THE CONSTITUTION

MOTION FOR AN ADDRESS TO HER MAJESTY THE QUEEN—
DEBATE CONTINUED

The Senate resumed from yesterday the debate on the motion of Senator Perrault that an Address be presented to Her Majesty the Queen respecting the Constitution of Canada.

Hon. Royce Frith (Deputy Leader of the Government): Honourable senators, pursuant to what we might call the "Roblin formula", is it agreed that we now proceed to Order No. 4? If Senator Roblin does not want to accept the credit for it, then I will.

Senator Perrault: The "Flynn initiative."

Senator Frith: Is it agreed that we now proceed to Order No. 4?

Hon. Senators: Agreed.

Hon. Heath Macquarrie: Honourable senators, I appreciate this invocation of the "Roblin formula." It may be a hazardous formula, and referred to as such only this once.

As honourable senators may know, or at least one or two may recall, I have spoken at an earlier stage of this constitutional discussion—that is, when we were considering the establishment of the special joint committee on November 3. I will not, of course—because it would be unparliamentary, impolite and rather stupid—repeat anything I said in those days, and because I assume they will all be remembered. The one thing I will not guarantee, however, is how long I will speak.

Senator Perrault: Is that your speech on the desk?

Senator Macquarrie: Yes, those are my rough notes. Since that event of November 3, some new element has entered into this procedure. The other day I read that one of the joint chairmen of the joint committee told the press that the parallel debate is expected to be shorter and more peaceful in the Senate than in the House of Commons. The committee joint chairman, Senator Hays, said, "Our people are pretty well in favour of the package and, seeing that we are a long way from the bathroom facilities, and considering the age of those in the opposition, we will whip them pretty fast."

That causes me to be careful. I look at poor old Senator Nurgitz over there; I look at this decrepit seatmate of mine, Senator Balfour; and then, of course, upon the venerable Senator Murray, and I wonder in what kind of a group I have been placed, considering, as I must, that we must face that beardless youth, Senator Hays, over there! His comment may have been interesting, but it was not particularly elegant and I am not even sure it will go down as dry humour. However, in case there is some organization, some Hays' office which gives credit to members who can sit in the chamber for long periods of time, I should like it to be recorded that I have been here now for 78 minutes waiting while my diligent colleagues sought—in vain, mostly, may I say—to get an intelligent response from the government. I have at least one bar to whatever medal I may receive from Senator Hays.

However, even more important than this situation, which is not always trifling, I wonder if we should not carefully reflect on what has happened, not only since my momentous speech, but since this Constitution debate, in its early phase, began. What has taken place in the intervening weeks? Are there developments upon which we can reflect which might change the attitude, not only of myself but of other Canadians and of senators and members of the other place?

A good deal has happened since November 3, honourable senators. The committee was duly established and it will be recalled—and I do not wish to be chauvinistic or boastful, but we must recall, in fairness, that this side of the house, this small group of gallant senators, did help in the formation of that committee, its composition, and its procedure. This group was effective, and it is to its credit that it was.

Some Hon. Senators: Hear, hear.

Senator Macquarrie: The government reversed itself and allowed TV cameras in to permit the people of Canada to see the proceedings. They did observe in great numbers, and that is to the credit of the Canadian people and perhaps to the surprise of some politicians. I believe the ratings were very good—some were stars.

While waiting for another speaking engagement in Charlottetown a few weeks ago, I turned on the television to see my parliamentary brothers. I saw my good friend, the Honourable Bryce Mackasey, during one of the wrap-up sessions—as Senator Tremblay will remember—speaking about the fact that he had never served on a joint committee before and had never tackled these problems of parliamentary matters with members of the Senate. He said that the people of Canada were very fortunate to have the parliamentarians from this particular body. He said that one aspect of constitutional reform he had abandoned after his experience on the joint committee was the suggestion of a reformed or altered Senate. I was very glad I had that few minutes to watch because I agreed with him 100 per cent.

I must pay tribute to the members of the joint committee. It was a major service that they rendered, and an onerous duty that they performed. Senator Tremblay, magnificently well versed, brilliant in his exposition, combined not only the status of a great parliamentarian but also a magnificent resource person in the one being. Senator Roblin, an outstanding provincial premier, as he is now an outstanding national legislator, served on the committee. Senator Asselin, a friend of mine for many years, very knowledgeable about the country, about the world, in particular his own province, also served on that committee. I am not suggesting that only the three Conservative senators were performing well, but I do have a partiality for them. There were excellent performances by other members and I, as one who was on that committee, although not very often, thought, Calvinist though I was and am, that it was a tremendous burden that these permanent members bore. There were endless, long meetings and, sometimes, I would say, tedious meetings.

• (1510)

Because of the good manners and the good procedures of the committee, the night Honourable Angus MacLean presented a most excellent, reasonable and helpful brief, I had the honour of asking the first question. All the sessions which I was able to watch on TV or in person made me very proud of our people, our Senate and the House of Commons.

These three were supported by those of us who were invited from time to time. I remember one particular day when the Conservative staff were so concerned that our strength be maintained that Senator Yuzyk and I figuratively landed in the same chair. There was no serious incident, but we all agreed that the committee was magnificently manned that day! It had supernumerary strength.

Our leader, Jacques Flynn, was supportive and inspirational throughout. Behind it all, there was someone else from my party who gave strength and direction. He has given it not only since November 3 but since this matter was first brought, in its new form, to the Canadian people by the Prime Minister. I refer to a man who is often underestimated, and examined for trifling things and overlooked for major things. I am speaking of the Right Honourable Joe Clark, the Leader of the Official Opposition.

Some Hon. Senators: Hear, hear.

Senator Macquarrie: Those in this vain profession of politics do not like to confess the slightest portion of fallibility, but I was concerned that the leader of the party, Mr. Clark, was being a bit too strong in the position he took in October. I did not think he was wrong, but I thought perhaps his emphasis was a bit strong. I have been proven wrong and he has been proven right, because what has happened in the intervening months has shown that his perception was sound. We used to read that one of the most important people in all this was not the Prime Minister of Canada or the Minister of Justice, but the Premier of Saskatchewan, that he was uniquely qualified to be a catalyst and an outstandingly perceptive interpreter, and that his support was absolutely the *sine qua non* of a proper solution.

Senator Frith: We used to say the same thing about Judas.

Senator Macquarrie: He troubled himself for months, from Regina to Ottawa to Honolulu. This Hamlet of the prairies took month after month, almost a full gestation period, to come up with something. He came up with the exact view which the Right Honourable Joe Clark arrived at after 90 minutes of consideration in October.

Some Hon. Senators: Hear, hear.

Senator Macquarrie: I will not criticize the Premier of Saskatchewan because I do not know him at all. Therefore, how could I dislike him. Also, he is a maritimer so he cannot be all bad. However, I have noticed that there is a great deal of foolish image-building taking place. I wonder if he might not be an example.

But more important than the conversion of the odd Saul as he traipses along to Honolulu instead of Damascus is what has happened to the people. I am one of those Conservatives who reads the Gallup polls, usually with a great deal of pain and always with a bit of fear. However, I see that now the public opinion polls are also reading the issues as did the Leader of the Opposition. That fact should be entered into the evaluation of who today is significant, who is indispensible and who, in fact, is possessed of the qualities of leadership.

It has been a long process, honourable senators. There has been a multitude of briefs and a variety of suggestions. But I still wonder, and I say this with trepidation in the presence of hardworking committee members such as I see here—Senators Lamontagne, Roblin and Tremblay—whether, in fact, even yet, there was enough examination, enough discussion. I am not a father of the church so I have no right to ask for confession, but if I asked how many senators here read every word of the briefs, would I have an overwhelming crowd saying yes? If there were, I would not be in it because I did miss one or two paragraphs.

