

# Executive Federalism and the Terms of Union: A New Approach to Understanding the “Roads-for-Rails” and “Roads-for-Boats” Agreements

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# **Executive Federalism and the Terms of Union: A New Approach to Understanding the “Roads-for-Rails” and “Roads-for-Boats” Agreements**

JEFFREY F. COLLINS

## INTRODUCTION

This paper introduces the concept of executive federalism to Newfoundland and Labrador's governmental relations with Canada through an examination of the 1988 railway and 1997 coastal ferry agreements.<sup>1</sup> In doing so it aims to add to our understanding not only of contemporary Newfoundland policy-making but also of Canadian federalism. Executive federalism is the process of policy-making brought about by the interaction of the executive levels of the provinces and the federal government. This executive process has long been considered one of the defining characteristics of Canadian federalism, and the policies that result from such interaction are said to be shaped by Canada's constitutional strictures (Smiley, 1974; Watts, 1989). In the cases to be analyzed in this paper, the concept of executive federalism will help illustrate how the federal government on two occasions made formal arrangements to end its involvement in Newfoundland's railway and the Labrador coastal ferry service.<sup>2</sup> Moreover, the paper argues that the Terms of Union, the constitutional document that governs Newfoundland's transition into the Canadian federation and mandated federal involvement in the province's transportation system, helped shape the debate and the subsequent final agreements, known colloquially as the “Roads-for-Rails” and “Roads-for-Boats” deals.

In making this argument this paper will first provide an overview of executive federalism theory. This summary will be followed by an analysis of the Terms of Union, with particular focus on how the document's interpretation helps explain why the agreements reached in 1988 and 1997 were possible. Following that are the two case studies: the railway and the coastal ferry service. This section of the paper will highlight the main discussions, issues, and actors that dominated the discourse leading up to the end of federal involvement in each service and, by default, provide a context for executive federalism theory. Finally, there will be an analysis of how these two agreements "fit" into executive federalism theory, concluding with what this means for Newfoundland's remaining, and constitutionally sanctioned, federal-operated transportation service, the Port aux Basques–North Sydney ferry. In analyzing the province's railway and coastal ferry agreements this paper represents a first in applying executive federalism theory to a Newfoundland case study. Furthermore, it places the province's railway and ferry services, the former of which has received some historical analysis, into a political science perspective that will be of interest to both students and practitioners.

## EXECUTIVE FEDERALISM

In Canadian political science discourse the transportation initiatives negotiated between the two executive branches in 1988 and 1997 can be said to represent examples of "executive federalism," a defining, and indeed dominant, characteristic of Canadian federalism today. At its core, the term simply refers to the "direct negotiation[s] between the executives of different governments" (Siméon, 2006: 5; see also Watts, 1989: ix). The emergence of executive federalism in Canadian intergovernmental relations owes as much to the lack of a constitutional provision governing federal-provincial interactions as it does to any ingenuity on the part of policy-makers (Smiley, 1974: 22; Watts, 1989: 1; Bakvis et al., 2009: 104). Specifically, executive federalism reflects Canada's hybrid constitutional model that combines, on one hand, British parliamentary institutions where power is concentrated in a central executive and, at the other, an American-style federal structure that disperses power territorially. Such a model is said to create ambiguity in federal-provincial relations by not providing any role for the provinces in the country's national political institutions (Smiley, 1974: 15). This leaves Canada's federal structure with a "low level of institutionalization" and consequently creates more "fluidity" in its

intergovernmental relations, which allows for both levels of government to pursue alternative, and indeed, unscripted avenues for addressing intergovernmental policy concerns (Bakvis et al., 2009: 105; Smiley, 1974: 38-39; Watts, 1989: 1; Simeon, 2006: 39).

In light of this it can be said that Canada's broader constitutional framework helps shape the outcomes of intergovernmental relations, given that such interactions between the provinces and Ottawa "are often attempts to get around constitutional strictures." Furthermore, these "attempts to get around" the Constitution can often result in *de facto* constitutional changes (Simeon, 2006: 41; see also Bakvis et al., 2009: 103). More importantly, the interaction between various constitutional provisions and the policies being advocated by one or the other government help "to shape the kinds of issues the governments negotiate" (Simeon, 2006: 39). For example, in the railway and Labrador ferry cases the provisions in the Terms of Union concerning federal involvement in Newfoundland's transportation sector conflicted with Ottawa's national policy goals, in the first case, to deregulate national railway operations in the mid-1980s and, in the second, to rein in the country's deficit in the 1990s. In both cases the province had as its goals a desire to obtain large-sum cash payments not only to compensate it for the lost or transferred services but, arguably, to assist the province's dire financial situation (Cadigan, 2009: 272-76). Therefore, a perceived benefit of executive federalism is that it allows both governments to avoid costly and publicly drawn-out court battles, as well as the sometimes cumbersome thrust and parry of elected legislatures and of caucuses. However, the threat of court action still remains the "ultimate weapon" should one party fail "to come to an acceptable result through intergovernmental bargaining" (Smiley, 1974: 11). And legislatures, when brought in after the fact to rubberstamp executive agreements, can become recalcitrant, as the Meech Lake experience demonstrated.

