(3) forces us to address.

3. Term 17(3) and the Newfoundland Experience

Term 17(3)'s brazen and unabashed permittance of religious observances appears almost comical. The provision is so broad and so inclusive of religion that it appears to be totally out of step with our current approach to religion.

Yet, when Term 17(3) is considered from the context of the Newfoundland experience it becomes apparent that our current approach's denunciation of it fails to suffice. Closeting religion simply does not accord with the past and present attitude of Newfoundland with respect to religion and education, as 97.5% of the population of Newfoundland claims some type of religious affiliation.⁹⁴ A close nexus between religion and education has always existed in Newfoundland. From pre-Confederation until present, religion has served to be an integral part of the education of its citizens. It is this reality that causes reflection.

Through Term 17(3), Newfoundland calls into question the foundation on which the current approach is based. Underlying Term 17(3) and the Newfoundland experience is a profound and subtle testimonial holding that religion and the education of its citizens are indelibly linked. Term 17(3) reflects the existence and relevance of religion in Newfoundland society.

By protecting religious observances in their school system, Newfoundland offers an interesting approach to religion in the public sphere. While a public life without religion may spare complexities and flash points, banishing them from public recognition is an inadequate solu-

⁹⁴ See Valpy, *supra* note 15.

tion. The ability of religion to bind together, or conversely, divide, bespeaks its importance generally, but more significantly demonstrates its presence and relevance in the lives of people. By amending its terms of union, Newfoundland has not so much answered how to solve these inherent tensions, but rather has demonstrated that what is more important is to enact laws which reflect the will of constituents, however irrational or undesirable this may be from a governing point of view.

This explicit acknowledgement of religion calls for a shift in the current discourse respecting how religion in the public sphere is approached in similar situations. While not specifically rejecting or adopting any theory, it simply seeks to advance the conversation from what should the role of religion be to an acceptance that the role of religion may not properly be considered contestable. Conceivably, in Newfoundland our attention should not be directed at the *desired* role of religion, but rather, at accepting its reality in public and private lives.

An acknowledgment of this kind resonates with other aspects of our society as well. Elements that divide humanity should not, for their divisive nature alone, be abolished or suppressed. On a parallel level to religion, divisions of race, gender and class operate in society. In contrast to our current approach to religion, any suggestion which would attempt to deflate these divisions to the private sphere would only appear regressive. Rather, by fully acknowledging the existence of these divisions in society, the discourse has progressively focused on how to best proceed within the acknowledgement that divisions like class, gender and race operate in all facets of life.

4. Shifting the Discourse – Theoretical Implications

The starting point of any theory should be reality. Accepting religions as comprising part of public and private reality may require theorists to further grapple with a divisive element of human life. While this may be difficult, theories can no longer be exempt on this basis alone. Shifting the discourse in this manner does not answer or alleviate some of the harms religion may cause when left unfettered. Without question, governments will need to be vigilant in promoting respect for diversity and tolerance of others.

By shifting the discourse to recognize that the place of religion is not properly contestable in all situations, the theories and jurisprudence must reflect this change. The challenge lies ahead and the following comments on the application of this recognition with respect to the major theoretical approaches merely represent a work-in-progress.

By accepting that neutrality can co-exist with the presence of religion, liberalism can adapt to this discourse shift. As demonstrated by a review of the case law, as a philosophical notion neutrality has been invoked to support the absence of any religion. Yet, logically, neutrality can equally exist in a climate which recognizes religions. Perhaps an example best captures the essence of this point. A school may be neutral by *refusing all* sports programs, but could also retain their neutrality by equally *supporting all* sports programs. Accordingly, the liberal desire to create equal conditions and equal opportunities does not have to be jeopardized by recognizing the existence of religion. Liberalism can still fight to ensure equal opportunities, respect, and dignity for all religious beliefs. Viewed in this light, we see that Term 17(3) may be appropriate. It does not support only one religion, or promote one-type of religious observances, but rather aims to provide equal opportunity and conditions.

Deliberative democracy strives for increased participation and legitimacy. By accepting and welcoming that humans may enter this arena with religious convictions, the potential for increased participation exists. Forums designed to gain increased participation and produce legitimation are hampered when restrictions are placed on their admittance. Undoubtedly corraling religious doctrines into the conversation may present flash points. However, the fact remains that permitting their presence better reflects the reality of the participants.

For non-neutralists, this discourse shift would represent the desired acknowledgment of religion's status in public life. While not professing an easy road ahead or a simpler society to come, recognition of religion represents a validation of religious beliefs, both private and public.

5. Shifting the Discourse – Legal Implications

As Part II demonstrated, in Canadian law Term 17(3) has a precarious existence between the jurisprudence of s.93 of the *Constitution Act*,

1867 and s. 2(a) of the *Charter*. Yet, by shifting the discourse on religion in appropriate contexts, judicial interpretations of these sections must also change.

While the s.93 jurisprudence has traditionally focused on its contractual nature (e.g., “historic compromise”), re-characterizing and emphasizing it as a reflection of the existence and relevance of religion may provide a more forceful normative foundation for the existence of provisions like Term 17(3). By consciously referring to s.93 as an explicit recognition of the relevance of religion, no longer does s.93’s purported defence of Term 17(3) seem technical or legalistic, but rather quite appropriate.

A shift in the discourse would necessarily require the courts to re-visit their interpretation of s. 2(a) of the *Charter*. Ultimately, the shape and format of such a change is beyond the scope of the present paper. Nevertheless, s. 2(a)’s re-interpretation must proceed from the acknowledgement that in appropriate cases the place of religion in the public sphere should be considered immutable. The primary implication of this acknowledgment would operate to restrain courts from resigning religion to the private sphere only.

VII. CONCLUSION

Term 17(3) has not been fully challenged in a court of law. Considering the dominant legal and theoretical discourse underlying our current approach, Term 17(3) will remain under tremendous pressure.

Our current approach to the freedom of religion appears to lead to the banishment of religious observances from the public school system. This conclusion is possible when we assume that the role of religion is properly considered to be alterable according to the positive or negative effects religion has on society.

Yet, by enacting Term 17(3) according to their experience, Newfoundland prompts us to re-visit an assumption of our current approach. Perhaps there are instances where challenging the role of religion is not appropriate; perhaps religion simply exists in Newfoundland. Proceeding on this recognition would be a preferable manner for the discourse to proceed.

The desire of the current discourse to ascribe religion to the private sphere is understandable; religions are divisive, messy and hard to regulate. Nevertheless, while it may be easier if they did not exist, no longer can we assume that such a result is possible.

Failing to appreciate the immutable existence of religion may prefer theory over reality and accordingly sacrifice the complexity of human existence for theoretical ease. By proceeding with our current approach, blind to the reality it ignores, we only serve to impose on societies like Newfoundland an artificial existence.