Despite the dedication of the committee, their hard work and the changes—and some of them are probably improvements—are we really through? Is the job done? Have we analyzed and scrutinized or reflected sufficiently? I heard my old friend, Senator Denis, speak the other night. I have a great regard for him because he very often hits the nail on the head. I know that he feels that people have had enough and would like to get it over with. That is a human reaction. If I could ever get to the stage where I would never hear the foolish words "the feds" again, I would be very happy. It is a most disgusting expression which now fills the mouths of our pressmen and sometimes our politicians. There is that tendency.

However, if we were to think a little more on the matter, I believe we would conclude we have not, in fact, finished the job. I am not suggesting that the committee did not discharge its mandate; I refer to the job of the country. I thought from the beginning, and I am more convinced than ever, that we should send nothing over to the United Kingdom but the first page or two, and that we should ask for nothing but repatriation, which is the proper word, and an amending formula. I have thought all along that these other inclusions should be left here, and that they require more profound, serious and sustained study.

It has been my view, and I do not know who else has had the same view, that somewhere along the line we should have turned this matter over to a constitutional convention and allowed the government to make an effort to govern. We should have put this matter on the kind of process which we once used in the old days, when it was safe to throw out the expression "royal commission". But a constitutional convention would be much more important, much more carefully structured and much more thorough in its job.

I do not believe that we have finished. Am I the only one who hears murmurings of dissatisfaction? Are the native people satisfied with regard to their interests, their claims, their anxieties and their fears? They are not. How is it viewed in the Province of Quebec? Outside the federal Liberal Party, I cannot find people there who say that this has been well done

or that the essential values of that province have been looked at, guaranteed or indeed properly understood.

Just the other day the St. Thomas Aquinas Society expressed the concern of the Acadian people, and I am sure that my colleague, Senator Fournier, knows that very well. Today, a spokesman for the francophones outside Quebec expressed concern and dissatisfaction. And need I mention what the women said with great clarity and very definitely?

Do we have to confine ourselves to these select groups? The six opposing provinces were joined today by the seventh most senior province of them all, Nova Scotia, which had the first legislative assembly in this country. I cannot exactly describe the position of Saskatchewan, but it is certainly not for this package. The premier of that province is certainly among the premiers who are the nay-sayers. Eight out of 10 provinces certainly strikes me as a fairly formidable negative expression.

So there is reason for pause, for thought and for the people to ask: Despite all the hard work of these very fine people, is the job done? Do we put on a forced draft and closure in certain places and rush that thing over to the United Kingdom so there is some personal satisfaction for some individual?

But more important even than the premiers is the public. As I read and try to understand the samplings of Canadian public opinion, I must conclude that the people of Canada are repelled by the processes which have been put in vogue to bring about a Constitution for this country. It is small wonder that the Prime Minister of us all, the leader of all the Canadas, invokes a highly unappealing suggestion when he says, "Let them hold their noses and take it." Is this a great occasion on which to build a new Canada? Is that an atmosphere through which we pass?

I hear people talking about it being an historic occasion. There have been some fine speeches and some exceptionally fine speeches, but not all the oratory from Demosthenes to today can make of a bad situation a glorious occasion. Why are we here? Why is the public negative? Why are the other jurisdictions distressed? It is simply because a few very basic and early detected things have continued.

● (1520)

None of the reasons for this attitude comes as a surprise. They are very simple. They have been talked about with strength and with vigour and with clarity. There should be nobody in the country surprised. First, of course—more poignant today than when the debate began but clearly there when the debate began—is the usurpation of authority by one level of government in areas which are not its alone. It is as clear as crystal. That is the reason.

Some Hon. Senators: Hear, hear.

Senator Macquarrie: It may be quaint for me to mention the British North America Act, but I do. It did certain things. In 1867 the British North America Act gave the provinces the right to amend their constitutions, saving one thing, and that is the office of the lieutenant governor. The federal authority suffered for a good many years before it had an equal right, and it was not until 1949, B.N.A. Act No. 2, that the federal government received the right to amend its Constitution in those matters which were clearly and exclusively federal.

Young though I was, I can remember vividly Prime Minister St. Laurent talking to the people on radio. He said it was as if there were two families living in two apartments under one roof. He did not say "in a duplex," because that was not a term in vogue then, but he said "living in two apartments under one roof." He said that one had the right to make any redecorations or alterations it liked without any consultation, while the one adjoining had to make consultations and had to check with the landlord. He said, "We have straightened out that anomaly. We have made them equal in that regard."

So as of 1949 the federal authority has the right to what is exclusively federal; since 1867 the provincial authorities have had the right to those things which are exclusively provincial. Clearly and definitely, without having to be an LLD or a bachelor of jurisprudence to perceive it, what is left is shared by the two, and neither the provincial nor the federal can unilaterally move into those which are left. And there are a lot left. Of course, there are a lot left. In a federal society and a dynamic society there are bound to be a lot left, and when you find one level of government moving in on those, naturally, trouble is bound to follow.

It is not only the lawyers who can see where we are today. This failure to recognize, or, perhaps putting it more bluntly, this unwillingness to admit, has caused our anguish; has brought about stalemate. Would any Canadian be happy to see the provinces taking the federal government to court? That would be an invidious situation.

I am not one of those who believe the provinces are supreme. I am not a bleeding-heart provincial-rights man at all. But more important than anyone's preferences is the preservation of the federal state, which requires two jurisdictions recognizing each other's right to hold those jurisdictions.

Hon. Senators: Hear, hear.

Senator Macquarrie: That is the thing. In the face of this tension, this disruption, what, surely, is the role of the leader of a federal government? Is it to make these matters worse or is it to assuage them, to diminish the tensions? Which, now, of these courses would be the more likely, if he wanted to build a strong, united country? To ask the question, immediately dictates the answer.

But our trouble today is that the person with the most authority has exactly the opposite idea. He does not want to go down in history as the great conciliator. He wants to be, and is being, the great exacerbater.

Don't ask for my interpretation. Senator Olson was talking about interpretations, but I would not presume to interpret the Prime Minister of Canada. I go to what he himself said. I read from an article by Iain Hunter, *Citizen* national editor. This article appeared in the *Citizen* on February 20:

> Prime Minister Trudeau admitted Thursday he is dividing Canadians by pushing through his constitutional reforms.

He's not sorry about it, he declared—in some cases he finds it "exhilarating."

Exhilarating!

Trudeau told more than 200 cheering Liberal supporters that if the country breaks apart in five or 50 years because of his unilateral action to patriate the constitution with an entrenched charter of rights and his own amending formula, "then I say it wasn't worthy of living another day."

Trudeau also said he would "relish" an election on the constitutional issue after patriation in one to four years . . .

He boasted he had "managed to split" both Conservatives and New Democrats in the Commons "down the middle" on the issue.

Down the middle! I think in the House of Commons there are 102 Conservative members, and one has voted for the package. Now that is the middle. But is "relish" what we want? "Relish" and "division"?

Honourable senators, let us reflect on that. Is that the role of the Prime Minister? It is, of course, up to the Prime Minister to enjoy what he likes; to have his views. He is a man who has already made his mark in history. There is no doubt about that. History, of course, will make its final appraisal of him, on how at this crucial time he measured up. All I can say is that I am glad that in the formative years of this country John A. Macdonald had a different view from that. His idea was that you diminish these differences rather than exacerbate them. And he was called the great conciliator.

I cannot find in history any great leader of this country, in the Dominion, who found divisiveness exhilarating—or, if he did, he didn't say so. Our leaders believed that in their role as Prime Minister of the whole country they had a special responsibility for holding that country together. In that, these former Prime Ministers were far closer to St. Ignatius, the Bishop of Antioch, who said, "Shun divisions as the beginnings of evils." That is just to show you that a Presbyterian can toss out the odd saint from time to time. I don't want to start a theological argument, but it was the Bishop of Antioch, Senator Roblin. You are correct.