In terms of the actual interaction between federal and provincial executives, termed "federal-provincial diplomacy" by Richard Simeon (2006), its roots are much more recent. What we know today as First Ministers' Conferences, for example, only became reoccurring events in the 1930s as federal and provincial governments came together "to coordinate their responses to the Great Depression" (Bakvis et al, 2009: 105). Following World War II, however, the federal government became highly involved in such traditional areas of provincial jurisdiction as education, health, and social services through the provision of financial transfers (*ibid.*; see also Smiley, 1974: 9). As Canada developed into a welfare state, the need to co-ordinate federal and provincial

policies and programs led to a “dramatic increase in the frequency of meetings, primarily of officials, and the rise of what Donald Smiley terms ‘executive federalism’” (Bakvis et al., 2009: 105).

Moreover, as Smiley (1974) notes, additional factors further facilitated the growth of executive federalism. For one, there was the emergence of a new kind of Québécois nationalism following the election of Premier Jean Lesage in 1960, which led to a series of constitutional meetings and conferences between the country’s premiers and prime minister. Second, there was “the shift in the balance of bureaucratic competence to the provinces,” leaving them more capable and autonomous in providing services. Third, there was the electoral defeat of the long-reigning federal Liberals in 1957, who were succeeded by a series of minority governments — one Conservative, others Liberal — following the elections of 1957, 1962, 1963, 1965, and 1972. And, finally, there was the “failure of the national economic policies from the late 1950s onward to ensure adequate conditions of employment and growth” (ibid., 9). All told, “These influences . . . led to a situation in which the most crucial aspects of Canadian public policy [were] created within the context of federal-provincial negotiation” (ibid., 9).

Practices within executive federalism have continued to evolve over the succeeding decades. The federal government has become “increasingly likely to pursue national objectives by way of separate agreements with each of the provinces” rather than provide an opportunity for the 10 provinces to “gang up” on it (Bakvis et al., 2009: 116). Regional ministers, once considered to have faded into oblivion with the ascent of the Pierre Trudeau as Prime Minister in 1968, began to make a comeback in the early 1980s. Largely responsible for dispensing patronage, leading their party’s provincial organizations, and “influencing expenditures affecting their region,” regional ministers such as John Crosbie and Brian Tobin were also known for “injecting a regional dimension into the delivery of departmental programs.” Crucially, they are also frequently tasked with “communicating the decisions and views of the centre to the region [and] explaining the less palatable outcomes of Ottawa’s deliberations to provincial or local constituents and helping ensure that they remain within the fold” (Bakvis, 1989: 122). Therefore, federal ministers like Crosbie and Tobin served just as much as emissaries of Ottawa to their home province as they did as Newfoundland’s representatives at the federal cabinet table.

Additionally, others have remarked upon the growing concentration of power in fewer and fewer individuals within the nation’s executive branch. Savoie (1999: 635), for example, suggests that the 1970s up to the Chrétien-era

in the 1990s witnessed the growth of “court government” whereby all effective power rested with the Prime Minister and his non-elected advisers in the PMO. Savoie argues that the PM had become the sole arbiter in federal-provincial relations, with regional ministers becoming more sidelined. Cameron and Simeon (2002: 49), however, notice that during this same time period executive federalism became characterized by a set of practices and principles termed “collaborative federalism,” meaning that intergovernmental relations had morphed into “a partnership between two equal, autonomous, and inter-dependent orders of government that jointly decide[d] national policy.” This move towards collaborative federalism was partly a response to deep federal spending cuts in the 1990s, which often led to “secondary downloading” of programs to the provinces. Moreover, the overall effect of these actions “was to invest the provincial governments with a stronger sense of their autonomy, their responsibility, and their right to judge, within their spheres of jurisdiction, what the national as well as the provincial interest requires” (ibid., 54). Furthermore, collaborative federalism, like executive federalism generally, serves as an “alternative” to constitutional change: “rather than being expressed in the uncompromising language of constitutional clauses, and enforced by the courts, they are to be expressed as intergovernmental ‘Accords’, ‘Declarations’, and ‘Framework Agreements’” (ibid., 55). The legal and political status of such intergovernmental agreements remains a key question, particularly in regard to their enforcement because, as a principle of constitutional law, one “government cannot bind future legislatures” without a constitutional amendment (ibid., 62-63; see also Monahan, 1991: 867).

Finally, the process of executive federalism is not above criticism. Many discussions and arrangements have occurred out of the public eye with little, if any, legislative debate (a prominent example being Prime Minister Brian Mulroney’s Meech Lake proposals). This tends to lead to charges of “backroom dealings” and “undemocratic arrangements” that allegedly place the interests of the involved governments, rather than those of the broader public, at the centre of the discussions. In most cases, however, the closed-door arrangements are due to the desire of the involved parties not to “upset the delicate deals which have been negotiated” after months of discussions and planning (Watts, 1989: 5; Menzies, 2012: 1). The process also receives criticism regarding the absence of decision-making rules and the effect this can have on public policy-making generally — essentially, if there is no openness and transparency who can be held to account for the policy being agreed upon? (Bakvis et al., 2009: 127; see also Cameron and Simeon, 2002: 64). Still, as Menzies (2012: 1)

records in her observations on executive federalism in Australia, despite the “purported ‘anti-democratic’ nature of executive federalism, many critics do acknowledge it does have the advantage of enabling rapid decisions to be taken and for a broader political accommodation which can be difficult to achieve through existing institutions.” Furthermore, the general public has often exhibited “little tolerance . . . for the constraints of constitutional government and the expectation from the public is that political leaders will either ignore or work around such constraints” (*ibid.*, 2).

