would be glad to do so. Otherwise, may it be incorporated in the record of today's proceedings?

The Hon. the Speaker *pro tem:* Is it agreed, honourable senators?

Hon. Senators: Agreed.

(*For text of reply see Appendix B, p. 1911.*)

NEWFOUNDLAND

SEAL HUNT PROTEST ACTIVITIES

Hon. Jack Marshall: Honourable senators, while we are on delayed answers, last Tuesday I asked the Leader of the Government a question relating to three supposed conservationists who intend to spray the seals during the seal hunt this year. Has the honourable senator received an answer from the Minister of Fisheries and Oceans as to what action will be taken to apprehend these reported conservationists in order to keep them away from the seal hunt, and in order to allow the seal fishermen of Newfoundland to conduct the seal fishery as it has traditionally been conducted for many years.

Hon. Raymond J. Perrault (Leader of the Government): I regret to say that the response has not yet been received. Hopefully, it will be here tomorrow.

● (2040)

THE CONSTITUTION

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

The Senate resumed from Thursday, February 26, the debate on the motion of Senator Perrault that an Address be presented to Her Majesty the Queen respecting the Constitution of Canada.

Hon. John M. Macdonald: Honourable senators, I wish to join with all the previous speakers in paying tribute to the members of the special joint committee on their examination of the proposed resolution we are now debating. There are 57 issues on the minutes of that committee, so it is obvious that a great deal of time and effort must have been expended by the committee members.

Those minutes constitute some important reference work and are of great interest. I confess that I have not read all of them carefully, but I did carefully read a number which I considered to be of more than ordinary importance.

Honourable senators, while studying the proposed resolution, my first reaction was pretty much the same as that expressed so well by Senator Fournier. Like him, I feel that there are more important and more pressing problems in Canada demanding attention than the patriation of the Constitution. I certainly do not agree with those who feel that this is such an important piece of legislation that it demands priority. In my mind, while it is desirable to have the Constitution here with the addition of an amending formula, I believe there are other and more pressing matters which require urgent attention.

I see a tremendous necessity for action by the government to deal with inflation and the curse of unemployment. Apparently, the government sees no urgency in these matters. Indeed, it appears that the government has no real appreciation of the need to deal with the twin evils of inflation and unemployment or, if it does recognize the problems, it has no solutions to offer. All one hears about is the Constitution.

Like Senator Fournier, I think the further one gets from Ottawa, the less interest one finds in the debate on the Constitution. This is understandable since the ordinary Canadian has more immediate problems which require his or her attention. They are concerned about the ever-rising cost of living. There is no interest shown in the patriation of the Constitution by a person trying to live on the old age pension and its supplement. There is no interest shown in the patriation of the Constitution by persons trying to get along on welfare, or by those earning just enough to be over the poverty line. These are people who are finding it more and more difficult just to live, to get enough to eat, to heat their homes and to clothe themselves.

Can one expect much interest in the Constitution from a person who, on January 23 of this year, had to pay 99.5 cents for a gallon of domestic heating oil when, on January 3, 1980, he had to pay only 70.9 cents for that gallon of oil. One cannot expect a person who uses coal as domestic fuel to have much interest in the Constitution when he now pays $75 a ton for coal and remembers that in 1980 he paid $65—and that is the cost at the coal yard.

One cannot expect too much interest to be shown in the Constitution by the unemployed—especially by the unemployed whose unemployment insurance has run out or is about to run out. I notice that new claims for unemployment insurance in Canada rose by 7.4 per cent to a total of 303,000 in December, from 282,000 in November.

Practically every day we read of renegotiated residential mortgage interest rates rising to astronomical heights. I do not believe it is much consolation to all those people to know that the Constitution is to be brought to Canada and stored in some vault in Ottawa where there will be no danger of its being lost or mislaid.