Now I would like honourable senators to know—and it is not for Senator Hays' reasons—that I will not lay about on all the issues I can think of, but the second one of immense importance to me is that in what might appear as a seemingly contradictory thing, that having usurped the authority of the provinces in their legitimate fields, the same government has done quite the opposite in a contradictory turn, having laid upon the British government and Parliament unwanted responsibility, giving them a far greater role than they desire or deserve, or possess in fact.

From the very beginning—and that is the one thing I do repeat from November 3, because the attitude has not changed—from the very beginning I felt humiliated that another Parliament was doing what should be done in the parliamentary institutions of my country. That must hit any thoughtful Canadian as the first and most undesirable aspect of the whole operation. In our free and sovereign country we have a foreign Parliament doing what they wouldn't do in 1868, and being asked to do it by our government.

Shame, I say! Shame! I was humiliated before and now I am burdened by vicarious shame. It is not enough to have my own country torn by strife, region against region, province against province; rancor increasing, disagreement abounding. We have to carry that on to the international scene now, and be seen as fools by the international community.

What an exercise we are going through in this process. Is anyone in Canada proud of all this leaking of documents? The leakage would make Niagara look like a timid stream. If you are leaking all over the place, at least the sprinklers aren't working and probably something else is far worse. Contradiction after contradiction. Somebody laying blame for what some other fellow did not say in a secret document, and then someone exposing what he said to someone else who did not say it. Someone going across the Atlantic this way, and someone going across that way. "We did say it." "We did not say it." "We only talked to her for seven minutes, and made it all clear."

• (1530)

How degrading! How embarrassing! Two great sovereign countries going through a tangled web like this. Confusion upon complexity! Complexity upon a morass of indignity! All this in the name of achieving a certain document by a certain time.

Of all the weird episodes in this affair, I think that the one involving the British High Commissioner, if not the most important—which it may not be—is clearly the most ridiculous. What a furore! I cannot talk about what goes on in the other place, but that is not going to stop me from talking about what I read in the newspapers and see on television. I read and watch the media, and with respect to this matter what an awesome story I saw unfolding.

Two members of a certain political party go to Rideau Hall—usually a harmless place and a fine place—to a skating party, where, we hear, they talk to an Englishman, who later indicates he is, in fact, the British High Commissioner. He talks to them. Then these members report to their leader. They go right to the top on a matter of this seriousness. The said leader goes into action right away and also goes right to the top. He goes to the House of Commons and talks to the Secretary of State for External Affairs. "Take note of this very serious thing. This Englishman, who is actually the High Commissioner, has actually sought to influence these two men."

And what happens? Instead of being laughed at, in good humour, as we would do in this place, an investigation of this serious piece of conversational imperialism is ordered. The fearful apparatus attendant upon a state inquiry goes into its fearful process.

Senator Flynn: The fighting Secretary of State!

Senator Macquarrie: Then the verdict is handed down—not too long after, a bit faster than usual. There is no declaration of war, no severance of diplomatic relations, but what headlines this bit of conversation causes to emerge.

> 'Beyond' normal role: British envoy's knuckles rapped for interference.
>
> External Affairs Minister Mark MacGuigan pronounced British High Commissioner Sir John Ford guilty of interference in Canadian domestic affairs Monday but let him off with a suspended sentence.

There were, you see, honourable senators, extenuating circumstances:

> —because the high commissioner is scheduled to retire in a few months anyway.

What headlines! What foolish degradation! What hyperbolic poppycock the whole thing was!

I am not here to comment upon these men, who felt themselves to be intellectually assailed and their honour exposed at the skating party, which was clearly one of the most dangerous social episodes since Aunt Dinah's quilting party. Anyway, they were all upset.

I am not going to hold myself up as an example, but in my early days here, as a little lad from Prince Edward Island, when all of you were very young, I never really felt endangered on the diplomatic circuit. We know that diplomats are supposed to be diplomatic, but they do not really make much of an impression if they confine themselves to banalities and comments about the weather. I, perhaps wrongly, thought it was something of a compliment if an ambassador or a high commissioner extended to me the courtesy of his candour, to which I thought the response was supposed to be confidentiality, and that in that way you might learn something. Perhaps I was living in a fool's paradise. Perhaps I was being intellectually plundered and did not know it.

Now, I try never to be one-sided in my criticisms. I think, with all due respect, that the British High Commissioner was ill-advised to confuse the issue further by holding a press conference, and I think his own government was either absent-minded or a bit stupid to choose that particular moment to announce the name of his successor. That added to all the foolishness that was going on at that time.

It is a bizarre situation. I almost expect from time to time, to see a press conference given by the Duke of Plaza Toro, since this is clearly Gilbert and Sullivan, if not Lewis Carroll's *Alice in Wonderland*. Perhaps some good Canadian, some day, if he writes a dirty enough script, might get a Canada Council grant for it, and will do something with it along those lines. I do not suppose that what who said to whom at that skating party is at all important. As old as I am, when I go to that skating party at Their Excellencies', I tend to skate, and that surprises many there into lack of speech. I do go, though.

But what is significant here, honourable senators, is that a government would take this charade and erect it into the status of international, intergovernmental communication. That is awful.

[Senator Flynn.]

What have we in this country? This country, a charter member of the United Nations, as it was of the League of Nations. Can we imagine our former Prime Minister, Sir Robert Borden, the godfather of the Commonwealth, in the fine sense of the word, and a respected member of the international community, dealing with such tittle-tattle as this sort of thing? *O tempora! O mores!* What have we come to in our restless strivings?

In this affair, of course, the press is no better than it usually is. One remembers what Adlai Stevenson said when he spoke to the National Association of Newspaper Editors. He said, "I know you are important. It is your job to separate the wheat from the chaff and then publish the chaff." There is a lot of chaff being published. They are majoring in minors much of the time. They would never be able to behave that way, of course, if they did not have such assistance from the government.

I even read that someone thought it worthwhile to develop the hysteria about the Canadian High Commissioner in London, Mrs. Wadds—who, I hear from all sides, is an outstanding occupant of that office—and said, "She was saying that you should use the Telex for important communications." This was something new. She was charging the British with snooping. They were spying, she was supposed to have said. We all get the External Affairs telephone directory every two months, and what do we find up here in the corner? "Warning. Classified information shall not be discussed on the telephone." A news item? Nonsense. Nonsense.

To make the whole thing even broader, the Secretary General of the Commonwealth was brought in. Should Britain and Canada, after all their years of association, need an interlocutor to enable them to talk to one another? It is totally unnecessary and very, very deplorable.

This whole affair would have been avoided, honourable senators, had the British had before them, as they should have had before them, nothing but a request for patriation with an amending formula. That is the great error.

There are many things that should cause us to be concerned, honourable senators. I heard Mr. Chrétien's speech. I admire him. I like him. I think that he himself is a very sincere man, trying to do his best. He closed, however, with something that possibly revealed another little area of trouble that we get into these days. He said he wanted a Constitution for tomorrow, and a modern one. Modernity is very much worshipped in our society. Perhaps it is too much worshipped. We think that if we can just get something new—in this case, a new Constitution—everything will be all right. People who have never read the British North America Act and do not know what is in it say that we must get something new. If you ask them why, they say, "We must have something new. We must have something new for today."

I am not one of those hidebound Tories who think that everything that is old is good. I am not dancing in the streets because there is supposed to be a new Conservative push on now. I am not nearly as happy as Frank Sinatra is about the

American election. That is their business, of course. I was in the United States on a speaking tour, which just happened to end on the day of the inauguration. When I am abroad I am fairly polite, but I did have going through my mind the comment of Sir Robert Walpole when the British almost danced in the streets—you cannot expect them to get too excited. They almost danced in the streets when the War of the Spanish Succession opened, and old Walpole said: "They're ringing the bells now; they'll be wringing their hands soon." So I wonder what will happen down south. We will have to leave it to them.

