I was sure the government would do it, but nothing has been provided in such cases. They are very few indeed, but as we often say, there is no solution in that respect. There is still of course the problem of the differential between judges appointed before February 1, 1975 and judges appointed from that date on. This amounts to $4,200, and with the new increases the differential will be still greater. A solution will have to be found. What will it be? I do not know. However, I am afraid that it will be quite difficult to find one, because as was suggested, contributions cannot be levied from those appointed before 1975. However, in many cases, the latter have earned their pension, if not by right at least in fact under a gentlemen's agreement which provided that any person appointed to the bench who retired at age 65 after serving for 15 years was entitled to a full pension without any contribution. It is not at all easy to require such payments from those people who have been there twenty years and who actually have earned their pension.

Senator Frith: And who accepted an appointment on this condition.

Senator Flynn:this is the problem. One judge sued the government because he was appointed after February 1, 1975, but before the act providing for the contribution was passed and enacted. In his suit against the government, he submitted that the government could not do that. He requested a refund of his contributions and denied the government the right to hold back 6 per cent for his pension.

I believe that this case has not yet been heard in the Federal Court, but it is impossible to say what will happen.

In any event, this is only a related problem which does not concern the main purpose of the bill. One thing of which you can be sure is that the judges have been under the impression in the last few years, as Senator Frith has mentioned, that both Parliament and the government have been neglecting them. Since there has not been any readjustment in over four years, especially in these inflationary times, the morale of the judiciary has not been very good.

If, in order to immediately settle at least the problem of salaries and partially the problem of pensions, we have to pass the bill in its present form, even though the provisions which I mentioned earlier have been withdrawn, I am very willing to do so. However, as Senator Frith has stated, I believe that it would be a good thing for the Senate Committee on Legal and Constitutional Affairs to examine the bill and ask the Minister of Justice questions as to the possibility of solving the remaining problems. In such a case, the bill could be referred to us tomorrow, and I for one would not object to its receiving royal assent immediately afterwards. I think that the judges have been very patient, and we should at least show them that we are concerned about their situation and that we want the Canadian judiciary to maintain the excellent reputation it has acquired.

• (1600)

[*English*]

Motion agreed to and bill read second time.

REFERRED TO COMMITTEE

The Hon. the Speaker: Honourable senators, when shall this bill be read the third time?

Hon. Royce Frith (Deputy Leader of the Government): I move that this bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

I suppose that I can now ask that it be placed on the Orders of the Day for third reading tomorrow, but perhaps we should wait for the report of the committee.

Hon. Jacques Flynn (Leader of the Opposition): If you did that you would pre-empt the report of the committee, and I do not think Senator Goldenberg would like that.

Hon. H. Carl Goldenberg: Honourable senators, if I may be permitted to do so, I would like to advise those members of the committee who are here that the committee is meeting tomorrow morning at 10 o'clock, in room 356-S. There was another bill that we were going to consider, but we will consider this bill first, and the other will follow. Notices will be sent to members within a short time.

[*Translation*]

Senator Asselin: Would the chairman of the committee tell us who the witnesses are he wants to call before the committee when dealing with the bill to amend the Judges Act?

Senator Goldenberg: I could not answer that. Our advisor, Mr. du Plessis, is making the arrangements. He will advise me in a few minutes. I shall call him.

Senator Asselin: Will the Minister of Justice be there?

Senator Goldenberg: No, I do not think so. However, there will probably be an expert, Mr. Samuels.

Senator Flynn: He is one of the commissioners.

Senator Goldenberg: Yes, I think he will be the witness.

Senator Frith: And Mr. Low, an expert from the department.

Senator Goldenberg: I am told that it is Mr. Low. Do you know him, Senator Flynn?

Senator Flynn: Yes, it is Martin Low.

[*English*]

Motion agreed to.

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. Dalia Wood: Honourable senators, I did not intend to go beyond a token word in this debate, having had an opportunity to work with all sides of Parliament in the hearings on the Constitution of Canada, but in view of the circumstances I feel that I should do so.

The committee sessions were gruelling, but we were very privileged, since we met so many truly national organizations of Canada which made tremendous contributions towards shaping the Constitution that they and their children will want to enjoy.

When, however, I hear those with a different perspective claim that this hammered-out package is the result of the machinations of one man, or that it is as divisive as the flag debate, or is damaging to French-speaking Canadians, I feel duty-bound to review events as I understand them, but without the help of quotations from ivory-tower mentors, including constitutional lawyers.

Generally, we are divided constitutionally because we have never faced the reality of our degree of statehood. The new package will determine this once and for all, and the "one man" responsible for this is the one elected to lead a government for all Canadians. It is ironic that senators from Quebec consider it too compromising a package for French-speaking Canadians of Quebec, and incredible when you think that for the first time since 1760 a constitutional document for all Canada will have an official French version.

How much more could have been attained had the Government of Quebec yielded to the concept of Canada as the people did, in electing Pierre Trudeau and 73 Liberal members from that province.

In 1864 Macdonald and Cartier were attorneys-general for Upper and Lower Canada, with Viscount Monck as the driving force. In the 1978-79 debate we had the Honourable Jean Chrétien with 10 attorneys-general, including Ray Romanow as co-chairman for the provinces. Things were looking good until the shopping list became too big for the store. This would have been enough to make anyone say, "I tried my best and gave my everything," but he did not, and may our country and its historians forever inscribe Jean Chrétien as one of the greatest great-grandsons of Confederation. His inspiration and empathy during the hearings will remain as one of my most epic memories.

The hearings were conducted with impressive skill, tact and impartiality on the part of the joint chairmen, Serge Joyal and Senator Hays. A vote of thanks from the Senate is owed to these two men.

Jake Epp, representing the Progressive Conservatives, comes in for the highest commendation. Unlike others, he supports patriation with an amending formula and an entrenched charter.

Viewpoints differed, but revealed nothing insurmountable except, of course, the usual caveat that all was generally in order, just so long as the premiers agreed. My ensuing probe into political history will indicate this impossibility.

There was one disappointing, if not bewildering, development during this experience, emanating from the man who is quoted in *Hansard* as saying:

> Mr. Chairman, this is a major first step in the new chapter of what, I hope, is a very exciting book in the new Canada of the twentieth and twenty-first centuries.

[Senator Wood.]

A few weeks later, when Premier Blakeney reversed his position, Lorne Nystrom, the man who made that statement and who had worked so diligently with us, felt compelled to reverse his position.

Honourable senators, we could quote many sources and many personalities who throughout our history have fought for home rule and national sovereignty. It would be painful for me to review all the events involved, and even disconcerting for anyone to listen to me do so.

Let us simply recall that the first all-Canada efforts in this direction arose in the 1830s, and after some years of systematic obstruction, hangings and exilings by the colonial government, the two Canadas were granted the Act of Union of 1848 setting up legislatures and certain autonomies. You will recall that when this act was proclaimed by Lord Elgin, he was virtually pilloried by the ruling "Family Compact" because he sided with the "Reformists," unlike Governor Head who was chastised by the home government for siding with the Tories.

When, some 20 years later, the imperial government decided, for reasons of better management, security and trade, to re-organize their colonies in British North America, some 30 parliamentarians met in Quebec in 1864 and in several weeks agreed on 72 articles which were to be promulgated by the imperial government. Governor General Lord Monck, because of his untiring efforts, patience, Irish empathy and experience as a Liberal member of Parliament at Westminster, was the man most responsible for the compromise solutions of the British North America Act, prompting and motivating discussions of it in Canada and parlaying it through the corridors of the Parliament at Westminster, which agreed that national defence on our 3,000 mile border had to be paid for and organized by the colony itself. There was no Prime Minister during that period of the colony, but we have one today, a home-grown Canadian who was born in Quebec, and whether or not he is your choice as Prime Minister, he has the constitutional right to govern on behalf of all Canadians. That is a fundamental difference in the two debates.

• (1610)

These new regulations would then apply to Canada as well as to Nova Scotia and New Brunswick. History related most dramatically Nova Scotia's reaction to assuming a privileged position which dealt directly with the home office, as opposed to one which required a submission to a larger branch office. Newfoundland attended the conference as an observer and agreed to join Confederation 85 years later—that is, once they saw it starting to work for the maritimes.