Honourable senators, I believe it is time—indeed, it is more than time—for the government to put its priorities in order and to put first things first. I further believe the first priority—the first problem which demands attention by the government—is the deplorable state of our economy.

As regards the resolution before us, I again state my belief that all the United Kingdom Parliament should be asked to do is to pass the necessary legislation to make the B.N.A. Act a statute of Canada, with only one amendment, that being an amending formula. I firmly believe that any other amendments should be made in Canada. I firmly believe that a Canadian Charter of Rights, if desirable, should be made in Canada for Canadians by Canadians, and not by Englishmen

in London. Personally, I find it humiliating that the Government of Canada should have to go to the U.K. Parliament to obtain a Charter of Rights and Freedoms for Canadians.

Hon. Senators: Hear, hear.

Senator Macdonald: It just does not make good sense to me. I thought we had long since ceased to have colonial status and had become an independent nation. I was strengthened in that belief by the fact that we have direct communication with the monarch, that we negotiate treaties with foreign powers, and, yes, that we even declared war as an independent nation. You may remember that, to emphasize our independence, Canada declared war on Germany one week after Great Britain had done so.

Now we have a government that wants to turn back the clock; that wants to reverse the course of our history and tradition, and to act as if there had been no constitutional development since 1867. To me, such policy makes no sense and, certainly, it contains no logic.

On the one hand, we have the determination to have the U.K. Parliament pass a Charter of Rights for Canadians, threatening that Parliament with some kind of serious consequences if it does not do so. In other words our government is asking the Parliament of the United Kingdom to interfere in a completely Canadian matter—to pass legislation which could have an effect on every Canadian. At the same time, we are saying that the U.K. Parliament must not interfere in what is a domestic, or Canadian, matter.

I have followed with interest the various speeches of senators and others learned in the law who have debated the matter of whether or not the federal government can proceed to have substantial changes made in our Constitution and the proposed Charter of Rights without the consent of the provinces, or at least a majority of them. Can the federal Parliament act in a unilateral manner to have the Parliament of the United Kingdom pass legislation when the majority of the provinces are opposed to such a course? This question is now before the courts and, I suppose, in due course, it will be before the Supreme Court of Canada for final decision. Personally, I do not like this approach.

Undoubtedly, there has been a continuous development in our constitutional history over the years, and especially over the past twenty or more years. Some sections of the B.N.A. Act have certainly become obsolete and a new relationship has developed between the federal and provincial governments. It is this development which is the cause, I think, of the major disagreements that now exist between the two levels of government.

There is nothing to gain from mutual recriminations. We must recognize that a new relationship has developed but that it is one which has not yet been defined, so there is still a good deal of room for disagreement. I think the present negotiations—if that is the proper term—between the federal and provincial governments, in trying to define their respective areas of authority, can be compared to negotiations between employers and employees over a labour agreement. Difficulties will and must, in time, be overcome and some kind of an agreement will eventually come about.

We cannot look to the past to find a solution to the problem of the relationship between the federal and provincial governments. What was suitable in 1867 is not suitable today. A new relationship, which would define the authority of each level of government as it has developed, must be accomplished by the elected representatives in the federal and provincial governments. This will be difficult since negotiations have been going on for some time without being wholly successful. Yet, as in labour disputes, I think they should continue and, in time, with goodwill and a spirit of compromise, some mutually satisfactory arrangement will be found.

I do believe that what is required is a political, and not a legal, solution to the present dispute between the two levels of government. In a legal decision, someone will win and someone will lose, and this does not make for a happy future relationship. Not only that, but in a legal dispute concerning the relationship between governments, I think there is a danger that our judicial system might be adversely affected. We are fortunate to have a fine judicial system and we do not want our judges to be placed in a position where people may feel one judge favours the federal authority and another the provincial authority.