● (1540)

But, honourable senators, we so often get carried away with the importance of that which is new. I would not be in this party if the word "Progressive" was not there and it was not a progressive party. But those things which are progressive, which are modern, are not always better. They are not always right. If we were a society of lemmings, the most progressive guy would be the one over the cliff first. That's who it would be. That is not a good example. So we get lost in some of these things and it sounds not terribly important. But if we combine these ingredients, and if, in an effort which is hailed as a great new chapter of our national experience, we exacerbate and extend those things which divide us; if we turn Canadian against Canadian; if we put excessive strain upon our institutions, then being modern will not be very helpful for the people of tomorrow—not at all helpful.

We must ask ourselves a question, which is: Do we really, in our innermost thoughts, believe that what we propose will make a better Canada? Not new institutions, not new names, not personal satisfaction for any one Canadian, no matter how exalted, but will it make a better Canada; has it the ingredients for improving our nation, making it stronger and more united?

We do not need anyone to encourage disunity. The elements of that have been there from the very beginning, and our great statesmen have troubled over it and tried to hold it back. On this question, I find that today I stand where I stood before: I cannot, in all conscience, in honour, dignity, or love of my country, support that which I know is inherently wrong, and I must oppose it to the end.

Hon. Maurice Lamontagne: Honourable senators, I will certainly not try to be as entertaining as Senator Macquarrie. Even if I tried, I am sure that I would not succeed. I would like to note, however, that in his defence of the provinces he invoked with great admiration the name of Sir John A. Macdonald. I am not too sure, however, if the honourable senator remembers how Sir John A. defined Canadian federalism. I have here a quote that we inserted in our report to the Senate last November. Sir John said that he wanted to join our five peoples into one nation "with the local governments and local legislatures subordinated to the general government and legislatures." I am not sure if Senator Macquarrie would accept the concept and the definition of Canadian federalism enunciated by Sir John A. Macdonald.

[*Translation*]

Honourable senators, after many others, I should like to congratulate Senator Hays and Mr. Serge Joyal, co-chairmen of the joint committee. Some have called them the "odd couple". I, for one, feel that they complemented each other and that they very successfully carried out duties that were both difficult and thankless. I should also like to thank my colleagues Senator Lafond and Senator Rousseau who so often replaced me on the committee.

This debate is indeed important, but we should not unduly dramatize it, especially in this chamber of sober second thought. On February 12, I was very glad to hear Senator Flynn urge this chamber to show reason and moderation. I have seen my country survive too many of these so-called last chances to be impressed now by references to a coup d'état which, according to some, would mean the end of Canadian federalism, and according to others, including Jean Ethier-Blais, the end of the French presence in America. I remember that in 1964, some people were saying that the Canadian flag would become a symbol of division in this country, that it represented the betrayal of Canada and the rejection of our Christian heritage. I hope that during this debate, we shall try, in this place at least, to demonstrate more serenity and moderation.

The centrifugal forces have always been strong in Canada. Almost as soon as Confederation was born, as you know, Nova Scotia favoured secession. When he started his election campaign in 1896, Sir Wilfrid Laurier spent a good part of his speech in Quebec City exposing the separatist movement and what he called then "la Laurentie". In 1935, Henri Bourassa mentioned that the four western provinces could separate and create their own confederation. About the same time, the Honourable Ian Mackenzie, from British Columbia, who was later to become a minister in the King government, stated that the separatist movement was gaining much momentum in his province. I recall these events to show that the tensions that exist today are not new, and that Canada has survived and developed despite the extreme centrifugal forces which have exerted themselves throughout our history.

I do not intend today to get into the specifics of the resolution because, except for some elements that I could probably deal with at a later date, there is a fairly widespread consensus as to the substance of the resolution. Instead, I would like to deal with the process involved, because that is what is at issue.

I shall refer in my analysis to those statements made by politicians and constitutional experts. At my suggestion, some of these were quoted last week in the other place. I do not think it would be redundant to read them into our own record.

My argument is that the resolution does not change the federal-provincial balance in a way which is unfavourable to the provinces. I do recognize however that several sections deal with provincial jurisdictions and that as such, if the resolution were presented as a bill, it would clearly be unconstitutional. But that is not the issue here.

Another question poses itself: does this unilateral action violate the Constitution or some constitutional convention? I do not think there is any constitutional provision to prevent the Canadian Parliament from passing this resolution which, in itself, has no *de jure* validity.

● (1550)

[*English*]

In other words, there is no legal requirement and no binding convention that prevents the Canadian Parliament from adopting, without the consent of the provinces, a joint resolution asking the United Kingdom Parliament to amend the B.N.A. Act, even with respect to matters affecting federal-provincial relationships or provincial powers.

The situation seems to be clear with respect to the lack of a strict legal requirement. Even in 1935, Professor W. P. M. Kennedy, appearing before the Special Committee on the British North America Act, said about the amendment process:

> —I do not think there is the slightest necessity in law for the Parliament of Canada to consult the provinces in the process. It may be very good politics, but politics is not the law. I think the Parliament of Canada can present any address to the Parliament of the United Kingdom.

Professor Norman Rogers, who became a minister in the King government, appearing before the same committee, held a similar view that consulting the provinces was not a matter of legal right, but a question of political expediency.

Professor Gil Rémillard of Laval University, although opposed to the resolution, stated before the special joint committee on the Constitution on January 9, 1981:

> In fact, you have the powers to do whatever you want as members of Parliament, as members of the two houses of Parliament of Canada.

Senator Flynn: And afterwards the Supreme Court said no.

Senator Lamontagne:

> You have the power to declare unilaterally that Canada now has a new Constitution, and I can see no legal argument that could be brought to bear to stop you from doing that.

But is there a convention requiring the consent of the provinces before an Address is adopted by the Canadian Parliament and sent to the United Kingdom? Constitutional authorities differ as to what constitutes a convention.

Professor Peter Hogg has probably expressed the prevailing view when he stated that a convention becomes established as a result of, first, a long standing invariable practice, and, second, a belief by the officials, to whom it applies, that the practice is obligatory.

The first question, therefore, is: Has the consent of the provinces become a long standing practice? Professor Gérard V. La Forest answered this question when he appeared before the special joint committee on January 9, 1981. He said:

> First, the precedents offer only limited support. A good number of amendments have been made without such consent, sometimes without consultation. It is true that there has been a strong tendency not to seek amendments altering the division of power between the two levels of government without such consent, but several amendments that affected the position of the provinces did not receive provincial consent. Even the very delicate question of the boundary between Quebec and Newfoundland was constitutionally defined without Quebec's consent. Moreover, the manner in which the consent of the provinces was expressed denotes a vagueness that even in conventions is not common, and *a fortiori* certainly not common to rules of law. Sometimes the legislatures consent—and sometimes the Premiers—and I get the feeling in a few cases that a Premier may have accepted something, but he was far from agreeing with it.

It is highly doubtful, therefore, that the seeking of the consent of the provinces has become a long standing practice. What about the second condition that there should be a belief by the officials to whom it applies that the practice is obligatory? It is true that, over the years, some officials concerned have believed that provincial consent was obligatory. But this belief was far from being unanimous. I will give a few recent illustrations to justify this statement.

In 1940, when the resolution asking the United Kingdom Parliament to transfer unemployment insurance from provincial to federal jurisdiction was debated in the House of Commons, the following exchange took place:

> MR. THORSON: . . . but I would not wish this debate to conclude with an acceptance, either direct or implied, of the doctrine that it is necessary to obtain the consent of the provinces before an application is made to amend the British North America Act. Fortunately, this is an academic question at this time.