In the meantime, national defence was a responsibility of the imperial government. Places like Prince Edward Island, the other island colony, had no recourse but to turn to the Canadian treasury to enable them to link up with the emerging transportation network and to provide the means to repurchase its land from the absentee landlords who had acquired it via Westminster patronage. Farmers would now have freehold tenure. This reminds me of the statement made at the last conference, a reference to their first nine inches of soil as their natural resource.

Therefore, armed with the Colonial Act of 1865, the imperial government was able to annex other land areas as they saw fit. I suppose it was very often a sink-or-swim choice, but regardless, we cannot turn back the clock. Furthermore, I could not, in hindsight, wish for or imagine a better institution to oversee our affairs of state than the mother Parliament at Westminster. In 1868 Nova Scotia instituted separation proceedings, but Westminster said no.

As time rolled along trade routes diversified, corporate marketing no longer needed flags and wars were becoming very costly. As a result, the colonies became a liability. Hence, the Statute of Westminster was enacted and we were told to fly on our own wings. But we could not make a pact among ourselves. The present youth of our great country is different from that of the thirties. Need we remind ourselves of those days? What alternatives will they have if we do not succeed this time?

We failed in 1931 supposedly because we could not produce an amending formula which was appropriate to our sovereignty then, any more than we can now, some 50 years later. No one in this chamber can spend the next 50 years on this project; and, if they could, the people of Canada would not. They want it done now, so let us do it now.

I do not agree with Senator Cook, who claims that we have been independent since 1931. We could have been, but the provinces were not ready to agree on the mandatory amending formula. But here I yield to constitutional experts, our crown lawyers. Can Senator Cook assure the Canadian people that, if we ask for simple patriation with no amending formula, certain provincial governments will not simply proclaim their autonomy in the interim? After all, it could be argued that they are in a quasi-legal position to attempt to do so. But then, I have never read law.

May I read you section 7(1) of the Statute of Westminster, 1931:

> 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 made thereunder.

It seemed innocent enough when we changed from a dominion government to a federal government. Most Canadians associated this with a United States type of federal government, but some conveniently saw it as an opportunity to bring Canada down to size and preferred to use the definition of a federation of states. We are not the government of a federation; rather, we are a federal government. This is not a lesson in history; it is more one in emotion and basic understanding of nationhood and security.

Respect for our degree of sovereignty with regard to both domestic and international matters has now reached a point where the world will soon be questioning our passports, our currency, our 200-mile limit, our international trade pacts and so forth.

The country to the south of us certainly must have more than a passing interest in our affairs. We know that Washington has had a Quebec desk for some time. I would imagine that they have now added a few more, pending the degree of sovereignty desired by the provincial petitioners to Westminster.

The fact that the Manitoba Court of Appeal has found the federal government in order has not dissuaded the premiers from dealing with the Colonial Office, nor has it altered the thinking of those in this House opposing the legislation on their behalf. The notion of provincial lobbyists or anyone petitioning the Colonial Office or Foreign Office of another country because they assume Westminster could obstruct is somewhat repugnant to me, as I think it is to most Canadians. Let us formally dissociate ourselves from any more of this undermining of our integrity as a people.

Unilateral action is a major hurdle in the minds of many people. It is an expression which both haunts us and rekindles our complexes as unassured Canadians. My view is that joint action with the provinces, though desirable, is just as impossible now as it was in 1867, when the British North America Act was imposed on us. Everyone was supposedly robbed then—everyone, that is, except the people who within that framework built us a nation before we could constitutionally become one. I also hold the view that we have progressed too far and have committed ourselves to too much to remain a non-nation of differing, checkerboard statehoods.

If, as suggested, we heed the advice of those who advocate trying "one more time" to achieve a joint approach, which one of the common front of premiers would compromise provincial benefits for those of value to the nation as a whole? I would not even venture a guess. As a matter of fact, in such a trade-off, we might find Ontario saying, "Enough. We will now deal directly with Westminster."

I think if you were to list all the demands and conditions of the premiers and study them, it would be obvious that, even if Westminster could grant them, we would have nothing more than a secretariat in lieu of a national government. But it seems fashionable to blame the federal government which must and does say "No." And is this national government, elected by the entire constituency of Canada, supposed to remain muzzled, lest it be considered divisive for refusing to allow one premier an exclusivity on something which belongs to all and serves to unite all Canada?

The fact that the provinces are daily undermining federal institutions is not considered by some to be divisive. The fact that one or two or perhaps three provinces want out—not for reasons of discontent but, rather, for supposed economic short-term advantages or cultural supremacy—again is not considered divisive; rather the national government, which withstands their barrages and which cannot give to one something which belongs to all, is called the divisive one.

Provincial governments have difficulties with competing interests among themselves. Most premiers will assume no responsibility in seeking a consensus for Canada at any cost to their own governments. Since their electorate is strictly provin-

cial, their strategy, as shortsighted as it may seem, can also appear to be astute, and therein lies the difficulty.

Are federal members of Parliament and senators simply an extension of the provincial members or do they represent the constituents directly? Surely the whole has to be more responsible than any one part and at the same time equal to all the parts combined. Are we, as members of the Senate, not compelled to look at matters from and within the pan-Canada concept?

Premiers whose interests and degrees of political stability vary cannot be expected to agree with anyone about anything, not even among themselves. The common front of premiers, so-called, has but one goal—to prevent the supposed encroachment of national government. Rather, they want a mishmash, checkerboard series of sovereignty associates, with some premiers being more Canadian than others.

Has anyone asked where the funds for equalization payments would come from? And yet, at present, that is an essential basis of Confederation. Have the "have" provinces made private deals with the "have-nots"? Is it the same approach as Quebec suggested for languages of education—reciprocal arrangements within a much looser federation, with perhaps a common currency, and certainly a fragmented 200-mile limit? Do we honestly expect Canada to maintain sovereignty in the Arctic, when it would not be able to proclaim jurisdiction over five or six federated states on its eastern shores? Honourable senators, before suggesting "one more time", please consider the costs in terms of anguish and national credibility. Let us for a moment look at the record of federal-provincial conferences and see if we can find a way out.

The first meeting convened to study the question of Canada's power to amend its own Constitution and that of ownership of natural resources was in 1927. The Right Honourable W. L. Mackenzie King and the Honourable Ernest Lapointe argued for that power on the basis that self-respect as a nation demanded that the dominion Parliament should have that right to self-determination. Premier Taschereau objected on the ground that, if that power were formally granted, it might lead to the endangerment of provincial jurisdiction and rights. Premier Ferguson of Ontario maintained that such a power would jeopardize the Dominion's links with the United Kingdom.

So much for the great dividers of 1927! Certainly, no aspersions can be cast on the Tories on that one!

The four western premiers reported that there was strong support in their provinces for Senate reform, but they could not agree upon the nature of such reforms. It seems that "44" has been around a long time! But then that's normal: the premiers never understood us; they still don't.

● (1620)

The 1931 conference was convened by the Right Honourable R. B. Bennett. The purpose was to give the provinces an opportunity to express their views with regard to the imperial Statute of Westminster. There was no objection in principle made to the proposed legislation, and a proposal that the provisions of the statute relating to the repeal of the Colonial Laws Validity Act should extend to the provinces was approved.

However, it was subsequently desired by some provinces that the question of powers and procedures in respect of constitutional amendments should be discussed. This was found to be impossible at the meeting, but it was agreed that a constitutional conference should be summoned as soon as possible.

Here we go again. The tragedy here was that since Canada found no amending formula, as had the other dominions, it might be argued that the Colonial Laws Validity Act was still very much in force.

Prime Minister Bennett convened another conference in 1933, and apparently the domestic state of affairs had the provinces asking the federal government to continue its assistance to the provinces in the discharge of their constitutional obligations so that they might effectively deal "with the present unprecedented economic conditions by distribution of direct relief." The minutes go on to say that the relative legislation jurisdiction of the dominion and the provinces respecting old age pensions, unemployment and social insurance were discussed without any resolution being adopted.

The next conference, which took place in 1934, was uneventful. It dealt with a petition by Quebec for permission to conduct lotteries.

The Right Honourable W. L. Mackenzie King convened the 1935 conference to study all aspects of federal-provincial relations, including a revision of the British North America Act. The subconference passed a resolution stating: first, that amendments to the British North America Act are necessary and imperative; and, second, that Canada should have the power to amend its own Constitution. New Brunswick cast a negative vote because it could not agree to all the terms.