● (2050)

Indeed, I have heard it predicted that if a reference were made to our Supreme Court certain judges would find in favour of the federal and others in favour of the provincial authority. It was not meant that they would consciously behave in an injudicial manner, but because of their legal and social background. So I feel that the federal government made a wrong decision when it decided to amend the Constitution on its own, and I hope that in time this can be corrected.

Honourable senators, I know it is not practical to discuss the various clauses contained in Schedule B of the Constitution Act. That schedule contains 65 clauses. However, I want to mention two. On January 21 last it was moved in committee that clause 1 of the proposed Constitution be amended to include a statement that the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person, and the position of the family in a society of free individuals and free institutions. It went on to affirm that individuals and institutions remain free only when freedom is founded upon respect for moral and physical values and the role of law.

Honourable senators, I was astounded to read that this amendment was not acceptable to the government. It appeared to me that this was an amendment which would have had the support of the vast majority of the Canadian people, so I read with interest the reasons given for its rejection. So far as I could see, there were three, two of which were trivial and of no substance. The main objection raised was that since some Canadians do not believe in God, it would be unfair to them to have that affirmation in the charter, and it would amount to discrimination against them, the implication being, of course, that we must respect the opinion of the minority.

Honourable senators, I am all for respecting the rights of minorities, but we must not forget that the majority also have rights, and their rights deserve just as much respect as, if not more respect than, those of any minority group. If that argument were carried to its logical conclusion, there would be very few clauses in the charter which did not have a minority opinion in opposition. Indeed, there would be no charter attached to the resolution.

Honourable senators, I believe it was most unfortunate that no reference is made in the charter to the effect that Canadians, as a nation, acknowledge the supremacy of God. In speaking on the amendment, one member said:

> I believe this country of ours has been founded by people, who on the whole, believed in God and I believe that because of that common belief held by so many, many of the principles which made it possible for us to have a free society have basically come because of the spiritual values held by those generations of people who went before us.

I also quote a sentence from another speaker:

> Let us recognize the historic fact of Canada, and the historic fact of Canada is that this was a nation founded under God—this was a nation that respected the dignity and the worth of the human being.

Honourable senators, anyone with even the slightest knowledge of history must be aware of the historical fact that the pioneers who came to this country believed in God and acknowledged the supremacy of God. Practically the first thing those pioneers did was to build a church. So I was disappointed that the committee did not accept that amendment which, I think, would be more than acceptable to the vast majority of the Canadian people.

The other clause I wish to discuss for a few moments is clause 15, subclause 1, which reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

On the face of it, that clause would not appear to be objectionable. But, honourable senators, strong objections have been taken to it, and I will tell you why. I understand that the original draft of that clause began as follows: "Everyone is equal, . . ." In committee the Minister of Justice proposed the amendment which changed the word "everyone" to "every individual", and it is this change which is strongly opposed by the various Right to Life groups. I understand that the change of wording was made at the request of the Advisory Council on the Status of Women. The reason given for that request was the fear that the word "everyone" might be interpreted to include children before as well as after birth, and the council wanted to avoid that. Changing the wording led the pro-life groups to protest. Such groups feel, and I think rightly, that the amended wording is a victory for those who advocate abortion on demand.

I draw to your attention a letter dated February 11, 1981, sent to all members of Parliament by the Campaign Life group. This letter is somewhat detailed, and honourable senators may have read it. However, I would like to quote two paragraphs from it which show, in no uncertain terms, the reasons for the opposition of the pro-life groups. They read as follows:

> Our objection lies with S.15 of the Charter in which Mr. Chrétien ignored the recommendations of the pro-life groups in regard to protection of the life of the unborn child and instead accepted the recommendations of the Advisory Council on the Status of Women. The purpose of this latter council's recommendation according to CP report, dated November 15, 1980, was to prevent "fetuses from having protection from the Charter," and to have entrenched into the Constitution total and complete "equal rights" for women.
>
> S.15 of the Charter will have a direct effect on the abortion issue in that it will be used by the pro-abortionists to bring about an enormously increased number of abortion facilities and abortion clinics (Statistics Canada reports that in 1979 alone 65,043 abortions were performed in Canada). The argument will be used that women in localities where abortions are available are allegedly being denied full "benefit of the (abortion law)" and therefore are being discriminated against contrary to S.15. This will either, (1) force the local hospitals to provide abortion facilities, or (2) force the Minister of Health for that province to set up abortion clinics which would be separate from and not responsible to any hospital. (Something the pro-abortionists have been pushing for years.)