Mr. Lapointe, who was the Minister of Justice at that time, replied:

> May I tell my hon. friend that neither the Prime Minister nor I have said that it is necessary, but it may be desirable.

Reference has often been made to a document entitled *Amendment to the Constitution of Canada*, published in 1964 by the Honourable Guy Favreau, then Minister of Justice for Canada. Such reference has usually been made in an attempt to prove that the consent of the provinces has become a binding convention. This publication, basing itself on past practices, lists four rules or principles that govern the procedure for amending the Constitution. It states:

> The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others, but since 1907, and particularly since 1930, has gained increasing recognition and acceptance.

It should be noted that the document does not say that the fourth principle has gained recognition but only *increasing*

recognition and acceptance. Those who invoke this document to prove that there is a convention often forget to mention the last sentence of the same paragraph. It reads as follows:

> The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition.

If the nature and degree of provincial participation have not lent themselves to easy definition, how can the consent of the provinces have developed into a binding convention? Finally, the document clearly indicates that this fourth principle, as well as the others, is "not constitutionally binding in any strict sense."

Senator Flynn: You were a member of the government at that time.

Senator Lamontagne: Again, that was a quote from Guy Favreau.

Senator Donahoe: Your colleague.

Senator Lamontagne: Yes, and I agree with him.

Senator Flynn: You would not have said that in those days.

Senator Lamontagne: A similar review of past practice undertaken by the Honourable Ron Basford and the Honourable Marc Lalonde in 1978 states:

> (d) the fourth observation is that, although not constitutionally obliged to do so, the Government of Canada, before asking Parliament to adopt a Joint Address, sought and obtained the consent of all the provinces on the three amendments (1940, 1951 and 1964) that involved the distribution of powers.

This view that there is no constitutional convention obliging the Canadian government to seek the consent of the provinces has been shared over the years by some provincial premiers, more particularly at the Dominion-Provincial Conference held in 1950 in another attempt to seek a Canadian amending formula. That view was then expressed very clearly by Premier McNair of New Brunswick. He said:

> —the provinces, in the final resort, are not assured of any say whatever in amendments of the Constitution, no matter how hard their interests may be affected thereby.

He went on to say:

> With these thoughts in mind, I submit that the provinces, at this stage in our constitutional development, face this situation. First, in the matter of constitutional amendments, the parliament of Canada is in effect the judge—and the sole judge—as to whether provincial rights and privileges will be affected. Second, in consequence the only protection the provinces have today against arbitrary invasion of their rights, powers and jurisdiction is the parliament of Canada itself.

● (1600)

Such statements, and others that I might quote, showing that there is not "a belief by the officials to whom it applies that the practice is obligatory", are undoubtedly the foundation of the conclusion reached by Professor La Forest before the special joint committee, when he said:

> I am skeptical about the existence of a convention . . . I am confident that it has not matured into a rule of law.

This view seems to have been confirmed, at least implicitly, by the Supreme Court of Canada in the Senate reference, when it said:

> The practice, since 1867, has been to seek amendment to the Act by a joint address of both Houses of Parliament. Consultation with one or more of the provinces has occurred in some instances.

This is not, in my view, an observation that leads to the recognition of the existence of full-blown and operative convention. The recent majority decision of the Manitoba Court of Appeal, rendered by three judges, clearly denied the existence of such a convention. A fourth judge refused to give an opinion on the ground that it did not belong to the courts, but to the political arena, to decide such an issue. By implication, therefore, that judge decided that no binding constitutional convention existed. Curiously enough, the fifth judge, the only judge who concluded that a convention existed, stated in his reasons:

> I must say that I am not sure that such precedents as exist in themselves create a constitutional convention which might be recognized by the courts as law . . . I am not wholly persuaded by one of the principal submissions made by the provinces, namely, that a convention has been established as a result of precedents.

That judge decided, in spite of these reasons, that such a convention existed.

The view that no such binding convention exists is shared by the two political parties that form the opposition in the House of Commons. The New Democratic Party supports the proposed resolution, which provides for unilateral action by the Canadian Parliament without the consent of the provinces. The Progressive Conservative Party, although opposed to the resolution, favours unilateral action by the Canadian Parliament with respect to the patriation of the Constitution and a Canadian amending formula. I conclude, therefore, that it is quite proper, in a legal or constitutional sense, for the Canadian Parliament to proceed unilaterally, without the consent of the provinces.

Senator Flynn: That is your understanding?

Senator Lamontagne: Yes, it is.

This conclusion is confirmed by Professor Frank R. Scott, who is undoubtedly one of our most eminent constitutional experts.

Senator Perrault: Hear, hear.

Senator Lamontagne: He wrote in 1950:

> There may be political wisdom in consulting with the provinces, before adopting a joint address requesting an amendment affecting provincial rights, but there is certainly no legal necessity for doing so.

During the current Canadian debate, a second basic question has been raised regarding the position of the U.K. Parliament with respect to amendments to the B.N.A. Act. In a strict legal sense, the act of 1867 is a statute adopted by the U.K. Parliament in the exercise of its sovereignty towards its North American colonies; the British Parliament still remains the sole authority with the power to amend it and to change the modifications made to it prior to 1930. The Statute of Westminster, which granted sovereignty to the British Dominions in 1931, merely reconfirmed Canada's colonial constitutional status. Indeed, section 7(1) states:

> Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation thereunder.

In this respect, Dr. O. D. Skelton said in 1935:

> All that was sought to do in 1931 was to ensure that for the time being the status quo was not altered by the Statute of Westminster, as regards constitutional amendment.

The U.K. Parliament is, therefore, in strict law, the sole authority empowered to amend the B.N.A. Acts passed before 1930 and it could do so, in theory, in the exercise of its own sovereignty, without even prior consultation with Canada.

Senator Flynn: You say since 1949?

Senator Lamontagne: Yes, even since 1949.

Senator Flynn: It could change anything in the future.

Senator Lamontagne: It could not change the constitution of the central Parliament, but it can change all the exceptions which were inserted in section 91(1) in 1949.

Senator Flynn: That is not what you said.

Senator Lamontagne: That is what I say.

Senator Flynn: No, no.

Senator Lamontagne: But then the following question arises: Is there a convention obliging the U.K. Parliament to amend the Constitution of Canada only on request and with the consent of the Canadian Parliament? To determine this issue according to Professor Hogg's two criteria, we must first decide if there is a long-standing practice to this effect.

The practice of amending the Constitution through an Address to the Imperial Parliament existed in the British North American colonies even before Confederation. According to Professor F. R. Scott, the existence of this old practice explains why the Fathers of Confederation did not include an amending formula in the B.N.A. Act in 1867. He says:

> —when the Fathers of Confederation met they were accustomed to the idea that the constitution could be changed and that it required no more than the presentation of an address to the Imperial Parliament . . . So that the Fathers of Confederation, having had that experience in Canada, were accustomed to that method of change.

Senator Flynn: There was no federal Parliament there then.

Senator Lamontagne: The Parliament of the United Kingdom has made 21 amendments to the B.N.A. Act since 1867. On three occasions, in 1893, 1927 and 1950, minor amendments for statute revision purposes were made on the sole initiative of the Parliament of the United Kingdom. In all other cases involving more substantial amendments, a request was made by the Government of Canada, as in 1871 and 1875, or, since then, by the Canadian Parliament. In no case has the U.K. Parliament refused an amendment because the consent of the provinces had not been obtained or accepted an amendment upon a provincial request. Furthermore, on only one occasion, in 1907, has the British Parliament made a significant change to the terms of a resolution adopted by the Canadian Parliament. The measure sought to increase federal subsidies to the provinces "as a final and unalterable settlement" but this condition was deleted in London because it was seen as "being obviously inappropriate in a legislative enactment." British Columbia opposed the Canadian request on the ground that the proposed increase in subsidies was not high enough.