## THE TERMS OF UNION

In light of this overview of executive federalism, a constitutional document like the Terms of Union can be seen to represent a “constraint” on intergovernmental relations between Ottawa and Newfoundland. This is particularly true in the sense that, like any constitutional proscription, the Terms of Union can govern the overall behaviour and policy development between two governments (O’Flaherty, 2009: 9). Having been negotiated in 1948 and signed in 1949, the 50 provisions contained within the Terms of Union laid out “the constitutional ground rules within which Newfoundland must operate as a Canadian province” (MacKenzie, 1998: 220). Like its 1871 and 1873 British Columbia and Prince Edward Island counterparts, respectively, the ultimate goal of the 1949 Terms of Union was to turn a self-governing British dominion, Newfoundland, into a Canadian province (*ibid.*, 221).

Many of the terms within the document illustrate this point quite clearly. For example, Term Four guarantees the province six senators and seven members of Parliament; Term 41 ensures that all Newfoundlanders and Labradorians, like all Canadian citizens, are entitled to unemployment insurance, while Term 40 provides for old age pensions and Term 38 guarantees veterans’ benefits (Newfoundland Act, 1949). While some terms, such as 28 and 29, provide for additional, albeit temporary, financial transfers on top of these other provisions, the impetus behind the whole agreement was not to give Newfoundland guarantees that would “create significant differences between it and the existing provinces” (particularly the Maritimes), but to aid it in transitioning to a Canadian province (Blake, 2012: 49-50; May, 2003: 175; see also Mackenzie, 1998: 233). Moreover, had the federal government wanted to give more beneficial and long-lasting terms to Newfoundland, it would have been prevented from doing so by section 146 of the British North America Act (now the

Constitution Act, 1867), which requires that new provinces admitted to the federation be bound by the same constitutional conditions as every other province (May, 2003: 174-75; MacKenzie, 1998: 233). Thus, promising to maintain a provincial transportation system in perpetuity would not be seen as meeting such conditions.

In light of this historical context the transfer of responsibility for operating the railway and the coastal ferry service to the government of Canada became governed under Term 31(a), which states:

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

(a) the Newfoundland Railway, including steamship and other marine services; . . . (Newfoundland Act, 1949)

A crucial component of Term 31(a) is that it decrees the financial responsibility of operating these services is to be incurred by Canada, not by the province. There were two rationales underpinning this transfer of financial liability. First, the railway and (to a smaller extent) the ferry service were largely responsible for the new province's vast amount of debt incurred during the pre-Confederation years (Noel, 1971; Monahan, 1991: 855-56). Second, and congruently, there was a realization on the part of both governments that operating any modern transportation system in Newfoundland with its "sparse and scattered population" would be a continuing costly endeavour (Blake, 1994: 17-18, 25). With a small tax base, little industry, and dependency on a handful of commodities whose prices were dictated by international circumstance, Newfoundland's government could not afford to maintain a modern transportation system for its growing population without federal relief (*ibid.*, 26-27, 36). As such, for several decades until its abandonment in 1988, many of Newfoundland's political leaders took the view that "[t]he implicit promise of the Terms of Union in rail matters was that special transportation infrastructure would be an ongoing commitment in light of Newfoundland's unique needs" (Dunn, 2003b: 16).

The problem with this latter perspective is that it regards the Terms of Union as a "treaty" or contract-like document, akin to the Charter of Rights and Freedoms in its binding nature (O'Flaherty, 2009: 8). But, as a number of analysts have noted (Monahan, 1991; May, 2003; O'Flaherty, 2009), and indeed what the administrations of Premiers Peckford and Tobin would later conclude,



the Terms of Union, despite being a constitutional document, are not subject to the same rules of constitutional interpretation as, for example, the Charter of Rights and Freedoms. Generally, the Canadian Constitution is interpreted in a progressive way to ensure that its various components remain relevant to whatever the existing norms and practices of the day are. The Terms of Union, however, “when reviewed by Courts, have not been interpreted in a progressive, liberal or broad manner” because they address specific issues (May, 2003: 183).<sup>3</sup> In legal analyst Stephen May’s words, the Terms “used precise language to identify specific obligations [while the] ‘progressive interpretation’ concept applies to general words in the constitution” (ibid.). Therefore, had a progressive view been taken of the Terms they “could be stretched to force potentially unreasonable interpretations” (ibid.). This conclusion is further strengthened by the fact that no language in the Terms dictates how they should be interpreted, which “supports the contention that the Terms of Union were intended to have limited long-term relevance and utility” (ibid., 201).