In my opinion, the decision of the government not only to exclude the unborn from the protection of the charter but also its determination to entrench this exclusion in the charter is a deplorable and regrettable action.

Honourable senators, feeling as I do about the resolution, you will not be surprised to learn I do not propose to vote for it.

Some Hon. Senators: Hear, hear.

Hon. Andrew Thompson: Honourable senators, may I begin by congratulating Senator Macdonald on his living up to his usual standard of providing a thoughtful and stimulating contribution to this debate. Indeed, honourable senators, I have listened to all the speeches that have been made, and have read them all as well, and I believe that they are a great credit to the Senate and have added to the thought which we all have to give to this momentous and historic issue.

I would also like to offer my sincere congratulations to all of those who served with such dedication, tenacity and stamina on the joint committee. It sat for 300 hours, held 106 meetings and heard 314 witnesses. I felt that the joint chairmen particularly characterized the vitality and distinctiveness of Canada: there was the rugged individuality and affable informality of

Senator Hays; and Mr. Joyal displayed all the urbane chivalry and perspicacity of his people.

I have already commended the senators who have already spoken. The quality of their speeches indicated the knowledge and experience which they bring to this critical and fundamental issue. I do not agree with all the arguments, but I must acknowledge their deep concern, their conviction and commitment to produce an even better and united Canada.

• (2100)

The committee has produced a substantial document which can result in significant ramifications on the fabric of our federal system and affect imposingly the lives of every Canadian in every hamlet and village from coast to coast.

What the Address to Her Majesty will accomplish is momentous and manifold. It would finally and irrevocably patriate our Constitution with a prescription for amending it to be decided in Canada, and it will also include the entrenchment of a Charter of Rights and language rights.

Let me quote Senator Connolly who, in the Senate in March 1971, defined the Constitution as follows:

> A constitution is more than just a statute of the legislature; it is the supreme law of the state. It is the basic premise upon which the political, the economic, the social and the juridical structure of the state is founded. To it all other law must conform, and to it all legislatures are subordinate. The constitution—

Senator Connolly said.

> —is the fundamental consensus—

I repeat that.

> —the fundamental consensus of a people for the life of a nation, the fundamental consensus of a nation for the life of a people.

I remember very clearly that speech, and as I listened to it I could not help thinking that over half a century before, in my former homeland—in the homeland of Senator Connolly's ancestors—there had not been that fundamental and essential consensus on the acceptance of one clause of the new articles of agreement for my homeland—their Constitution—and that lack of consensus resulted in violent confrontation, in a bitter, brutal civil war whose scars still bleed in the streets of the city where I was born. I thank God that in Canada our deepest national tradition and trait is exemplified in patience, tolerance and compromise when we are making amendments to our Constitution.

Some Hon. Senators: Hear, hear.

Senator Thompson: In my less elegant and more homespun language, the Constitution is the rules of the game for each team and for each individual player.

I am proud to belong to a political party, the Liberal Party, but partisan play stops, I suggest, when as Canadians—not as Liberals, Conservatives, Social Crediters or New Democrats—we sit down to discuss the rules by which our vast and varied country will govern itself. I respectfully suggest to those who have brought up the flag debate that it is our national symbol.

It was certainly one issue that touched deeply the hearts and emotions of our people, but the choice of our national symbol did not, as this resolution will, significantly change the fundamental rules which govern us all.