In 1941 the Right Honourable W. L. Mackenzie King again convened a conference to obtain the views of the nine provinces on the 1940 Rowell-Sirois Report on Dominion-Provincial Relations. However, when the agenda committee made its report, Alberta, Ontario and British Columbia were opposed in principle. The conference adjourned without even a discussion of the constitutional issue.

Then in 1950 the Right Honourable Louis St. Laurent's conference brought unanimous agreement that Canada should have the power to amend its Constitution itself. There were eight points of agreement and it was suggested that a standing committee be set up. Those recommendations were adopted.

There was a second session of the 1950 conference, which reported that it was not possible to secure unanimous agreement but that there would be a continuing committee of attorneys general which would report in December 1950. At the end of 1950 it was decided to suspend that committee pending consideration of tax agreements and related matters.

There were four further meetings of attorneys general in 1960-61. The initiative for that came from Premier Lesage. It

was during those meetings that the Honourable Davey Fulton submitted his proposals to domicile the British North America Act in Canada with a permanent method of amendment. All provinces except Quebec were opposed to that. It was recorded there that the British North America Act could be frozen indefinitely, if the amending formula were not achieved before patriation.

In the September conference of that 1961 series, the Honourable Davey Fulton hinted that the federal government might seek patriation of the British North America Act, even if unanimous consent could not be achieved. That must have been most disconcerting for the Diefenbaker government.

In August 1964 the Right Honourable Lester B. Pearson presided over a conference held in Charlottetown, Prince Edward Island. Quebec issued a separate communiqué stating its reservations with respect to the 1961 formula. Premier Robichaud of New Brunswick suggested that there should be a union of maritime provinces, but Premier Shaw of Prince Edward Island disagreed with that.

The conference reconvened in Ottawa in October, again with the Right Honourable Lester B. Pearson presiding. The major achievement of that session was that the premiers approved unanimously a unanimous report issued by the attorneys general. Once again, the conference ended with the issuance of a communiqué stating that the various governments would continue to study the workings of the Canadian Constitution.

The next constitutional conference took place in 1968 and dealt with the desirability of entrenching a Charter of Rights in the Constitution. The Right Honourable Pierre Elliott Trudeau, then the Minister of Justice, argued that the division of jurisdiction between the federal government and the provinces with respect to the rights of Canadians under the present system required the entrenchment of a Charter of Rights, if those rights were to be fully protected. He argued that such an entrenched charter would not amount to a transfer of power from one level of government to another but would, instead, be a restriction of both levels of government in favour of the rights of Canadians. Provisions affecting those rights would not be subject to amendment by a government through a simple act of a legislature; rather, amendment of such provisions would require the federal Parliament and a given number of legislatures, the number to be determined by an amending formula, to agree to any changes.

Honourable senators, does that appear to you as such a divisive statement? It is somewhat painful history in retrospect, but some of you were there.

Once again, the conference ended with a proposal to establish a continuing committee of officials.

At the second meeting of that conference discussion rather centred on taxation and regional disparities. Premier Weir of Manitoba said that a discussion of these matters should take precedence over concerns for language and the entrenchment of fundamental rights. It was at that meeting that Attorney General Donahoe of Nova Scotia argued that the new Constitution should include the principle of equalization and should set out its formula. A committee was formed to study problems of regional disparities, official languages and the Charter of Rights.

Alberta stated that the concept of two languages was "objectionable and unacceptable"—a still familiar cry from the west federation.

"Quebec like any state must have increased powers," said Premier Bertrand, in order to "proportionally shoulder its responsibility." The same meeting heard the maritime provinces appeal jointly for a strong central government. It would seem, honourable senators, that we are always returning to square one.

The June 1969 conference dealt with taxing, spending, and regional disparities in the constitutional context. It was agreed then to meet again at the year's end. Well, December 1969 found Premier Bertrand disagreeing with Prime Minister Trudeau's proposals. Premiers Robarts and Bennett supported the objection in part, while Premier Bennett reiterated his proposals for a five-region Canada. Premier Smith of Nova Scotia argued that equalization powers should be the exclusive right of the federal Parliament, while the premiers of British Columbia and Alberta contended that a system of guaranteed annual incomes would be far more effective.

In retrospect, honourable senators, it seems that the more we probe, the more we find division and vacillation among the provinces.

At the conference of 1970 Premier Robarts stressed that the immediate and high priority should be to examine and agree upon an amending formula. Consequently, two additional meetings were agreed to.

At the conference of February 1971 the federal and provincial governments agreed to proceed as quickly as possible to patriate the Constitution with an appropriate amending formula. They also agreed to entrench fundamental political rights and language legislation, providing it had a sufficient-number clause. Matters concerning regional disparities and the Supreme Court were also settled. However, Premier Thatcher disagreed with Quebec in respect of the privacy of financing and administration in certain areas, and Prime Minister Trudeau noted that, if a province were to go too far in its own special way, it would not be able to have the equalization grants which are paid by the federal government to the poorer provinces.

Almost, but not quite, honourable senators; but we are getting closer.

In June 1971 the Right Honourable Pierre Elliott Trudeau called a conference at Victoria at the suggestion of Premier Bennett. The charter which had resulted from the consensus of the previous conference was presented for acceptance by the provinces. Just about everything imaginable was included. Reservations were expressed, but by the deadline of June 28 eight provincial governments had accepted, while Quebec refused to recommend the charter to its national assembly.

So close and now so far. Does anyone still think unanimity should be the criterion instead of unilateral action?

The conference that ensued in 1978—which Quebec attended only as an observer pending the referendum—did not seem unduly alarming, because by that time several provinces had studied and copied Quebec's bargaining techniques. But, in the end, those techniques have achieved nothing, either for Quebec or for them, or for Canada.

At that same conference Quebec and the four western provinces were opposed to the entrenchment of a Charter of Rights. Premiers Lévesque, Lougheed and Bennett were opposed to the official languages aspect, but the real thrust was towards having provincial sovereignty ranging from increasing powers in certain areas to having the entire power in certain areas.

In the conference of February 1979 Premier Davis argued that the federal government had the power to seek patriation unilaterally and should do so immediately. Premiers Lévesque and Blakeney, however, argued that firm agreements on constitutional change should be achieved before Ottawa sought patriation. It was at that time that Prime Minister Trudeau said he would meet *one more time* with the premiers before seeking patriation unilaterally.

● (1630)

The ensuing conference of June 1980 started in turmoil when Premier Lévesque opposed in principle the first five words of the statement, which read "We, the people of Canada" and referred to it as centralist thinking, ignoring the duality of Canada and Quebec's right to self-determination. Other premiers also rejected the statement on principle.

Honourable senators, I suppose the most crucial problem facing some legislators in Canada is, what will they do for an encore after the Canadian people have won their Constitution?

At present the rights and freedoms of Canadians are not constitutionally guaranteed, and it has become increasingly evident that more protection than the ordinary process of parliamentary democracy is required.

The amending process which we are bringing forward is a just one for all. It reflects the federal and the regional nature of Canada. For the first time it formally involves the provinces in the amending procedure, a procedure which is designed to ensure that there is substantial support for amendment to the Constitution in each of the four regions of Canada. It provides an opportunity for the provincial governments to present an alternative formula for the approval of the people of Canada, *if* the provincial governments can agree on one to be presented.

Legislative majorities should not have complete freedom to act inadvertently or deliberately against the rights of minorities. We must not forget such incidents as the Padlock Law of 1937, the asbestos strike and how it affected civil liberties, Bill 22, Bill 101, or the occurrences involving Japanese Canadians, the Manitoba schools legislation, Witnesses of Jehovah, and Italian Canadians in the second world war.

Here, I must interject a rebuke to Senator Thompson when he referred to his working in the Italian district of his riding and dressing as shabbily as he could. It takes more than shabby clothes to simulate a minority—yes, even an Italian one. I should know, because this includes me and my own parents. Can we not find better ways of identifying ourselves, for in effect we are all ethnic, even those of us from France and the United Kingdom? Rather, Senator Thompson should direct his efforts at least to the mobility clauses in the charter and use his experience to help improve them, rather than join those who would not want migrant construction workers to have every opportunity of earning a living. Let us re-instill some of that vigor that Viscount Monck, our Liberal, Irish, Governor General, gave us in the 1860s.

Travel naturally relates to mobility rights, which are guaranteed in the charter. The Newfoundlander who found a career in British Columbia will now have that right to work guaranteed. Some provinces do not like this. While it may be good for the pursuits of the individual, it may upset their power in certain jurisdictions. In other words, they put their own interests over human rights.