Given that Term 31(a) contains no wording decreeing that Canada would operate either the railway or the coastal ferry service indefinitely, it can only be assumed that the parties to the document realized that the federal government was under no legal obligation to maintain the service in perpetuity (ibid., 193). This was particularly noted during the 1948 negotiations when Newfoundland’s delegates were recorded as having expressed concern over the fact that the Terms of Union did not “require the federal government to continue operating the Newfoundland Railway” (Monahan, 1991: 856; see also Blake, 2012: 50). As such, the Term 31(a) use of the words “take over” implied “that the federal government would be in compliance with Term 31 as long as it ensured that the province did not have to assume any of the losses of the Newfoundland Railway” (Monahan, 1991: 856). Consequently, without “language that guarantees continued operation of or support for any of the services listed in Term 31, their continued operation remains at the discretion of the Government of Canada” (May, 2003: 193; see also Monahan, 1991: 856).<sup>4</sup>

## ROADS-FOR-RAILS

This ambiguity in the Terms of Union as to the status of the railway and coastal ferry created the flexibility needed for the 1988 and 1997 agreements to be made. The first of these agreements, the “Towards 2000: A Transportation Initiative for Newfoundland Labrador,” popularly known as the Roads-for-Rails

agreement, was signed on 20 June 1988, at the Radison Hotel in St. John's. In exchange for an \$800.6 million payment Newfoundland agreed to give up its claim that under Term 31(a) of the Terms of Union the federal government was required to operate a railway on the island. This was expressed in Article 10(1) of the Roads-for-Rails agreement:

[This agreement represents the] full satisfaction of all Canada's constitutional obligations related to railways on the Island of Newfoundland, and Newfoundland acknowledges that these arrangements are made for such purpose, and accepts that when carried out and performed in accordance with the provisions and intent of this Memorandum of Understanding, they will represent a meeting, to the satisfaction of Canada's constitutional obligations related to railways on the Island of Newfoundland. (Government of Newfoundland and Labrador, 1988)

At that the time the railway was being managed by a subsidiary of the then federally owned Canadian National Railways (CN), Terra Transport. In exchange for giving up the railway Newfoundland would receive \$740 million in highway infrastructure spending, including the building of 123 km of four-lane highway, to be allocated over a 15-year period. The roughly 700 Terra Transport employees who would lose their jobs with the railway closure would in turn receive a separate severance package valued at \$70 million while the railway towns of Bishop Falls and Port aux Basques would receive \$15 million for economic development (*ibid.*).

In many ways the railway's closure in 1988 did not come as a surprise. Since its inception in 1881 the railway had always been a financial burden (Noel, 1971). Still, it was the primary — and until the building of the Trans-Canada Highway (TCH) in 1965, the only — mover of goods and people across the island. But the inability to generate sufficient revenue would be the railway's undoing, especially when it was forced to compete with alternative means of transportation. By 1969 CN and the federal government reached a deal with the province to abandon the trans-island passenger railway service in exchange for highway money and a CN bus service. But even the ability of the railway to dominate the freight sector began to collapse as increased competition from trucks and container ships cut into CN's market share. From 1972 to 1976 CN saw its share of freight traffic decline from 87 per cent to 61 per cent (Morris, 1977). In 1977, a joint provincial-federal Royal Commission, the Sullivan Commission, reviewed the province's transportation system and

concluded that the railway should be closed after a 10-year phase-down and a guarantee from the federal government that it would provide long-term highway funding (Collier, 2011).

However, the provincial governments of Progressive Conservative Premiers Frank Moores (1972-79) and Brian Peckford (1979-89) refused to abandon the railway in the face of reports declaring that the line still had a future in the province as long as the federal government modernized it (*Globe and Mail*, 1978; Walters, 1979: 20-21). Peckford even went so far as to say, in 1979, that the province was legally “not obliged to give up rails in order to get federal aid on roads” (ibid., 21). Despite the political rhetoric, however, CN was making it clear that it wanted to abandon the railway. The company’s local president and general manager, Ron Messenger, told an interviewer in 1981 that the Terms of Union requiring federal ownership of the province’s railway were “so neutral that [they] really are of no advantage to either the federal or provincial governments” (*Decks Awash*, 1981: 47). The company argued that it was illogical to operate a railway in a province where every town served by train was also being served by road (Walters, 1979: 21). However, without consent from the provincial government to agree to abandon the line the federal government invested an additional \$77 million into a five-year railway revitalization plan in 1980 (Boone, 1987: 95).

Despite this plan the railway’s market share continued to decline and the monetary losses mounted. By 1986 it was widely reported that discussions between the two governments towards reaching a deal on railway abandonment had started (*Truro Daily News*, 1986). Crucially, 1986 saw the federal government deregulate Canada’s railways, at the time when both Canadian Pacific and Canadian National were required by law to service thousands of kilometres of unprofitable railway lines in rural areas, many of which were in Atlantic Canada (Forbes, 1993: 510; Crosbie, 1997: 286-87). The deregulation of the industry would allow the companies to pursue more profitable operations in other parts of the country, as was amply illustrated earlier in the year when Ottawa denied CN’s request for federal funding for a \$5 billion expansion into western Canada. Notably, this rejection was based partially on the company’s continuing financial woes — specifically, the \$40 million a year it lost on operating the Newfoundland railway. However, as the company was mandated under the Terms of Union to operate the railway, it could not unilaterally shut the line down (*Daily Graphic*, 1986). Coincidence or not, it is with this back-drop that Peckford began facing pressure from the province’s federal representatives. First, Tory MP James McGrath told Peckford publicly to “stop dithering

on the subject [the railway] and strike a deal for improvement of the province's highways, including turning the double lane TCH into a four lane route across the province" (*Evening Telegram*, 1986a). More importantly, however, the province's regional minister (and then federal Transport Minister), John Crosbie, went on the record declaring that the province needed to think more about the idea of a railway closure given the "deplorable" state of the province's road system and of the "finances of the government of Canada" (*Motor Truck*, 1986). Notably, Crosbie's comments came on top of news that Peckford had been offered upward of \$1 billion in benefits from Ottawa to abandon the railway (*ibid.*).