Indeed, I recall the process that took place. Senator Olson described one of the approaches in arriving at a decision on the national flag and mentioned that there were over 42,000 written submissions and over 2,695 designs. I thought that was tremendous—citizenship participation at its best.

Citizenship participation was a rallying call for us Liberals not too long ago, and I hope that we shall look at the flag process in the course of this debate, not in terms of its being a symbol but rather as a process from which there evolved our national symbol—watching carefully, getting participation from across Canada, and then following strictly heraldic traditions in deciding on a design.

This Constitution debate is an historic occasion, which demands of us to speak out from our own deeply held individual convictions, and not to be silenced by any narrow partisan loyalties. I wish to say that no one has made any serious attempt to try to curb my expressing my own convictions with regard to this resolution. I have worried over, have been troubled about, and have studied this speech that I am making more than I have done in connection with any speech I have made in the past. I am not a sophisticated or learned constitutional lawyer as are some of my honourable colleagues—

Senator Marshall: But you are pretty good.

Senator Thompson: —and my questions are blunt and simple. Putting it bluntly and simply, my question is: Are we keeping our word; are we breaking the rules by which we agreed to govern ourselves in the federation? No matter how noble and worthy the purpose of this resolution—and I believe that what we are trying to achieve is worthy—the end does not justify the means.

Some Hon. Senators: Hear, hear.

Senator Thompson: I know that no senator will argue, because the aims are so noble and worthy, "Let us ignore and abuse the means."

Honourable senators, I recall the time when I got my first job in Canada. I was in my early teens. It was during the first years of the Second World War, and Toronto University had permitted me leave of three weeks to help with the prairie harvest. I was a skinny, small boy compared with the older students with whom I went out to Lucky Lake, Saskatchewan—which I know an honourable senator in this chamber will recognize well.

I recall that I stood in the centre of the square of that little town, and I was the last to be chosen. I felt very awkward about that, standing there and hoping that someone would choose me to help them with the harvest. Then a Mr. MacGregor chose me.

When the harvest was completed and I was watering his horses out on the prairie, looking over that enormous expanse and watching the sun slowly setting, Mr. MacGregor came over to pay me. He was a homesteader and did not have very

much money. I felt very guilty because I was scrawny and small, and not that effective. I said to Mr. MacGregor, "I was a poor worker; you do not need to pay me these wages." Mr. MacGregor was a blunt man. He said, "You were indeed." Then he added with a note of pride and determination in his voice, "Remember this, laddie, you're in Canada, and a man's word is his bond, poor bargain or nay."

Honourable senators, over the past weeks I have attempted to find out particularly what is the Canadian government's word on this amending procedure, poor bargain or nay.

We do not have a large staff, and I commend my secretary, whom I share with Senator Steuart, for the work she has done, and also the Library research staff and, indeed, some honourable senators who have helped me obtain some background material on this subject. I have read the Kershaw report and all the different briefs that were submitted, and at times I have read all through the night, to the concern of my wife who thinks that I may be getting mentally disturbed over this issue.

Perhaps, with all my homework, I should have followed the advice of Judge Begbie in the last century who said, "The statute books are exceedingly muddled. I seldom look at them."

● (2110)

Honourable senators, my deep concern is not with the substance of the resolution, but rather with the procedure being followed. I have stated that concern to the government through the traditional channels of the caucus, the Senate caucus, the National Liberal caucus, and now I am stating it on the floor of the house.

I want to thank Senator Austin, in particular, and Senator Lamontagne, because both of them focused, to a certain extent in their speeches, on the unilateral procedure being adopted by the federal government, and they realize that this is a matter that worries me, and worries many Canadians.

Senator Lamontagne, in his usual masterful, erudite manner, provided a powerful, persuasive and unique argument to justify the unilateral procedure, namely, that the means indeed do justify the end. Senator Lamontagne argued:

> 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.

In other words, a majority of both houses of Parliament can have unfettered power over the provinces.