My personal esteem for Senator Thompson will, I hope, allow me to relate some plights of minorities in Montreal, where I have lived as one for the past 2,922 weeks. In Montreal, during the dirty thirties, neither the Irish nor the Italians went to work in tuxedos, rented or otherwise. The Italians could not gain access to French-speaking institutions, because they were "des immigrés"; nor could they gain admission to Protestant schools, because they were Papists. The Irish, on the other hand, had access to Catholic schooling, but in the French language only. The solution was interesting. When the Irish demanded Catholic schooling in English and were squelched under threat of excommunication, some of the more affluent in the community directly petitioned the Pope, whereupon they won their case. Here is an example of a home-grown Canadian problem solved in Italy. Minorities of Roman Catholic faith were now able to enter a subsection of the school system. This grew to such a point where it had to be stopped, because decreasing enrolment was causing empty classes in the schools of the majority.

The street riots of St. Leonard were the precursor of Bill 22, which was instituted to cancel Bill 63, which had allowed the parents to choose among the options available. When anyone's right of choice is removed, the removers will eventually find themselves in very deep trouble, but, in the meantime, it would be better and human not to remove acquired rights. The federal charter will make this type of legislation much more difficult to enact. Canadians should have their choice, be it schooling, religion, or domicile.

It has been said that a referendum is foreign to our system. That is not really the case. There was an epic one conducted in 1980, the results of which are manifested in our package. Referenda, I say, are here to stay, thanks to a province. The charter will also levy controls on public servants as they interpret and enforce regulations, and this in itself will humanize the process of government.

The official opposition in the Commons opposes the charter in general, just as they traditionally oppose a budget speech—

as though the people take them seriously. However, no one has yet opposed any one aspect of the charter. Rather, the whole resolution seems wrong—that is, if it is enacted with patriation; although that, too, is acceptable if it is enacted at a later date.

Honourable senators, experience over recent years should prove that provincial legislators generally are not interested in the larger constituency of Canada. They will agree with all the individual rights imaginable, but at a price, and that price is the essence of national government and our institutions needed to enforce the maintenance of these rights, let alone our impact abroad.

Courts have traditionally settled disputes between citizens and the state, and in the future they would have the charter to guide them. We all remember *Roncarelli vs. Duplessis* and the role of the Supreme Court.

The charter will guarantee mobility. Some premiers oppose this provision. I hope that no member of the Senate, regardless of provincial party affiliation, will support that opposition. The charter will protect citizens from discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, physical or mental disability. The federal and provincial governments will be given a two-year reprieve on this one, and, Heaven knows, we may need it. Aboriginal rights are to be recognized and affirmed.

Which of these new-found and guaranteed freedoms can honourable senators honestly oppose? Even if the adjustment is too much for some premiers, would honourable senators oppose these freedoms with equal zeal if Liberal premiers were obstructing?

Part I of the Constitution Act, 1981 was changed in committee. To cite an example, clause 1 of Part I was altered after representations and suggestions by the following organizations: the Canadian Jewish Congress; the Canadian Civil Liberties Association; Société franco-manitobaine; the British Columbia Civil Liberties Association; the Canadian Federation of Civil Liberties and Human Rights Associations; the Canadian Human Rights Commission; the Canadian Advisory Council on the Status of Women; the National Association of Japanese Canadians; the Ukrainian Canadian Committee; the National Association of Women and the Law; the Council of National Ethnocultural Organizations of Canada; and the Coalition for the Protection of Human Life—I could go on. I believe there are another ten organizations.

Clause 2 was amended in response to testimony from the Canadian Bar Association, the Canadian Council on Social Development, and so on.

Have the opposing senators who are members of the Canadian Bar expressed their indignation to these groups for their alleged support of Canadian nationhood? Are the honourable senators who are members of the Bar aware that their profession's spokespersons have also prepared and submitted a list of principles which could be used to describe the character, the institutions and the purpose of Canadians? To quote in part, they say, "The Canadian Constitution should sell the essential attributes of Canadian federalism." Then, they go on to mention eight essential attributes.

All told, some 97 groups of witnesses advised the Joint Committee on the Constitution. Their testimony overwhelmingly supported the principle of patriation initiatives that include a Charter of Rights. Also, some 1,280 written submissions were received. The committee held 106 meetings over a four-month period and debated the resolution for 267 hours. Then some 67 amendments were made to the original draft, many of which profoundly strengthened the position and dignity of the Canadian people, and affirm our attitude of giving when we can, but never taking any rights away from anyone. This hardly seems like unilateral action, especially when compared to actual representation by Canadians in the Statute of Westminster or the British North America Act.

These aforementioned groups, who by and large represent national memberships, made the decision to petition their Canadian Parliament, rather than lobby Westminster, as it would have been beneath their dignity. That should tell us something. Is it wrong for this house to support these people in their desire for meaningful nationhood? Is it wrong for us to release them from the restraints of the Colonial Laws Validity Act, 1865, which technically is still within the framework of our statutes? Why is there such obstruction, which is generally along party lines? Which item or aspect is offensive, and, if we, the senators of Canada, had to face an electorate rather than broad public opinion—which I will not dwell upon—which section of the charter would we eliminate on behalf of the people of Canada? Would we say that human rights and dignity are a provincial affair? Surely at some time or another, either at home or internationally, something other than the Canadian Mint has to be a national responsibility.

• (1640)

Honourable senators, would we deny our constituents—who, in our case, are the people in all of Canada—the most up-to-date Charter of Rights in the world, one which no provincial legislature can change on an *ad hoc* basis?

Federal governments will come and go, as will provincial legislatures, actually in a ratio of 10 to 1, but our Parliament and our first Canadian-born charter, our really home-grown assertion of and momentum to nationhood, must be enshrined—and this with the distinguished blessing of this chamber.

Honourable senators, have you ever considered that this package could conceivably usher in a better Canada, in so many respects? Some may have reservations, and I respect that fact, but what is the alternative? Let us assume our responsibility—which is for the common good and welfare of all regions and all the peoples of Canada.

Separatism started in 1868, with only the federal government as a bulwark. Let us not unduly weaken the fabric by shouldering the provinces who often turn one against the other. The resulting scenarios are too horrible to imagine.

The Quebec government should be protesting the demands of Newfoundland, Alberta and Saskatchewan; but it is not,

and it will not because, with a separatist mentality, it knows it will have to negotiate oil and offshore rights directly with those emerging states. Why, in the meantime, should it bother with Canada?

Can you imagine the bargaining position of Prince Edward Island in this triangle, yet it supports the common front? It is, indeed, incredible. The common-front provinces welcome Prince Edward Island as a number only—pawns in a game the Islanders cannot possibly win. Do they not realize that their equalization payments can only be derived from resource revenue-sharing? Yet they support the provinces which would deprive them of this. Ontario cannot be asked to do it alone.

Can Senators Cook, Thompson and Deschatelets devise some other ways to secure meaningful nationhood, to prevent the erosion of rights; to stand on guard against future pressures from within and without; and to dissuade premiers from organizing lobbies in London and perhaps other capitals—as other capitals have lobbyists in some of our provincial capitals? This does not exactly instill faith in one's own institutions.

Can we not guarantee Canadians at least the security of remaining Canadian, in spite of some provincial threats to the contrary? Lawyers know full well, when entering a debate on behalf of a client, that one of the clients is going to be the loser. Honourable senators, the client in this debate is all of us and the people we represent. Either we all win or we all lose. Please treat this package with a different routine from the superficial criticisms of a budget debate.

I too, like Senator Deschatelets, would want to represent Quebecers, but all Quebecers, including those who welcomed the Norwegians in the first century, as well as those from many lands who followed in succeeding decades. Governments must speak the official language of the people and not vice versa. We want rights that can be legally protected for all Canadians and not be subject to the whim of acceptance by provincial governments, nor, for that matter, the whim of a federal government. You may argue that protection by Parliament has been safe enough protection for individual rights in Canada. We can use Bill 101 as an example of collective rights of a majority over those of a minority.

The Canadians of Quebec, just a year ago, outvoted the would-be anti-Canadians and are thereby assured a place in the Constitution Act, 1981. They are and want to remain Canadian. We promised them a framework whereby it would be possible for them to travel and live first-class anywhere in Canada. Is it any wonder the separatist Government of Quebec is petitioning Westminster on its own, with disregard for those Canadians who said "No" to them on May 20, 1980? Do you realize how our package foils their game plan? Surely, honourable senators, you will not support the aims of the Péquiste government, but rather those of the majority of Quebecers who are counting on us.