By June of 1986 Peckford was admitting that he was in negotiations with Crosbie and Deputy Prime Minister Mazankowski but that they had been offering "unacceptable alternatives" (*Evening Telegram*, 1986b). Still, he declared that he was open to the idea of an acceptable offer assuming that the federal government met several conditions, including the provision of a "substantial amount of money" that would be used to make "significant improvements" to the TCH and secondary roads, in addition to a "fair chunk of change" to diversify the economies of the railway towns of Port aux Basques, Corner Brook, Bishop Falls, and St. John's (*ibid.*). But Peckford's refusal to accept anything less than \$1 billion for agreeing to abandon the railway led to an impasse. In response, the federal government announced a \$36.4 million reprieve to keep the railway operating through 1987 (Yaffe, 1986; *Edmonton Journal*, 1986).

While these discussions were happening, the provincial Opposition Leader, Leo Barry, was issuing press releases calling on the provincial government not to be "blackmailed" into making "trade-offs for [the] Newfoundland railway" (Barry, 1986a). Barry included in his press releases quotes from Premier Peckford affirming that the railway would stay, that the Newfoundland railway was a "sacred trust," and that it was "a right under [the] Terms of Union with Canada and not linked with possible federal spending on needed highway improvements" (Barry, 1986b). Barry noted that "the Peckford Government has undergone a conversion of some strength on the [railway] issue" and had pointed out numerous instances when Peckford cabinet ministers called on federal MPs to reaffirm Canada's constitutional obligation to operate a railway in the province (*ibid.*).<sup>5</sup> Furthermore, Barry summarily tied those remarks to comments Peckford made on 6 May 1986 that "it is very, very dicey as to whether we could make these solemn promises [the Terms of Union] hold-up constitutionally in the Supreme Court of Canada" (*ibid.*).

Despite the ongoing negotiations and Opposition press releases, debates in the House of Assembly on railway abandonment were led by Opposition

members and not the government. An example of this occurred in March 1988 when Transportation critic David Gilbert presented a private member's motion arguing that the House of Assembly recognize the railway as a constitutional obligation; that the federal government "failed to properly discharge its constitutional responsibility to maintain the Newfoundland railway"; and that the railway be shut down on the grounds that the federal government must meet a number of conditions including a new constitutional obligation that Ottawa "pay the capital cost of twinning the existing Trans Canada Highway across Newfoundland" (Hansard, 10 Mar. 1988: 39-40). Gilbert would also argue that the "most important matter" his motion raised was that the "rights guaranteed in Term 31(a) of the BNA Act, are not bartered away for a lump sum payment," for such a move would only bring "short-term gain for long-term pain . . . [for what is] entrenched in the BNA Act is a guarantee that the federal government will pay for the cost of a transportation system for the Province of Newfoundland" (Hansard, 16 Mar. 1988: 127-28).<sup>6</sup>

Government response to the Opposition motions and questions was often in the form of denial. For example, Norm Doyle, the provincial Minister of Transportation, in response to Gilbert's motion argued that there was no deal in place and that the province would not forfeit the rights "accorded Newfoundland under those Terms of Union" (ibid: 131, 136). Most notable during these debates in the months leading up to the agreement were Peckford's comments, particularly during Opposition questioning in late May 1988 when he declared that "our legal advisors and others, constitutional advisors, tell me we do not have a very strong constitutional or legal position" (Hansard, 31 May 1988: 2475). He further responded that while no agreement was in place he had never denied having had negotiations with the federal government (Hansard, 3 June 1988: 2661).

One month after the deal had been signed an article in the *Oshawa Times* (Oosterom, 1988) summarized the agreement. The *Times* spoke of Premier Peckford's 1979 train ride from Whitbourne to Bishop Falls, in which he rallied railway workers with the words, "This railway must be made to work and grow," backed up by a verbal threat to take legal action to force CN to modernize. As Oosterom noted, the 1988 Roads-for-Rails deal amounted to "a remarkable about face" (ibid.). In regard to the Terms of Union, Oosterom wrote that Peckford had in previous times agreed that Term 31(a) meant "Ottawa [was] responsible for the costs of Newfoundland's portion of the national transportation system," but after declaring he had "done his homework" he decided that "court action was a waste of time" (ibid.).

## ROADS-FOR-BOATS

Unlike the Roads-for-Rails agreement, the coastal ferry transfer received less media coverage and near-zero public and legislative debate. Officially labelled the "Labrador Transportation Initiative," the Roads-for-Boats agreement was signed on 3 April 1997. In exchange for not having to operate the Labrador coastal ferry service, as stipulated in Term 31(a), the federal government gave the province a \$340 million lump-sum payment to be used for road construction. However, unlike the abandonment of the railway, the Labrador ferry service was transferred to the province. As such, a \$150 million portion of the \$340 million payment was allocated for operating the ferry service in addition to the transfer of all assets. Similar to the railway deal, a separate severance package, worth \$17 million, was provided to the estimated 250 employees laid off once the agreement came into effect. The remaining money, \$190 million, was to be used to upgrade an existing highway between Churchill Falls and Happy Valley-Goose Bay, plus the building of additional roads that would connect several coastal Labrador towns to the main highway at Red Bay (Cleary, 1997: 1).