• (1610)

This single incident in nearly 115 years, whatever interpretation is given to it, cannot be invoked to deny the existence of a long-standing practice. But what about the second requirement? Has there been a belief by the officials to whom it applies that the practice is obligatory?

It may well be argued that, while the Statute of Westminster does not apply to amendments to the B.N.A. Act, the U.K. Parliament decided implicitly and unilaterally, when it passed this statute, not to amend the act in the future except by consent of the Dominion of Canada, thereby recognizing that the long-standing practice it had followed up to then had become obligatory. We should remember that section 4 of the statute states—and I recognize that it does not apply in strict law to Canada at the moment:

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

Since then, successive British officials have considered that the Parliament of the United Kingdom was bound to act at the request of the Canadian Parliament. These quotations have already been referred to elsewhere, but I wish them to be inserted in the *Debates of the Senate*. In 1940, when the unemployment insurance amendment was being considered by the United Kingdom House of Commons, the Solicitor General stated:

> —we square the legal with the constitutional position by passing these Acts only in the form that the Canadian Parliament requires and at the request of the Canadian Parliament.

He went on to say:

> My justification to the House for this Bill—and it is important to observe this—is not on the merits of the proposal, which is a matter for the Canadian Parliament; if we were to embark upon that, we might trespass on what I conceive to be their constitutional position. The sole justification for this enactment is that we are doing in this way what the Parliament of Canada desires to do.

When Quebec objected to the 1943 amendment postponing a redistribution of the seats of the House of Commons, the Secretary of State for Dominion Affairs at that time, Mr. Attlee, stated:

> I have no information as to any Province objecting, but, in any case, the matter is brought before us by an Address voted by both Houses of Parliament, and it is difficult for us to look behind that fact.

Again in 1946, when Quebec opposed an amendment changing the basis of representation in the House of Commons, Viscount Bennett, who was Prime Minister of Canada when the Statute of Westminster was approved, said in the House of Lords:

> Canada is the only one of the Dominions in which a Party majority can amend the Constitution. They cannot amend it directly but they do it indirectly, because we have agreed—

And he was speaking as a member of the House of Lords at that time.

> —that we will consent to pass any legislation that they may petition to have passed by this Parliament.

In 1949, with respect to the amendment adding section 91(1) to the B.N.A. Act, 1867, no mention was made in the British Parliament that some provinces were strongly opposed to the modification.

Senator Flynn: There was no strong opposition.

Senator Lamontagne: You can put your interpretation of that situation on the record.

The Secretary of State for Commonwealth Relations said:

> The Bill is cast in the terms of the Address adopted by the Federal Parliament of Canada and, of course, we are all ready to do what they desire.

In 1960, when an amendment providing for the compulsory retirement age of 75 for superior court judges was introduced, the Minister of State for Commonwealth Relations stated:

> —legislation by the United Kingdom Parliament is still necessary where the subject of the amendment is one which affects the interests both of the Federal Parliament and the Provinces.
>
> We are therefore to all intents and purposes acting in what is a formal capacity for the Canadian Parliament in a matter which is solely its concern.

He went on to say:

> In accordance with long-established precedent, we refrain from discussing the merits of a Bill submitted to us amending the British North America Acts when this has been introduced in consequence of Addresses to Her Majesty adopted by both Houses of the Canadian Parliament.

Senator Flynn: We had the approval of the provinces at that time, so what you are saying is irrelevant.

Senator Lamontagne: It seems obvious, therefore, that this "long-established precedent" has become a binding convention.

Senator Flynn: No.

Senator Lamontagne: This view has also been held in Canada. I have already quoted a statement made to this effect by Premier McNair in 1950. The Honourable Ernest Lapointe stated in 1931:

> In that matter the Imperial Parliament is not really a dominating power; it acts as a trustee and as a guarantor, and merely gives effect to the will of the Canadian people.

In 1943, Mr. Coldwell restated the prevailing view. He said:

> I know, of course, that at present the real power of amendment of our Constitution, which is the British North America Act, is in reality in the hands of this Parliament. As I have just indicated, anything we may ask regarding amendment will be granted by the Imperial Parliament at Westminster.

Although the biased and inconsistent report recently published by the Foreign Affairs Committee of the U.K. House of Commons did not reproduce the statements of those British officials that I have quoted, it practically confirmed the prevailing view that there is a convention binding the U.K. Parliament. The report stated:

> —it would not be in accord with the established constitutional position for the U.K. Parliament . . .
>
> (ii) to undertake any deliberation about the suitability for the people of Canada of a requested constitutional package;
>
> (iii) to patriate the Canadian constitution unilaterally with or without a post-partriation amending formula;
>
> (iv) to enact a requested constitutional package with amendments not consented to by the Canadian Government and Parliament;
>
> (v) to fail to give a proper request priority in Parliament's time table.

The report adds that the U.K. Parliament is not bound by the so-called provincial unanimity rule, and that it would have to accept a unilateral request from the Canadian Parliament, even if this request affects the rights of the provinces, because the British government and Parliament are not "the guardians or trustees of the rights of the provinces precisely as provinces."

Some Hon. Senators: Hear, hear.

● (1620)

Senator Lamontagne: All these conclusions reached by the select committee are in accordance with long standing British practice.

However, the report goes on to say, at least implicitly, that the U.K. Parliament must reject a request from the Canadian Parliament if it affects the federal structure of Canada and if it is not supported by a majority of provinces as defined by the Victoria formula. It states:

> —if the U.K. authorities must be said to have a duty to someone, it would be a duty or responsibility to the Canadian people or community as a federally structured community—

This doctrine that the U.K. Parliament is the guardian and trustee of Canadian federalism contradicts all statements made by U.K. governments over the years. In a rather rambling argument, the select committee tries to show that this new role of the U.K. Parliament, which has no basis in our history, arose out of the Statute of Westminster in 1931. However, it contradicts itself when it says that the statute was merely designed to retain "the pre-1931 status quo, in relation to constitutional amendments".

The Foreign and Commonwealth Office summarized for the select committee the position taken by successive U.K. governments with respect to the amendment of the B.N.A. Act. It stated:

> If a request to effect such a change were to be received from the Parliament of Canada it would be in accordance with precedent for the Government to introduce in Parliament, and for Parliament to enact appropriate legislation in compliance with the request.

The select committee did not note, however, that this statement directly contradicted its own new doctrine. The most curious thing is that Sir Anthony Kershaw, the chairman of the select committee, himself destroyed the credibility of his own report. In an interview given to Southam News in Edmonton, and reported in the *Citizen* on February 7, 1981, he predicted that the constitutional package would be adopted by the U.K. Parliament. He merely pleaded for time and said: "But don't expect us to push the thing through in two or three days". In my view, Sir Anthony has thus buried his own report.

I wish at this stage to summarize the points I have made up to now by stating two specific conclusions which are based on a proper interpretation of the evidence available. First, a binding convention has developed, during more than a century, according to which the U.K. Parliament amends the B.N.A. Act only at the request and with the consent of the Canadian Parliament, which is expressed through the adoption of a Joint Address by the Senate and the House of Commons. Second, there is no similar binding convention requiring provincial consent before or after the Canadian Parliament adopts such a joint address.

Where does this leave us now? Since 1927, the federal government has sought, without success, the unanimous agreement of the provinces on a Canadian amending formula. During all these years the provinces were under the false impression that they were better protected by the so-called unanimity rule, supposedly guaranteed by the status quo. But we rediscover today what others, including Premier McNair in 1950, had found before us, that in reality and for all practical purposes we have had a Canadian amending formula all along and that this formula did not require unanimous provincial consent, but a simple majority in both houses of Parliament, as former Prime Minister Bennett asserted in 1946. In my view, the Canadian Parliament should not have this *de facto* unlimited and overriding power in a true federal system. The very purpose of the proposed resolution is to eliminate it. The unanimity formula may be at most a recent political practice but, from a constitutional point of view, it is a myth, like the concept of provincial sovereignty in several important respects.