On the eve of the referendum, our Prime Minister said:

> I know that I can solemnly promise that should the "No" side win, we will set in motion forthwith, the mechanism required for renewing the Constitution and that we will not stop until we have achieved this goal.

The Prime Minister was relying on the goodwill which many of the premiers expressed during the referendum campaign to carry out the necessary reform through federal-provincial conferences.

Last September I attended the federal-provincial conference, and, instead of seeing people involved in negotiations to achieve the goal of a renewed Constitution, I saw our first ministers discuss power-sharing issues above all else. They were not too anxious or concerned about the patriation of our Constitution, and were certainly not too concerned about a charter.

Finally, on the other hand, you have this young Inuit member of Parliament, Peter Ittinuar, who, at the hearing on January 30, said:

> However, there is one person I would like to mention that I think perhaps whose patience has been tried, but that is the Prime Minister of Canada, without whose approval we would not be doing this today. I personally, and on behalf of the aboriginal peoples, would like to thank him and together we will build a great nation.

We will build a great nation!

Honourable senators, let us make this our commitment also.

Hon. Senators: Hear, hear.

Hon. John M. Godfrey: Honourable senators, in the first sentence of his dissenting judgment in the reference by the Manitoba government on this resolution, Mr. Justice O'Sullivan, of the Court of Appeal of Manitoba, said:

> In this constitutional case, the submission of the Attorney-General of Canada ends up in the proposition that a political party, if it forms the majority of both houses of the Canadian Parliament, has the power to amend the constitution of our country as it pleases.

In my opinion, this accurately, if somewhat disturbingly, summarizes the position of the federal government with respect to this resolution before the Parliament of Canada. I am sure that most Canadians who do not profess to having any expertise in constitutional law would think that, on the face of it, that submission is absurd. This submission is, of course, one of the principal issues I will be discussing later in my speech.

When the Liberal Whip, Senator Petten, wants to find out how you intend to vote on any particular matter, his approach is to ask his Liberal colleague whether he is having any problem with the matter. When this question was put to me with respect to this resolution, my answer was that I certainly had, and may I say that I still have.

It was not long after this resolution was presented that I was approached by one of my fellow Liberal senators, for whom I have great regard, who asked me to say that I would vote against the resolution unless clause 44 were amended so that the Senate would retain its right of absolute veto with respect to any proposed constitutional amendment that would change or abolish the Senate. May I remind honourable senators that

clause 44 gave the Senate a right of suspensive veto for 90 days only in connection with those amendments to the Constitution requiring the amending formula provided for in clauses 41 and 42 of the original resolution. This meant, in effect, that the Senate could be fundamentally changed or abolished without the Senate's consent.

Honourable senators, I was a member of, and very active on, the Special Senate Committee on the Constitution, which was appointed on June 28, 1978 to consider proposed constitutional changes, including reform of the Senate. That committee never did make a formal report with respect to Senate reform, although it did come to some tentative conclusions which it informally made known to the government late in December 1978, so that they could be considered before a federal-provincial meeting of ministers held in January 1979.

To say that the committee lacked a sense of urgency on the subject of Senate reform is to put it mildly. It was not even reconstituted after the federal election of May 1979. Since being appointed to the Senate in 1973, I would describe the Senate's record with respect to reform of itself as one of creative inertia—lots of talk from individual senators, accompanied in some cases by a certain amount of bluster, but no action except when the continuance of its existence in its present form is threatened from time to time.

Such a threat was again perceived in the federal-provincial talks on constitutional reform being held in the summer of 1980, so on July 8, 1980 the question of constitutional reform was again referred to a committee, this time the Standing Senate Committee on Legal and Constitutional Affairs, which committee appointed a subcommittee to consider the matter. Ten additional senators were appointed to that committee for the express purpose of serving on the subcommittee which consisted of 15 senators. I was one of those senators, and I, again, was very active, particularly on a subcommittee of the subcommittee which considered the whole question of Senate reform and was responsible for most of what appeared in Part II of the report which was euphemistically titled, "Toward a Renewed Senate."

● (1650)

At this point I would like to interject that while there has been no reform of the Senate since I have been here, I am of the opinion that the quality of the work of the Senate has been improved because the quality of the members of this house has improved. The opposition has been enormously strengthened by the very high calibre of the appointments to it by both Mr. Trudeau and Mr. Clark, and that, taken with the generally high calibre of the appointments to this side of the house, has resulted in a noticeably higher percentage of senators who are doing an outstanding or reasonably competent job.

The subcommittee settled on the main thrust of its report in August 1980, and its recommendations were approved in principle by the Standing Senate Committee on Legal and Constitutional Affairs on September 3, 1980, which was before the Meeting of First Ministers. These recommendations were then unofficially communicated to, at least, the federal government so that they would be known before that meeting.

In order to remind honourable senators of what the recommendation of that Senate committee was on the subject of the present absolute veto power of the Senate, I am going to read that part of the committee report dealing with the subject:

> At present the Senate has the legal power and right to reject any bill whatever, and as often as it sees fit. As already noted, it has not exercised that power for many years. Its members have been fully conscious of the fact that any such action would provoke a storm of protest against "frustration of the people's will" as expressed by the elected House of Commons.
>
> It is conceivable that if the Senate were faced with legislation that in its view would seriously undermine national unity, or that had aroused strong opposition in one or more of the regions (especially if the bill were brought forward toward the end of a Parliament, and embodied a policy that had never been before the people at a general election) it might decline to pass it until it had been endorsed in a general election. (The Senate did this with the Naval Aid Bill of 1913.)
>
> We do not believe that in a democratic society an appointed second chamber should have these powers. It is important, however, to make sure that any highly controversial bill passed by the House of Commons really does represent the will of the people, or, at the very least, the considered judgment of the people's representatives. In such cases the House of Commons should at least be forced to think again.
>
> We feel that for this purpose the present absolute veto power is not necessary; indeed, the very fact of its absoluteness makes the Senate reluctant to reject any bill, however bad, even temporarily. We believe that a six months' suspensive veto would give the Senate all the power it needs. The government, the House of Commons and the country would be compelled to think again. The Senate would have enough time to put its case squarely before the public. If, when the six months were up, the government and the House of Commons were so convinced of public support for the bill that they insisted on re-passing it in the House of Commons, then the Senate would have done its duty and could acquiesce with a clear conscience. It would be essential, of course, that the bill be re-introduced in the House of Commons and re-passed there. A mere lapse of six months, after which the bill would come into effect without any reconsideration by the Commons, would destroy the whole purpose of the suspensive veto.

In making this recommendation, the committee was following the recommendation of the Special Joint Committee on the Constitution of Canada, which was chaired by Senator Molgat and the Honourable Mark MacGuigan, M.P. After two years of intensive study, they recommended in 1972, "that the present veto power of the Senate be reduced to a suspensive veto for a period of six months." There was no suggestion in that report that an exception be made for constitutional amendments.

Might I point out that the Senate committee report was not finally adopted by the committee until a meeting held on October 30, 1980? At that meeting, without any prior notice to the committee as a whole that changes were going to be proposed, two recommendations for reforming the Senate were deleted from the draft approved in principle in September. Yet no suggestion was made to change that part of the report dealing with the powers of the Senate in light of the resolution on the Constitution which had been introduced weeks earlier.

It is true that the report only deals with legislative powers, and specifically refers to bills. However, the first draft of the report prepared by the distinguished consultant to the committee did provide for our consideration that the suspensive veto should only apply to ordinary legislation, "as distinct from constitutional amendments and perhaps other constitutional legislation." These words were deleted from the report by the subcommittee of the subcommittee, and I cannot recall anyone ever suggesting that they be re-inserted during the ensuing process of approval by the full subcommittee and the full committee. Surely, the reason given for substituting a six months' suspensive veto for the present absolute veto of the Senate with respect to bills would apply even more forcefully with respect to a proposed constitutional change which must be approved not only by an elected House of Commons but also by a majority of the provincial legislatures as provided for in an amending formula.

I have previously made my position clear to many of my fellow senators that as far as I am concerned, clause 44 was reasonable except that the 90-day suspensive veto provided for should be extended to six months, in line with the suspensive veto recommendation in the report of the Standing Senate Committee on Legal and Constitutional Affairs, and the Report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada of 1972.