Like the railway, the coastal ferries had become a necessary part of the province's transportation infrastructure due to the lack of roads built during the pre-Confederation era. Importantly, as the marine services of the new province had been owned and operated largely by the railway, the federal government found itself, as per the conditions of Term 31(a), with the responsibility of servicing these routes. As the Labrador region lacked any sort of road or rail infrastructure, the coastal service remained a crucial lifeline for the many communities dotting its coast. Moreover, the service provided a continuous communication and economic link between Labrador and the island of Newfoundland. Although initially operated by CN, the marine service was transferred to another Crown corporation, Marine Atlantic, in 1986.

The move towards ending federal involvement in the coastal ferry service began in the early 1990s. At that time Marine Atlantic was spending \$25.5 million a year on the Labrador coastal service in addition to the \$30 million to \$40 million a year it used on the Newfoundland-to-Nova Scotia ferry service. Nonetheless, the company was losing \$4 million a year on the Labrador ferry as its usage declined and suffered competition from private air carriers (Doyle, 1995: 8). During this period, public discussions began on transferring the ferry service to the province in exchange for road construction money (and the promise of hundreds of jobs with it) to complete the Trans-Labrador Highway (TLH) (MacKenzie, 1993). By 1994-95 Marine Atlantic was scaling back its services to

Labrador as both freight and passenger traffic continued to decline. Consequently, local politicians and business groups, particularly from Liberal MP Bill Rompkey and the Labrador Transportation Committee (a collection of regional chambers of commerce), called for the provincial government of Liberal Premier Clyde Wells to make a deal similar to the 1988 Roads-for-Rails agreement and swap the ferry service for highway cash (Pomeroy, 1994; Doyle, 1995: 8).

By 1996 Wells resigned and was replaced by Brian Tobin, a popular federal Fisheries Minister and close associate of Prime Minister Jean Chrétien, who had made his mark in the turbot standoff with Spain the previous year (Harris, 1998; Tobin, 2002; Goldenberg, 2006). After a few months in office Tobin's government announced a "Labrador Transportation Initiative" (Bettney, 1996). The document stated that negotiations between the federal and provincial governments had already started "with a view towards developing a partnership on the issue" before the year was out. Notably, the document concluded by arguing that highway development in Labrador could only proceed once the provincial government accepted responsibility for operating and maintaining the Labrador coastal services and support infrastructure in exchange for "sufficient" federal funds (*ibid.*).

Following that announcement there would be no more news from either the government or the press on the Labrador Transportation Initiative until the day the deal was finalized in April 1997, during the Easter holiday. Likewise, there was no debate in the House of Assembly on this proposal in the lead-up to the announcement. In his speech during the signing Tobin declared that the agreement represented the "successful completion of negotiations between the province and Ottawa on the transfer of responsibility for [the] Labrador coastal boat service" (DWST, 1997). Tobin invoked the 1988 deal as the framework upon which the 1997 agreement had been made: "Just as in the Roads-for-Rails agreement, we intend to see that every dollar is used to build the TLH, and to maintain necessary ferry services in Labrador" (*ibid.*).

## ANALYSIS

The application of the Roads-for-Rails and Roads-for-Boats agreements to the theory of executive federalism provides further insight into the province's relationship with its federal counterpart. First, regarding the role constitutional frameworks play in shaping policy discussions and results, the absence of any words on interpretation in the Terms of Union is of note. As detailed above,

this absence created enough ambiguity for both governments to agree that Ottawa did not have to operate the trains and boats in perpetuity. In his 1983 personal manifesto, *The Past in the Present*, Premier Peckford seems to have tacitly acknowledged this fact when he stated that the federal obligation under the Terms of Union was simply to maintain the railway and that changes could only occur with the “consent of both parties” (Peckford, 1983: 75-76). Premier Tobin, however, in his own personal reflections on the Roads-for-Boats agreement, indicates that the federal government “was committed under a constitutional agreement to maintain the service in perpetuity” (Tobin, 2002: 201). Regardless of his dubious explanation, the reality is that the Terms governed the type of deals that would emerge; for although there was no wording requiring a permanent federal obligation to operate the trains and boats, Ottawa could never unilaterally withdraw its support from these services.

With the railway and coastal ferry service being maintained under the mandate in Term 31(a), the province had to be financially relieved from operating its trains and boats. Therefore, the federal government was implicitly bound to provide monetary compensation to Newfoundland upon agreeing to abandon the railway and transferring the coastal ferry. This point is amply demonstrated in Peckford’s comments during the signing of the ‘Roads-for-Rails’ deal:

We have assessed the legal intent and obligations imposed on the federal government by the Terms of Union. It is clear that the Government of Canada does not have a legal obligation to operate a railway in Newfoundland forever. *We have always felt, however, that the federal government does have an obligation to ensure that there is a viable transportation system in this province.* This agreement today constitutes our mutual recognition that this comprehensive transportation package meets that obligation. (Cited in Monahan, 1991: 867; author’s emphasis)