I would like now to raise another question. In the absence of any legal and constitutional requirement that could prevent Parliament from passing the proposed resolution, is it sound and proper for us to adopt it in terms of political expediency?

First, let us see whether the overall content of the resolution is desirable and whether it affects the federal-provincial equilibrium to the detriment of the provinces. The resolution, in its provision regarding the future amending formula, eliminates the *de facto* overriding power that the Canadian Parliament now has and gives new and specific constitutional rights in this respect to the provinces and to the Canadian people. Viewed in this perspective, the resolution affects federal-provincial relationships to the detriment of the Canadian Parliament. It involves the provinces directly, as a matter of constitutional right, in the amending process.

It is true that section 46 provides for a referendum at the sole initiative of the Canadian Parliament to change the Constitution, but this alternative will be used only as a deadlock-breaking mechanism. Moreover, a federal-provincial commission will be asked to define the rules of such a referendum to ensure its fairness. This provision for a referendum does not infringe upon any existing provincial constitutional right. It merely transfers an existing *de facto* federal power to the Canadian people in the four regions of the country, and it gives to the ten provincial governments the opportunity to oppose a federal deadlock-breaking proposal during a referendum campaign.

The provisions of the resolution regarding resources and equalization offer further constitutional guarantees to the provinces.

The Charter of Rights and Freedoms, which is the second major aspect of the resolution, does not affect federal-provincial relationships.

Senator Smith: Oh, yes it does.

Senator Lamontagne: Let me continue. The honourable senator will have his turn.

Indeed, section 30 states:

> Nothing in this Charter extends the legislative powers of any body or authority.

Senator Flynn: It restricts it.

Senator Lamontagne: The charter reduces provincial powers but it affects federal powers in the same way. The very purpose of entrenchment is to curb the authority of legislative

bodies and to give to the citizens the additional protection of the courts. Viewed in this perspective, it is obvious that the proposed charter does not satisfy everybody, but I believe, like most people, that it is a realistic proposal, as a first step. It is to be hoped that it will be reviewed periodically, whenever desirable, once the entrenchment issue has been solved and a relatively flexible Canadian amending formula has been determined.

I find, therefore, that the overall content of the resolution is most desirable. It does not assign, as some argue, more powers to the Canadian Parliament. On the contrary, it gives more constitutional rights and guarantees to the provinces and to the Canadian people.

Many Canadians, while agreeing with the overall content of the resolution, claim that we should not go to London, even for the last time, more particularly, to get a Charter of Rights and freedoms. We all agree, I am sure, that it would be ideal if we could accomplish in Canada, through unanimous federal-provincial consent, the intent of the resolution. Unfortunately, I cannot see this ideal solution as a possibility, at least in the near future.

● (1630)

Canadians have deplored the colonial status of their Constitution for a long time. Henri Bourassa said in 1931:

> I feel somewhat ashamed to find that in the year 1931 the Dominion of Canada is the rearguard of all the dominions in the exercise of full-fledged autonomy.

He then expressed a hope, when he stated that:

> The time will certainly come when there will be enough wisdom, enough sense of self-respect either in the provinces or the Dominion of Canada, to find means of exercising that right of amending our own constitution by cooperation between the Dominion parliament and the provincial legislatures.

That was in 1935.

Senator Flynn: Yes.

Senator Lamontagne: Following the failure of a federal-provincial conference to reach agreement on an amending formula in 1927, Professor Norman Rogers expressed the view, again in 1935, that a new conference would succeed, and I quote:

> In the first place, I would approach a new conference in the faith that something could be accomplished, particularly in view of the present state of public opinion in this country. I do believe that the people of this country are more alive to the importance of this problem today than ever before. I do not think because consideration of the matter by a previous conference failed that we are compelled to accept failure as the lot of another conference called in the near future.

Since 1927, as we all know, ten First Ministers' Conferences, often preceded by numerous meetings of ministers and officials, have failed to produce an agreement. The last attempt in September, 1980, followed many meetings of the Continuing Committee of Ministers on the Constitution during the summer months. Yet, today, some people still believe that, as Mr. Rogers has said, "another conference called in the near future" would succeed.

Unfortunately, there is no evidence to this effect. At their meeting in Toronto last October, the provinces did not even try to agree on a positive proposal that could have been presented to the Canadian Parliament. Six of them merely decided at that time to go to the courts. Premier Hatfield made it very clear to the Joint Committee on the Constitution that another conference would not succeed. A great deal has been made—and will be made again, I am sure, during the course of this debate—of the so-called provincial consensus reached at the Chateau Laurier last September. But Premier Blakeney stated before the joint committee on December 19, 1980, that this so-called consensus has been at best a "tactical agreement", saying, "I certainly do not like it, I do not think it is going to fly but it is our best bargaining position." I suggest, therefore, that the so-called Chateau consensus was not meaningful and substantive, and that even this tactical agreement does not exist today.

What about the meeting of six premiers held in Montreal on February 9, 1981 ? Its results were summarized, in part by the *Citizen* in an editorial published on February 10, as follows:

> But one premier, B.C.'s Bill Bennett, wanted the gang of six to seek a new amending formula, and he wanted to press for return to the bargaining by all the first ministers. Bennett's compromise attempt met with failure, largely because too many of the premiers don't want compromise. Lévesque wants failure. Lougheed and Peckford want energy jurisdiction. Lyon refuses to accept a charter of rights. But the split is there for all to see—

Under such circumstances, another conference would in my view be doomed to failure. Moreover, it should be noted that the proposed resolution does not impose an amending formula. If the provinces can reach a substantial agreement, during the next two years, on a formula of their own, they will be entitled, if the resolution is adopted, to submit this formula to the Canadian people for approval. This is, I believe, a fair and proper way of getting out of a long-standing deadlock.

Hon. Senators: Hear, hear.

Senator Lamontagne: Unfortunately, our past failures have not been limited to this impasse. Indeed, the record shows that it may be as impossible to get provincial agreement on an entrenched charter as it has been in the case of an amending formula. In 1946 Mr. John Diefenbaker deplored the fact that the Canadian Constitution did not contain a Charter of Rights. He said:

> The British North America Act contains no charter of liberty as does the constitution of the United States . . . It makes no declaration of the rights of man, as our cousins south of the line do when from time to time they speak with eloquence and power of a constitution that is couched in magnificent language.

In 1947, a Special Joint Committee on Human Rights and Fundamental Freedoms was established. It recommended that no attempt be made to enact a bill of rights only in the form of

a federal statute; it was felt at the time that the provinces would not agree to be bound by an entrenched charter.

The adoption of a Bill of Rights by Parliament was delayed until 1960 mainly because it was thought that a mere legislative enactment, having no paramountcy over other legislation and limited to the federal sphere of jurisdiction, would not provide adequate protection to Canadian citizens. Curiously enough, the Quebec government was the first in Canada to propose the entrenchment of a charter. On July 25, 1960, Premier Lesage stated at a federal-provincial conference:

> We therefore believe that it is now necessary for us to have a Bill of Human Rights. We are also of the opinion that such a Bill would have a much greater actual and symbolic value if it were part of our constitution ... It seems to us that we have here a magnificent opportunity to discuss this problem and to see if we cannot agree on a joint declaration of human rights that could be embedded in our Constitution.

This proposal unfortunately was not followed up at the time. At the Victoria constitutional conference in 1971, unanimity was reached in favour of an entrenched charter, but Quebec withdrew its support shortly thereafter. This issue was raised again at a federal-provincial conference in 1978 and although the previous unanimity was broken, a substantial majority of the provinces still favoured entrenchment. At the conference of September, 1980 only two provincial governments fully accepted putting in the Constitution the charter proposed by the federal government. These successive failures show that if the Canadian Parliament does not proceed unilaterally now to include a charter in the proposed resolution, the entrenchment of rights for the Canadian people will be postponed indefinitely.