For that reason, I emphatically disagree with the government dropping clause 44 under pressure from certain senators who claimed that enough Liberal senators would vote against the resolution to defeat it if that part dealing with abolishing the Senate's absolute veto with respect to a constitutional amendment changing or abolishing the Senate was not eliminated.

One of my other objections to the way the government is proceeding is that they want the Parliament of the United Kingdom to deal with the Joint Address before the Supreme Court of Canada decides whether or not it is legal to do so.

Let me make my opinion perfectly clear on this point. While I had not previously studied the question in depth, I could never understand how a constitutional convention could be turned into a legally binding law on the say-so of several law professors, of whom Professor W. R. Lederman is the leading exponent, when there is absolutely no decision of any competent court to support that proposition. Many eminent law professors and writers on constitutional law, including the great A. V. Dicey, have clearly distinguished between a constitutional law which the courts will enforce. To quote Dicey:

[Senator Godfrey.]

> The other set of rules consisting of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the "conventions of the constitution," or constitutional morality.

Mr. Justice Hall, of the Manitoba Court of Appeal, also quotes various other authorities to support this proposition. I will refer to only four of them.

Colin R. Munro, in his 1975 *Law Quarterly Review* article "Laws and Conventions Distinguished," states:

> The validity of conventions cannot be the subject of proceeding in court of law. Reparation for breach of such rules will not be affected by any legal sanction. There are no cases which contradict these propositions. In fact, the idea of a court enforcing a mere convention is so strange that the question hardly arises.

Peter Hogg, in his 1977 book *Constitutional Law of Canada* says:

> Conventions are rules of the constitution which are not enforced by the law courts. Because they are not enforced by law courts, they are best regarded as non-legal rules—

Senator Flynn: Peter Hogg also said that Parliament could abolish the Senate without the consent of the provinces.

Senator Godfrey: I am not aware of that.

In the *Reference re Disallowance and Reservation of Provincial Legislation* (1938) S.C.R. 71, Chief Justice Duff, of the Supreme Court of Canada, generally considered one of Canada's greatest judges, stated:

> We are not concerned with constitutional usage. We are concerned with questions of law which, we repeat, must be determined by reference to the enactments of the British North America Acts of 1867 to 1930, the Statute of Westminster, and, it might be, to relevant statutes of the Parliament of Canada if there were any.

Finally, in a decision of the Supreme Court of Newfoundland in 1948, before it joined Canada, Mr. Justice Winter said:

> To these conventions the adjective constitutional is applied; any action violating them is termed unconstitutional . . . Not merely has a court of law no power to redress directly a violation of a genuinely constitutional role, but it is, I should think, the last place in which redress should be sought.

I rather like Mr. Justice Hall's statement in his judgment that:

> "It is not appropriate to the exercise of the judicial function to find a political orange and turn it into a judicial apple"

And he concludes by saying that "the conventions of the Constitution are not for judges."

• (1700)

Chief Justice Freedman, in his judgment, came to the conclusion that there was no constitutional convention, so that he did not have to decide specifically whether a constitutional convention, if it existed, could become a rule of law. However, he does quote some of the same authorities referred to by Mr. Justice Hall, which I have already quoted.

Chief Justice Freedman does refer to the compact theory of Confederation and states:

> In my view the theory in question is supported neither by history nor by subsequent usage.

Honourable senators will recall that I began this speech by quoting the opening sentence of the judgment of Mr. Justice O'Sullivan with approval. He wrote the main dissenting judgment. He quoted extensively from the judgments in the Newfoundland case referred to in the judgment of Mr. Justice Hall, and quotes also from a judgment of the Privy Council to the same effect.

However, even in the face of all this, he has no difficulty in deciding that although:

> —the constitutional convention referred to has not been established as a matter simply of precedent, it is, however, a constitutional principle binding in law.

Evidently, because he thinks it should be.

As a lawyer, I found his reasons unconvincing and not supported by any relevant legal authority. Judges must decide what the existing law is. They should leave to the politicians, legal practitioners and law professors the job of saying what they think the law should be on a matter as politically controversial as this.

As to Mr. Justice Huband's dissenting judgment, I can only say that he does not even attempt to quote a single legal authority to support his views. As a lawyer, I found his reasoning irrelevant and unconvincing. If I were a political science student at a university I would have found his theory—and I cannot place it any higher than that—as to what constitutional practice should be, rather interesting, if novel.

As I said earlier, one of the matters that I very definitely disagree with is the apparent eagerness of the federal government to press the U.K. Parliament to deal with this resolution before the Supreme Court of Canada has a chance to adjudicate as to whether or not it is legal.

While I strongly agree with the government that it is legal, and I am of the opinion that the Supreme Court of Canada will so decide, I am sure that honourable senators will not be surprised when I confess that there has been the occasion—very rare, of course—when a court has decided a legal question contrary to an opinion that I gave when I was practising law.

Senator Flynn: I don't doubt.

Senator Godfrey: So there is always the possibility that they may do so this time.

In view of the action taken by six provinces challenging the legality of the process being followed, I am of the opinion that there is no urgency demonstrated that would justify the amendments being enacted by the U.K. Parliament until the legality of the process has been determined by our Supreme Court. Because of the split decision in the Manitoba Court of Appeal, there is bound to be speculation in the U.K. Parliament as to whether this process is legal, and that may well influence the vote of individual members.

It seems to me that it is common sense and tactically sound to get that question out of the way before the U.K. Parliament votes on the matter. If I were a member of the U.K. Parliament, I would certainly insist that consideration of the bill be postponed until after the decision of the Supreme Court, and I am of the opinion that the federal government should do everything it can to expedite the determination of the matter by the Supreme Court before the resolution is sent to the United Kingdom.

I would now like to discuss the report of the Foreign Affairs Committee of the British House of Commons, chaired by Sir Anthony Kershaw. I must say that my initial reaction to this committee, even considering what the Westminster Parliament should do with a joint address before it was actually received, was very adverse. My opinion did not change when I read the summaries in the press of their conclusions.

However, my ears pricked up a bit when I was told that Mr. Gordon Robertson, the former Clerk of the Privy Council and for some years the Prime Minister's principal adviser on federal-provincial relations, had read the report and thought it was both serious and scholarly.

I then obtained a copy of the document and read it carefully, and may I say that I completely agree with Mr. Robertson? It is well written, meticulously researched, and its conclusions, generally speaking, are very logical, even if one does not necessarily agree with all of them or that the U.K. Parliament should follow them. I must say that I was somewhat surprised to hear Senator Lamontagne refer to this report in his speech as "biased and inconsistent."

There is some very interesting and relevant constitutional history, not generally known, revealed in this report. In several instances it gave me a new slant on what had happened in the past, and I would like to refer briefly to some of them.

Honourable senators are now aware from other speeches that in 1907, in respect of a resolution of the Canadian Parliament for an amendment to the B.N.A. Act with respect to the payment of subsidies from the federal to the provincial governments, the Legislature of British Columbia had passed a resolution protesting against the settlement and also its being regarded as final and irrevocable, and laid a petition before His Majesty to that effect.

In introducing the B.N.A. Bill, 1907, the Under-Secretary of State for the Colonies, Mr. Winston Churchill, as he then was, stated:

> He did not pretend to go into the merits of the difference on a constitutional question before the British Columbia and the Federal Government. We on this side did not know enough to decide upon the merits of the claim. On

> the other hand, he would be very sorry if it were thought that the action which His Majesty's Government had decided to take meant that they had decided to establish as a precedent that whenever there was a difference on a constitutional question before the Federal Government and one of the provinces, the Imperial Government would always be prepared to accept the Federal point of view as against the provincial. In deference to the representations of British Columbia the words "final and unalterable" applying to the revised scale had been omitted from the bill.

In light of this quotation, it really is extraordinary that Mr. Serge Joyal maintained, in his speech in the House of Commons, that London removed these words solely because, in the opinion of Mr. Churchill, they seemed totally inappropriate in the legislation. There was no mention by Mr. Joyal of the opposition of British Columbia which, according to Mr. Churchill, had considerable influence.

I find equally extraordinary the statement by Senator Lamontagne, in his speech, to the same effect, and his further statement that:

> British Columbia opposed the Canadian request on the ground that the proposed increase in subsidies was not high enough.