Premier Tobin, in his own memoirs, echoes a similar tone:

We approached Ottawa with a proposal: instead of providing the inadequate seasonal ferry service year after year, Newfoundland would build a coastal highway serving the same communities. The province would release Ottawa from its constitutional obligation to operate the ferry service in return for the transfer of a one-time-only lump sum of money to Newfoundland to pay for the road construction. (Tobin, 2002: 201)



In this sense the 1988 and 1997 agreements can be said to represent examples of what Simeon (2006) referred to as “*de-facto* constitutional” changes; there was ambiguity in a constitutional provision — namely, how to end federal involvement in Newfoundland’s transportation sector — so both levels of government agreed to an alternative: swap the services for lump-sum cash payments. In this regard, both agreements reinforce O’Flaherty’s (2009: 9) statement that the Terms of Union “can govern the overall behaviour and policy development between federal and provincial governments.” In addition, these agreements highlight the fact that, now, the purpose of the Terms are to serve as a “means to an end for policy development and resource allocation,” given that original *raison d’être* of the Terms — that Newfoundland be incorporated as a Canadian province — has been completed (*ibid.*, 10). Finally, in regard to the legality of these agreements, while it is a basic principle of constitutional law “that one government cannot bind another to a decision without a constitutional amendment,” this ignores the fact that the “federal government has never been under a constitutional obligation to maintain or operate the Newfoundland railway...The absence of any requirement to maintain the service means that there is no constitutional objection to a decision” to close down the railway and transfer the coastal ferry service (Monahan, 1991: 867).

In a similar vein, the use of an “agreement” to get around constitutional ambiguity points to Cameron and Simeon’s (2002) collaborative federalism sub-theory of executive federalism. While these authors suggest that collaborative federalism began as a response to deep federal cuts in the 1990s, the cases examined in this paper suggest that this form of policy-making occurred as early as the mid-1980s with the Mulroney government’s deregulation of the transportation sector — before the Chrétien government’s “secondary down-loading” of federal services to the provinces in the 1990s. In both the 1988 and 1997 agreements the province was left with a greater degree of responsibility for maintaining its own transportation network, particularly its highways. Likewise, these cases point to an earlier observation in this paper on the intersection of national policy goals — deregulation and deficit cuts — with a constitutional stricture that can result in a *de facto* constitutional change. Moreover, and especially in regard to the railway, this form of agreement also allowed both parties to avoid a costly court challenge. This much was admitted by Peckford during his debate with Opposition Leader Leo Barry in 1986, when he stated that it would be “very, very dicey as to whether we could make these solemn promises hold-up constitutionally in the Supreme Court of Canada” (6 May 1986).<sup>7</sup>

Savoie's description of "court government" is also worth mentioning. As Savoie (1999: 639) notes, Chrétien was known to have preferred dealing with premiers one on one, bypassing and, indeed, often sidelining his own appointed regional ministers. Chrétien and Tobin had a close relationship, given the latter's performance in cabinet as Fisheries Minister during the PM's first term (Harris, 1998; Goldenberg, 2006). As such, Tobin would often negotiate directly with the PM and the PMO rather than through the province's regional minister, Fred Mifflin. While Tobin, in his memoirs, does not mention specifically asking the PM or his advisers about negotiating the Roads-for-Boats deal, he does discuss having negotiated with Ottawa directly, with no mention of Mifflin as part of the conversation (Tobin, 2002). If additional experiences are worth anything, it is notable that in 1998, a year after the boat deal, Tobin was appealing "directly to Chrétien, rather than Pierre Pettigrew — the relevant minister at the time — to speed up the post-TAGS (The Atlantic Groundfish Strategy) planning and increase the [federal] financial contribution." Neither the cabinet nor the Finance Minister, Paul Martin, was consulted on these changes (*ibid.*, 640).

The opposite was true in the 1988 Roads-for-Rails deal. In that case John Crosbie, the federal Transport Minister and regional minister for the province, dealt directly with Peckford on behalf of Ottawa, a role he carried out throughout his term in Mulroney's cabinet no matter what department he led. As such, at one level, these two agreements highlight how more subjective factors, first identified by Bakvis (1991), can shape the roles regional ministers play in federal-provincial relations. For one, some ministers become "unusually prominent because they have both the will and the capacity to cultivate the role of regional spokesperson," as was the case with Crosbie and Tobin. Second, there is the "broader role played by the Prime Minister . . . [as] the Prime Minister determines the allocation of portfolios to individuals" (*ibid.*, 288-89). However, the PM is always "constrained by what the election results bring forward in the way of raw material, particularly from the regions," and "the material is often far from adequate" (*ibid.*). Thus, the inference that can be made from the 1997 deal is that Mifflin, with a much "smaller-than-life" personality and a smaller pedestal (Veterans' Affairs versus Transportation and Fisheries and Oceans), played a more minor (indeed, if any) role in federal-provincial relations during Tobin's tenure as Premier.