Senator Lamontagne, in order to substantiate this viewpoint, quoted a very impressive list of academics, such as Professor Kennedy and Norman Rogers in 1935, both talking about the lack of a strict legal requirement.

Senator Lamontagne also quoted Professor Gil Rémillard of Laval University, and went on further to quote Professor Scott, who also said that there is no legal necessity for consulting the provinces. He then reached back to Dr. O. D. Skelton, in 1935, who said:

> 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.

Senator Lamontagne argued what was to me an innovative approach to this whole concept of federalism. He suggested that despite the fact that there are six provinces before the courts now, in the process of trying to stop the federal government from proceeding with this resolution, the Canadian Parliament must no longer retain this unlimited power to amend the Constitution by itself, and that if we were to follow the method proposed by the federal government, as set out in the resolution, we would be giving a guarantee to the provinces of their rights.

Mr. Chrétien, before the special joint committee, also expressed this view, talking of the British government and saying that the B.N.A. Act is British law, and telling us that we have to bring it back because, as he said:

> It is, after all, a British law. The British Parliament could, probably, if they wanted, do almost anything with our Constitution.

Indeed, if we were to follow to a logical conclusion the strict legal argument of Senator Lamontagne and Mr. Chrétien, we would have to assume, in fact, that we never had a Canadian federation; yet, of course, we know we did, and I know that Senator Lamontagne would agree with me. The preamble of the B.N.A. Act of 1867 states that Canada is a federation, and not a unitary state. Let me quote:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown—

Viscount Haldane authoritatively stated, referring to the background of the B.N.A. Act:

> The scheme of the Act passed in 1867 was thus not to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to establish a central government in which these provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest.

If we were to follow the logic of Senator Lamontagne and the Honourable Jean Chrétien, we would be entitled to ask why, in the light of the fact that since 1927 there have been ten first ministers' conferences on the amendment of the Constitution, the federal government, in the past, has not used this legal power that it is suggested it has? I would like to answer that by a quotation from someone who, I know, all Liberals revere, and who is revered, I am sure, by all of us. I am referring, of course, to the Right Honourable Louis St. Laurent. Senator Macquarrie may recognize this as a textbook by one of his heroes, MacGregor Dawson, who also taught me. At page 133 of the fourth edition of this text, the author says:

> The legal and conventional position as it still exists was accurately stated by Mr. St. Laurent, the Minister of

Justice, when the proposed 1946 amendment was before the House. In reply to a query whether Section 133 (regarding the use of the English or French languages in Canada and Quebec) could be altered without provincial consent, he said:

> Legally I say it can. The situation appears to me to be this. There are persons and nations who reach a high estate in the affairs of men, and the high estate they reach imposes upon them high obligations... I feel—and I believe my fellow Canadians of my race and religion can feel—that a better guarantee than anything that might be found in Section 133 is to be found in that respect, for those who have been formed under the principles of British freedom and British fair play, to protect what are our essential rights.
>
> It is not the manner of those who have themselves had, and whose ancestors have had, the formation that comes from that long history which has brought us to this point in the civilization of mankind, to do things which the conscience of humanity at large would regard as dishonourable; and the conscience of humanity at large would frown upon an assemblage in this house that attempted to take from me and from those of my race the right to speak the language I learned in my infancy as one of the official languages in which the deliberations of this house may be carried on. So it is of everything else that is not within Section 92. If it is fair, if it is just, if it is proper according to the standards of human decency, it will be done; if it is unfair, if it is unjust, if it is improper, all members of this house will say, "It is not our manner to do such things."

Obviously, the standards which the Right Honourable Louis St. Laurent used are not those of a narrow, legalistic definition, which is the one arrived at by Senator Lamontagne in his use of the quotations from his esteemed academic authorities. The question that the Right Honourable Louis St. Laurent was asking was: "Is it fair, is it just, is it proper, according to the standards of human decency?"