While that is true, as far as it goes, Senator Lamontagne carefully refrains from pointing out that Mr. Churchill said, in the speech quoted above, that the provincial legislature:

> —passed a resolution protesting against the settlement being regarded as final and irrevocable. They also laid before His Majesty a petition asking that, in any legislation to give effect to the Ottawa resolutions (of a Federal-Provincial Conference of 1906), the arrangement should not be taken as of a final and irrevocable character.

In commenting on this statement of Mr. Churchill, the Kershaw committee's report stated:

> Here we record it simply as evidence of a recognition that the federal character of Canada's constitution might affect the responsibility and the actions of the U.K. authorities in relation to that constitution.

Thus we do have an instance of the U.K. Parliament, at the request of a provincial legislature, altering an amendment to the B.N.A. Act proposed by the Canadian Parliament, although they may have also thought it only an improvement in drafting in accordance with general legislative practice.

Subsequently, in connection with this amendment, Lord Elgin, Secretary of State for the Colonies, wrote to the Premier of British Columbia that he:

> —fully appreciates the force of the opinion expressed that the British North America Act was the result of terms of union agreed upon by the contracting provinces and that its terms cannot be altered merely at the wish of the Dominion Government.

But that he feels, however:

[Senator Godfrey.]

> —that in view of the unanimity of the Dominion Parliament and of all the Provincial Governments save that of British Columbia, he would not in the interests of Canada be justified in any effort to override the decision of the Dominion Parliament.

Senator Lamontagne: Would the honourable senator go on with the quote?

Senator Godfrey: I do not have it. I believe I have included everything—

Senator Lamontagne: Except the substance.

Senator Flynn: You knew about that yourself.

Senator Godfrey: In 1943 the federal Parliament proposed an amendment for the postponement of redistribution of seats in the Canadian House of Commons until after the war.

When the bill was being considered in the British House of Commons, Clement Attlee, the British Secretary of State for Dominion Affairs, stated:

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

In fact, while the amendment involved no question of the powers or rights of the provincial legislatures or governments, there was opposition to the amendment by Premier Godbout, a Liberal Premier of the Province of Quebec and the Quebec legislature.

● (1710)

While it is somewhat lengthy, I believe I should read into the record that part of the Kershaw report dealing with this incident:

> The existence of opposition by a Provincial government and legislature was not conveyed to the UK Government until after the BNA Bill 1943 had received the Royal Assent. The Canadian request had not been conveyed to the UK Government until 17 July 1943; it was accompanied by a request that the legislative processes in Westminster be completed before 24 July. It was introduced and passed in the House of Lords on 21 July. On the morning of that day, the Dominions Office received from the UK High Commissioner in Canada a telegram stating:
>
> "Mr. St-Laurent, the Minister of Justice, told me the following informally today. *Some citizens in Ottawa and elsewhere* are preparing representations which they wish to make against the passage through Parliament at Westminster of the Bill amending the British North America Act. Mr. St-Laurent . . . remarked that it will be convenient if the representations referred to above arrived after the Bill had already become law . . .".
>
> 70. The Bill was passed in the House of Commons on 22 July and received the Royal Assent. On 23 July, the UK Government heard for the first time that the opposition from "some citizens in Ottawa and elsewhere" was in fact the opposition of the Premier of Quebec with the

unanimous approval of the members of the Quebec legislature. A Dominions Office internal minute, dated 23 July 1943, states that the relevant telegram from a Canadian MP "very fortunately reached us after the Bill had passed both Houses . . . We had not heard previously of the [Quebec Government's opposition]". The minute continues:

> "It is doubtful whether any reply to the telegram is desirable. It is not proper that an individual Canadian MP should communicate direct with the United Kingdom Government in a matter of this kind. The position might be different if the Premier or Government of Quebec had addressed us on the subject though, even in that case, it should be noted that the established principle is that the United Kingdom Government have no direct dealings with Canadian Provincial Governments and communicate with them only through the Canadian Government . . . As was mentioned in the debate yesterday, it is anomalous that the United Kingdom Parliament should be called upon to deal with such questions, seeing that these must imply some measure of responsibility on the part of Parliament here in what is purely a Canadian matter . . ."

71. Accordingly, on 22 September 1943, the UK High Commissioner in Canada sent to the Canadian Under-Secretary of State for External Affairs an "informal note" expressing the UK Government's disquiet at the events of July. The main paragraph of the note is as follows:

> "Generally, it seems unreasonable that at this stage of constitutional development the United Kingdom Parliament should afford the sole means of amending the Canadian Constitution, since it is clear that it *cannot effectively discuss the merits of the case.* The suggestion has been made that the United Kingdom authorities should represent to the Canadian Government that the procedure adopted on this occasion was derogatory to the United Kingdom Parliament and might indeed be the cause of serious friction in the future. But the position is that express provision *to maintain the existing practice* in this respect was made in the Statute of Westminster in a special clause, the form of which was drawn by Canadian authorities as the result of a formal conference between the Federal and Provincial Governments. Accordingly, the United Kingdom do not wish to make anything like a formal approach on the subject as to the unsuitability of the present position. At the same time they hope that the Canadian authorities will realize that *inappropriateness and possible risks involved*" [*sic*] "*in the present position.* They take the view that the present practice has become increasingly anomalous and *likely to lead to friction* and they feel that, at any rate as soon as the war is over, the Canadian authorities may wish to find some method of amending the Canadian Constitution by action taken in Canada."

It is really quite extraordinary that a man like Mr. St-Laurent, in referring to opposition to the amendment as coming from "some citizens in Ottawa and elsewhere", obviously felt it advisable to apparently be somewhat less than frank with the U.K. High Commissioner in order to conceal the fact that the Quebec government and legislature were opposed, so that the U.K. Parliament would rush the amendment through in two days and they wouldn't know about the Quebec opposition until too late. This would indicate to me that Mr. St-Laurent was worried that the U.K. Parliament might pay some attention to opposition from a province if they knew about it. It also certainly shows that, even back in 1943, the U.K. Government was worried that they might find themselves in the position they are in today, and wanted to avoid it.

The Kershaw report stated at page xxxvi, that:

> "Both Mr. E. Lapointe, who as (Liberal) Minister of Justice attended the Conferences of 1926 and 1929, and Mr. H. Guthrie, who as (Conservative) Minister of Justice attended the Conferences of 1930 and 1931, stated in the Canadian House of Commons (in 1931 and 1935 respectively) that the UK Parliament could, and probably would, reject a Canadian request affecting Provincial rights if made without Provincial concurrence."

Honourable senators, that is not what Mr. Lapointe said. The Kershaw report has glossed over a critical distinction. According to the footnote at the bottom of the page, Mr. Lapointe actually said:

> "—the Imperial Parliament is not really a dominating power; it acts as trustee and as a guarantor, and merely gives effect to the will of the Canadian people . . . I think that amendments to the constitution could be divided into two classes; first those which would affect the provinces, *which would add powers to the federal parliament and in that way affect provincial rights.* In such cases surely the British Parliament, even under the situation as it exists to-day, would not agree to pass a law to effect the change . . . on the question of the respective jurisdiction of the Dominion and the provinces, there is no doubt that this could not be changed by either without agreement with the other."

As far as I am concerned, the most important and relevant words are, "which would add powers to the federal parliament". Mr. St-Laurent made the same point in 1943 when he was Minister of Justice, and said:

> "to change the allocation of legislative or administrative jurisdiction as between the provinces, on the one hand, and the Federal Parliament on the other, it could not probably be done without the consent of the organism that was set up by the constitution to have powers that would assuredly be taken from that organism."

Mr. St-Laurent then specifically referred to the B.N.A. Act, 1940, where unemployment insurance was transferred from provincial to federal jurisdiction.

In the quotation of Mr. Trudeau's mentioned by Senator Thompson, Mr. Trudeau refers to the practice of the federal

government seeking the unanimous consent of the provinces "before seeking amendments that have affected the distribution of powers."

I personally think that this makes all the difference in the world as to how the amending process should be handled. This resolution does not propose to add to the powers of the federal Parliament any powers taken from the provinces that they presently have under the B.N.A. Act. The federal government has very carefully stayed very clear of any question of division of powers. Those will only be handled under the amending formula and in Canada. In view of the fact that the federal government has a power of disallowance over provincial legislation, which it can use if provincial legislation did offend fundamental rights of the kind contained in a bill of rights, then provincial legislatures can be curbed even now in this area by the federal government, even though the power of disallowance has fallen into disuse. In fact, it has not been used since 1943, but it was used 112 times before that.