Some people say that they would be ashamed to get their rights from a so-called foreign country. I suggest in this respect that Canada is a rather unique country, at least in one sense. We never had to fight or go through a revolution to acquire our independence and our basic rights. We got them all from that same so-called foreign country; but we got them by instalment.

• (1640)

Senator Donahoe: When we were colonies!

Senator Lamontagne: The provinces became the masters of their own constitutions, as Senator Macquarrie has told us, in 1867 through a British statute, as did the Canadian Parliament in 1949. Canada received its extraterritorial sovereignty in 1931 through another British statute. We also acquired our basic rights and freedoms, going back to the Magna Carta, from the United Kingdom. As far as I am concerned, I am proud to be a Canadian, but in view of all these antecedents it does not really offend my pride to have to go back again to Great Britain, but for the last time, in order to complete a process that began in 1774.

The issue raised by the resolution, in terms of political expediency, is therefore quite simple. Do we want to maintain the constitutional status quo and our colonial status indefinitely? If so, let us vote against the resolution. Do we want, on the other hand, to break long-standing deadlocks on patriation, an amending formula and the entrenchment of rights, thus opening the way, in a second phase, for other constitutional reforms? If so, let us use for the last time the only formula that the provinces thought appropriate in 1972, and vote for the resolution.

[*Translation*]

I wish to comment now very briefly, because I have spoken at length—perhaps as long as Senator Tremblay the other night—on an entirely different subject: the rights of anglophone and francophone minorities in Quebec and in the rest of Canada. If the charter contained in the resolution is adopted, for the first time in our history those minorities will have equal constitutional rights to education in their respective language throughout the country. In my opinion that is already great progress. But it is not really enough.

I particularly regret that Ontario, which is home to the largest francophone minority in Canada, did not resolutely commit itself, like New Brunswick, to institutional bilingualism by accepting, among other things, to be bound by section 133 of our Constitution. Were Ontario to decide to treat its linguistic minority the same way Quebec respects its own minority, a decisive step would be made to close the gap between our two main communities. The Government of Ontario has often expressed its commitment to Canadian unity. I am convinced that its credibility in that respect would be greatly enhanced if, at this historic moment, it were to agree at least to be bound by section 133.

As I see it, bilingualism, especially if it is based on two great international languages, is first and foremost a source of personal enrichment. But in a country like Canada it also has immense political value, for it is a guarantee of unity. Indeed I am deeply convinced that Quebec separatism will never gain currency if francophone communities in the rest of Canada, particularly in Ontario and New Brunswick, enjoy the rights and services they need not only to survive but to grow. I hope that in the course of this debate many senators, more especially anglophone senators, will express their views on that primordial problem.

I cannot end this long speech without mentioning the attitude of the Quebec government in this matter. That government does not believe there is a way out of the constitutional deadlock. It states in its white paper:

> In the opinion of the government of Quebec the sad story of attempts, as useless as they were numerous, to review the constitution demonstrates how illusory it will be henceforth to think about renewing federalism in such a way as to please Quebec and the rest of Canada at the same time.

But above all the PQ government does not want renewed federalism. That is why it is adamant on the unanimity formula, for that is how it protects the status quo in order to be in a better position to object to it. Under the circumstances, only a unilateral approach can break the deadlock. Those who

oppose this initiative are therefore, unconsciously or not—and I know that Senator Flynn will disagree—playing into the hands of Quebec separatists. Indeed, the logical consequence of a vote against this resolution would be to maintain indefinitely the status quo. In my opinion, this is certainly not what most Canadians and the great majority of Quebecers want.

Senator Flynn: On the last point raised by Senator Lamontagne, may I ask a question? He said that all those who oppose the resolution are playing into the hands of the separatists.

Senator Lamontagne: Unconsciously.

Senator Flynn: I know. This is not what bothers me. Is Senator Lamontagne saying that the Quebec Liberal Party and the Union Nationale Party, which oppose the resolution, are also unconsciously playing into the hands of the separatists?

Senator Lamontagne: In this context, yes. However, there is a great difference between the position of the Union Nationale, which has taken so many different stands in the last few years, and that of the provincial Liberal Party, which I know quite well.

I submit that the provincial Liberal party is basically in agreement with this resolution. It objects to unilateral action, but it agrees that federalism should be improved. It agrees that the deadlock should be broken while, and this is a very significant difference, Mr. Lévesque and his supporters want the status quo.

Senator Flynn: Would Senator Lamontagne suggest to the government that it postpone putting forward the resolution to London until after the provincial election in Quebec? Thus, assuming that Mr. Ryan will become the next premier, we could then try to come to an agreement?

Senator Lamontagne: Honourable senators, there is no doubt in my mind that Mr. Ryan will win the next provincial election, and on that point at least, we shall have no difficulty in getting along. However, if we delay the process once again, even if Mr. Ryan does not oppose the resolution, we would still have to face the opposition of Mr. Peckford, Mr. Lyon and Mr. Bennett if they are still in power in their own provinces.

Senator Flynn: No, I was talking of postponing the process until after the provincial election.

Senator Lamontagne: Do you mean until elections are held in the respective provinces of Mr. Bennett and the other provincial premiers?

Senator Roblin: The answer is no.

Senator Flynn: In that case, the answer is no.

On motion of Senator Macdonald, debate adjourned.

[*English*]

PRIVATE BILL

ROYAL CANADIAN LEGION—THIRD READING

The Senate resumed from yesterday the debate on the motion of Senator Godfrey for the third reading of Bill S-15, respecting The Royal Canadian Legion.

Hon. G. I. Smith: Honourable senators, yesterday afternoon, as most honourable senators will recall, this debate was adjourned in order to make sure that the sponsor of the bill could be present when I made the rest of my remarks, which will be brief, I hope. I had just read the proposed amendment to the statute affecting the Royal Canadian Legion, and also the existing provision which was to be deleted. Since both of those are rather short, perhaps I might do so again without taking up too much time.

● (1650)

The paragraph in the present statute, which was passed in 1948, deals with the membership of the Legion—that is, the classes or kinds of persons who shall be admitted to membership. It reads now as follows:

> (i) those persons who have served or are serving in Her Majesty's navy, army or air force or any auxiliary force thereof,
>
> (ii) those persons who have served or are serving in the Royal Canadian Mounted Police, and
>
> (iii) the sons and daughters of any of those persons referred to in subparagraphs (i) and (ii),

The proposal in the bill is that those words be deleted and that the following words be substituted for them. They are not broken down into subclauses (i), (ii) and (iii), but are embodied in clause (a):

> (a) to constitute an association of those persons who have served or are serving in Her Majesty's armed forces or any auxiliary force thereof, and of other persons—

These are the words to which I intend to direct my remarks.

> —and of other persons who support the purposes and objects of the Legion,

So instead of enumerating the kind of people who shall be admitted to membership, the amendment would allow membership to be granted to any other persons who support the purposes and objects of the Legion—which is, of course, a very wide definition indeed and, depending upon what the authorities in the Legion—the Dominion Command or any convention assembled—at some future date might decide, it could really make it a completely different organization from what it is now.

Under the present provision, I would ask honourable senators to note how the common thread of service to the country, in an organized, disciplined force, authorized to bear arms, binds the groups named as being entitled to membership, except the sons and daughters who may be thought to have learned something of that common thread.

We see how that thread would be completely abandoned if the amendment became law; the Legion would no longer remain as an association of those who have experienced the discipline, the sense of values, the feeling of mutual respect which arises from that common bond. It would be just like any other fraternal organization, such as the Independent Order of Odd Fellows, the Elks, or any of the like. It is bound to lose the esprit de corps that brought it into being in the first place,