Finally, Menzies's (2012) summary of the often "closed-door" nature of executive federalism is evident in the two cases examined in this paper. With both agreements the provincial Opposition and, more importantly, the public were largely kept in the dark on the federal-provincial discussions leading up

to the deal. This was particularly noteworthy with the Roads-for-Boats agreement, which warranted no attention in the House of Assembly by the Opposition and for which discussions largely occurred out of the limelight of the media (it was also unveiled over the Easter weekend, when the House was not in session and the public's attention was directed elsewhere). While it is true that such agreements lack decision-making rules and transparency, Menzies (*ibid.*, 2) argues that the public expects its political leaders to work around constitutional constraints. In both cases, public opposition was mute once the agreements were made. But with most Newfoundlanders and Labradorians commuting by car (especially after the building of the TCH in 1965), there has been, and always is, a desire — as in most other jurisdictions — for more government investment in road infrastructure. This was particularly demonstrated in Labrador by the advent of a grassroots advocacy group calling on the provincial government to exchange the ferry service for Trans-Labrador Highway money. It was also notable in Prince Edward Island when that province, with federal agreement, determined to give up its railway and the ferry service to New Brunswick for a permanent fixed link.

## CONCLUSION

The Roads-for-Rails and Roads-for-Boats cases demonstrate that much potential exists for further research on executive federalism in the province regarding a variety of issues and services, particularly natural resources such as oil and gas, hydroelectricity, and the fishery. An examination of executive federalism surrounding the Churchill Falls agreement in the 1960s, building upon the work of Jason Churchill (1999), and in relation to the Atlantic Accord, in 1985 and 2005, would be particularly valuable from a comparative perspective, particularly in light of today's debates surrounding the Muskrat Falls hydro development. Moreover, a comparison with PEI's deal with Ottawa to abandon its railway and ferry for a fixed link, the Confederation Bridge, would also represent a fitting comparative study with Newfoundland's agreements.

However, given the 1988 and 1997 deals, it is worth asking what the future is for the one remaining federally operated transportation service in the province still mandated under the Terms of Union: the Nova Scotia-Newfoundland ferry service. While mandated under Term 32, instead of Term 31, the ferry is ostensibly protected on the wording that "Canada *will maintain* [author's emphasis] in accordance with the traffic offering a freight and passenger steamship service

between North Sydney and Port aux Basques,” a phrase that was never included in the Term covering the railway and coastal ferry (May, 2003). Still, this did not stop Premier Tobin, during a Marine Atlantic labour dispute with Ottawa in 1999, from publicly positing that the federal government should transfer the Gulf ferry service to the province in exchange for a one-time cash payment (“we would need a very substantial dollar sum upon the table,” Tobin was reported to have said) (Sweet, 1999: 1). The resulting public backlash in the press over this issue saw Tobin backtrack from his comments, but nevertheless this example may point to another issue worth examining: the role of what wider civic society may see as an important public interest and how this may impede or facilitate executive federalism. If there is a demand for a certain service or arrangement (such as new highways or better roads), then the public will be more likely to let its political leaders, as Menzies (2012) suggests, work around constitutional strictures in order to make effective deals (as can be demonstrated with the Roads-for-Rails and Roads-for-Boats deals). However, if a proposed deal involves an agreement that could possibly alter a service or provision mandated under a certain constitutional document that the public largely holds in high value, then there will be little support for a deal brokered through executive federalism.

Again, these questions point to the fact that much research remains to be done on executive federalism within a Newfoundland and Labrador context. While this paper has provided a political science perspective on two such agreements, more research is required to identify what trends and dissimilarities exist in such arrangements and what this means for the province’s place in the Canadian federation.

## NOTES

- 1 Special thanks to Scott Reid for his encouragement, helpful suggestions, and insight. Additional thanks to the anonymous reviewers for their input, and to Jenny Mason for her love and support.
- 2 For the sake of simplicity, Newfoundland and Labrador will henceforth be referred to as Newfoundland.
- 3 Most crucial were cases brought before the Federal Court and the Supreme Court of Canada in respect to the PEI and BC Terms of Union. In both cases, *BC (AG) v. Canada (AG)*, [1994] 2 S.C.R. 41 and *PEI (Minister of Transportation and Public Works) v. Canadian National Railway Co.*, [1991] 1 F.C. 129, the respective courts ruled, on the basis of a strict interpretation of each province’s Terms of Union, that the federal government was not obligated to operate a railway in either province in perpetuity.

- 4 Also noteworthy, as cited by Monahan (1991: 858), is the 1949 federal Order-in-Council authorizing Canadian National to “operate the railway on condition that ‘such management and operation shall continue during the pleasure of the Governor in Council and be subject to termination or variation from time to time in whole or in part by the Governor in Council.’” Thus, in Monahan’s words, “The absence of any such requirement in the 1949 Order in Council indicates that the government of the day did not believe that it had any constitutional obligation to ensure the perpetual operation of the railway.”
- 5 Of particular interest, Barry highlights a letter written by Education Minister Lynn Verge to then MP Brian Tobin on 22 April 1981 asking, “Will the Federal Government honour its promise to Newfoundland at the time of Confederation, set out in Terms 31 and 32 of the Terms of Union, assuring the operation of the Newfoundland Railway and the subsidy of the Port aux Basques-North Sydney Gulf crossing?”
- 6 The BNA Act, 1949 (see References, under British North America Act) and the Newfoundland Act, 1949 are different names for the same enactment that brought Newfoundland into Confederation.
- 7 Of interest in this context are Peckford’s previous failures, in the early 1980s, at using court challenges over the Churchill Falls contract and offshore oil jurisdictional claims.

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