• (1720)

In Bill C-60 the federal government offered to give up the power of disallowance with respect to those provinces that agreed to the entrenchment of a Charter of Rights. The limitation on the powers of the provincial legislatures imposed by a judicially interpreted Charter of Rights surely affects their powers less than the discretionary power of the federal government to interfere at will by disallowance. I might also interject at this point that the powers of disallowance and reservation contained in the B.N.A. Act, together with the declaratory power, emergency power and the spending power of the federal government, really negates the sovereignty theory that some people and some judges claim, without proper qualification, that the provincial legislatures possess.

It was as the result of a unanimous request of all the provinces, as well as the federal government, that section 7(1) of the Statute of Westminster was enacted which left the amending power in the hands of the U.K. government. No attempt was made to define the principle upon which the U.K. Parliament would act. It was because no agreement could be reached upon an amending formula by the provincial and federal governments that there was no such definition. If it had been possible to agree upon what circumstances the U.K. Parliament would act, then that would have been the equivalent of an agreement upon an amending formula and the Constitution could have been patriated. Surely, by no stretch of the imagination could the provinces have thought that in all cases, such as a drastic revision of the division of powers between the federal and provincial parliaments in the federal government's favour, the U.K. Parliament would automatically rubber-stamp the request of the federal Parliament. The provinces did regard the U.K. Parliament as some form of protection, and that is why they agreed to leave the power there, as they had no intention of agreeing to permit the federal Parliament to amend it at its will.

Honourable senators, I agree with the Kershaw Committee in its conclusion:

> It would not be in accord with the established constitutional position for the U.K. Government and Parliament to accept unconditionally the constitutional propriety of every request coming from the Canadian Parliament.

What I do not completely agree with is the Kershaw Committee's conclusion that:

> —the U.K. Parliament's fundamental role in these matters is to decide whether or not a request conveys the clearly expressed wishes of Canada as a whole bearing in mind the federal character of the Canadian constitutional system.

They have, in my opinion, such a role only when the federal Parliament is trying to take away significant powers from the provinces to add them to its own powers.

In the body of its report, the Kershaw Committee overlooked the critical distinction drawn by Mr. Lapointe when he said that it was with respect to amendments "which would add powers to the federal parliament and in that way affect provincial rights" that "surely the British Parliament even under the situation as it exists to-day, would not agree to pass a law to effect the change."

This is not the situation with respect to the amendments to the B.N.A. Act we are considering today. The government has been very careful not to increase the powers of the federal Parliament with respect to the powers given to the provinces under section 92 or other sections of the B.N.A. Act. It is obvious to me that the government does not think it would be proper to do so, except in compliance with some amending formula then in place, unless it had the substantial concurrence of the provincial governments or their people as determined by a referendum.

To digress for a moment, I cannot see what all the objections are to the use of referenda in the constitutional amending process. Experience in Australia, where the only way their constitution can be amended is by way of a referendum provided for in a bill passed by the federal Parliament, is that since 1901 there have been some 28 referenda held, representing some 50 proposed constitutional amendments. On only six of these referenda have the requested majorities been obtained, thus enacting a mere nine out of 50 proposed amendments into law, each a relatively simple proposal not bringing about any fundamental change in the division of powers.

Incidentally, the federal government in Australia completely controls the conduct of referenda. Switzerland also uses referenda to approve amendments to its constitution. The Swiss vote down most constitutional amendments, particularly if they propose to broaden the jurisdiction of the federal government. The federal penal code took 24 years of referenda before it was finally approved.

While I do not believe, judging by the Australian and Swiss experience, that referenda ordinarily will serve any useful purpose, there is always the possibility that they might, and for this reason I approve of the present proposals.

I was somewhat surprised at one of the arguments given by Senator Thompson in opposing referenda, that is, "the inabili-

ty of ordinary citizens to have the time to study complex issues." That is the kind of argument I would expect from a right-wing elitist who does not really believe in democracy, and Senator Thompson is certainly not one of those.

I think that this is the appropriate point at which to say that this process by which we are acquiring a Charter of Rights binding upon the provinces does worry me. Some honourable senators may recall that on January 29, 1979 I gave a speech in this house on the question of whether a Bill of Rights should be entrenched in the Constitution. I will not repeat what I said then, except to summarize my conclusions, which were, incidentally, influenced by the evidence of the Honourable J. C. McRuer, former Chief Justice of the Supreme Court of Ontario, and Professor Walter Tarnopolsky, the president of the Civil Rights Association of Canada, given before the Special Committee of the Senate on the Constitution.

My opinion, then—which I have amplified somewhat since—was that while we should have a Charter of Rights in the Constitution, binding on the federal and provincial parliaments, it need only be semi-entrenched as far as the provinces are concerned, in view of the opposition of a majority of the provincial parliaments. If it was in the Constitution, it would clearly have an overriding effect on all other legislation which was desirable. I would not allow the provinces to amend it, but I would allow them to override it with respect to specific legislation where it was clearly desirable to do so because the Supreme Court of Canada had gone off the rails in one of its decisions with respect to that legislation and public opinion clearly thought so and approved of a correction of this decision.

I would have given the power to the provincial governments to correct the way the Supreme Court of Canada interpreted the Charter of Rights with respect to specific legislation by being able to re-pass that legislation with a "notwithstanding" clause in it; that is, the legislation would have effect notwithstanding the Charter of Rights or, more particularly, notwithstanding the way the Supreme Court of Canada interpreted it. However, I would not have given them such power with respect to language rights because the provinces have all previously agreed to that.

I thought, and still think, my suggestion, which I modestly refer to as the "Godfrey formula", is a reasonable compromise that would have met the fundamental objections of some of the premiers to an entrenched Charter of Rights; namely, that the legislatures and not the courts should be, in the last resort, responsible for protecting our liberties. Premier Blakeney, in his brief to the special joint committee, said:

> With the entrenchment many of the most important and sensitive public policy decisions are delegated irretrievably to the courts. Courts, of course, are partially responsible now for administering federal and provincial human rights codes, but their decisions are not beyond popular review through legislative action.

In view of the overwhelming support of the public for the concept of fundamental freedoms, the provincial legislatures would be very cautious indeed about using a "notwithstanding" clause. The present federal Bill of Rights, for which Mr. Diefenbaker was responsible, also had a "notwithstanding" clause in it which has only been used once, and then in 1970 in connection with the Public Order (Temporary Measures) Act which replaced the War Measures Act. I understand that the present Alberta Bill of Rights has a "notwithstanding" clause that has never been used. I would also allow each province to opt in to entrenchment of the Charter of Rights, which they might well do eventually, particularly after they have had some experience with it and how the Supreme Court of Canada interprets it.

I want to say to Senator Thompson that I have done just as much worrying as to how I should vote as he has, and for just as long as he. I did not really definitely make up my mind until after I had done all the research necessary for the preparation of this speech. I do not recognize, and never have, any obligation on any Liberal senator to follow any so-called Liberal whip.

On that subject, I would like to quote Senator Dandurand, when he became government leader in the Senate in 1922, and I remind honourable senators that he remained Liberal leader in the Senate for 20 years:

> I shun party discipline and the party whip. I invite criticism of the measures of the government, criticism from the right as well as from the left; I feel it is the responsibility of each senator to try to improve the legislation that comes before us.

I might say that in my more than seven years in this chamber, neither the leader of my party in the Senate nor the whip has ever attempted on any individual basis to influence my vote. That does not mean, of course, that we do not collectively get exhortations in the Senate Liberal caucus from the government leader in the Senate, from time to time, to follow the party line, and I am comfortable in doing so in most cases because, of course, it is in those cases right.

• (1730)

As between no Charter of Rights in the Constitution and no patriation with an amending formula and an entrenched Charter of Rights together with patriation of the B.N.A. Act with an amending formula, I have finally come to the conclusion, in spite of my strong reservations about the process, that patriating the Constitution is all important, is long overdue, and should be done now, even though it includes a Charter of Rights which is completely entrenched, which I do not really think is necessary at this time.

Let us get this first step over with, so that we can get on with amending the Constitution at home with respect to other important matters, such as the division of powers. I am, therefore, going to hold my nose and vote for this resolution.

On motion of Senator Macdonald, for Senator Nurgitz, debate adjourned.