Honourable senators, I am concerned that this resolution to patriate and amend our Constitution should have just those qualities which Mr. St. Laurent emphasized. My concern is not because of any particular sympathy towards some of the provincial premiers' viewpoints as expressed at the recent constitutional conference. Frankly, I was appalled at the parochial character of the views expressed by some of them, in spite of the fact that, like Senator Austin, I do recognize that they should and do represent provincial interests within a federal Canada. My concern is most assuredly not born of my belief in more decentralization. Our country, in my view, is already dangerously decentralized. My concern is rather with regard to the very basic issue, namely, the sanctity of our federal principle.

Let me quote the Right Honourable Lester B. Pearson in *The Amendment of the Constitution of Canada* (1965) in which, at page vii, he says:

• (2120)

> In any federation, the two most critical questions are the distribution of powers between the two levels of government and the manner in which the Constitution can be changed. A federation is necessarily a delicate balance between conflicting considerations and interests. It is to be expected that the most delicate of all questions should be the way in which such a balance might be altered.

Some of you may recall the words of Sir Ivor Jennings in *Constitution Laws of the Commonwealth*, (1957):

> The essence of federalism is a division of powers between a central and local legislature that the central legislature has no power to alter. If this test is applied, the Constitution of Canada is certainly federal.

Why am I concerned, honourable senators? It may be because of my own background; where I have come from. I have seen a homeland where there was not a consensus of the people, and I have seen what resulted when a constitution was brought back from England to my former country.

Dr. Edward McWhinney, who has studied and written on the general principles of constitutionalism in the English-speaking world, and who appeared before the joint committee, emphasized that constitution-making and its subsequent operation demanded a substantial consensus of the people. Professor Lederman wrote in his article "Changing Canada's Constitution":

> The basic provisions of a country's Constitution are first principles that develop out of the whole course of its history about the right way to do things.

I would like to say that I am not attempting to expound the "compact theory" because I agree with MacGregor Dawson, my former professor, when he said that the compact theory is constructed on sheer invention, without any legal or historical foundation. What I am discussing is the basic principle of federalism rather than any contractual arrangement between various governments which we are discussing. It is a matter not of a "federal compact", but of a federal principle. Therefore, when we look at the procedure to see whether the federal principle is being honoured, I know that Senator Lamontagne, in his most able and scholarly speech, argued that:

> 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.

I accept his statement, but I also checked the history of proposed amendments to the Constitution which would affect the legislative powers of the provinces. I found that no amendment which affected the legislative sovereignty of the provinces was sought without the consent of all the provinces.

Some Hon. Senators: Hear, hear.

Senator Thompson: Indeed—and I wish Senator Lamontagne or others would inform me if I am wrong—there were only two such amendments in which there was not unanimous consent. There was the 1930 amendment which contained the natural resources agreements between the federal government

and the Governments of Manitoba, British Columbia, Alberta and Saskatchewan. Those were the four provinces directly affected, and all agreed to the amendment. Senator Dandurand, on behalf of the federal government, explained that consent in principle had been given by all the provinces at a conference of federal and provincial governments in 1927.

The other amendment was that of 1907, which assigned higher federal subsidies to the provinces from those established in 1867. It was approved by eight of the provinces, but not consented to by British Columbia, whose premier, Premier McBride, according to Dr. Gerin Lajoie, was motivated by "a claim for better claims." Because of Senator Lamontagne's brilliant and erudite speech, which kept me reading all through the weekend, I know that he stated that in 1978, the Honourable Ron Basford and the Honourable Marc Lalonde had reviewed past practices and they had stated that, though the provinces' consent was sought in 1940, 1951 and 1964, constitutionally this was not obligatory. Well, I would like to read the white paper entitled, "The Amendment of the Constitution of Canada, 1965," detailing the approach taken by the Government of Canada to constitutional amendment, "which finally produced a unanimously acceptable solution," the Fulton-Favreau formula. Let me quote from pages 45, 46 and 47:

> . . . The very nature of the federation requires that the rights and powers of its constituent units be protected . . . It may be argued that a requirement of unanimity is too inflexible to be applied to the distribution of legislative powers, but this distribution is basic to the Canadian federation. In fact, in the 97 years that have elapsed since Confederation, no amendment has altered the powers of provincial legislatures under section 92 of the British North America Act without the consent of all the provinces.
>
> This clearly reflects a basic and historic fact in Canadian constitutional affairs. The Constitution cannot be changed in a way that might deprive provinces of their legislative powers unless they consent. The law has not said so, but the facts of national life have imposed the unanimity requirement, and experience since Confederation has established it as a convention that a government or Parliament would disregard at its peril.

Perhaps, honourable senators, to indicate that there are others who have studied this question, I can refer to one who, I think we all recognize, has spent a great deal of his life considering constitutional affairs, the Right Honourable Pierre Elliott Trudeau. I quote a letter that he sent to the premiers, dated March 31, 1976, in which he wrote:

> In practice, of course, the federal government has in the past sought the unanimous consent of the provinces before seeking amendments that have affected the distribution of powers.

Honourable senators, what has been the stated commitment of our Prime Minister as regards the provinces' consent to amendments? As I read out the following statements, honourable senators, I would like you to think in my simple terms, if you could, of that proud, independent old Scottish farmer, Mr. MacGregor. Let his simple words ring in your ears: "Remember, laddie, in Canada a man's word is his bond, poor bargain or nay." I believe that his chiselled, proud face represents the integrity of the people of Canada.

Let me quote Mr. Trudeau's words uttered at the federal-provincial constitutional conference on February 6, 1979—not very long ago. He was answering questions of the first ministers on the continuing process of constitutional reform, and said:

● (2130)

> So, will there be unilateral action by the federal government regardless of the result of this conference? Our priority would be to seek agreement and move in areas of federal and provincial concern where we could move together but if we are not successful I repeat we preserve our constitutional right to change our constitution, the federal one, just as the provinces keep their right to change their provincial constitutions and I do not think either the provinces or the federal government would want to give up that right . . . Our priority is to change this constitution collectively, federal and provincial . . . We will adopt a Charter of Human Rights, we will constitutionalize it. We cannot force the provinces to do it. We are trying to convince them to do it . . . I can answer unequivocally that the federal government intends to entrench a charter of basic human rights and of linguistic rights. Now, this will bind the federal government; it won't bind the provinces unless they want to bind themselves but here again we can under our constitution bind ourselves just as the provinces, many of you, have adopted Charters of Human Rights. Well, we have adopted one and we want to constitutionalize it.

On June 12, 1978, again the federal government had tabled in the House of Commons a government document entitled, *A Time for Action: Toward the Renewal of the Canadian Federation.* I am sure many of us have read that document. In it were set forth the proposals for renewal of the Canadian federation. Let me read to you from page 19 of chapter 5 of that document, in which the government gives us "the word":

> The government has resolved to provide Canada with a new Constitution by the end of 1981 . . . It urges the provinces to co-operate with it in order to renew the constitutional provisions which cannot be amended without their co-operation.

On March 31, 1976, the Prime Minister wrote to the premiers outlining alternative approaches towards patriating the Constitution with an amending formula. In his second alternative he proposed to detail a permanent and flexible amending procedure in, as he put it, "our Joint Address and having it included in the British legislation as an enabling provision that would come into effect when and only when it had received the formal approval of the legislatures of all the provinces . . ."

In his letter of March 31, 1976, he outlined a third alternative which follows closely the procedure adopted by this resolution:

> A third and more extensive possibility still, would be to include, in the "patriation" action, the entirety of the "Draft Proclamation" I am enclosing. In other words the British Parliament, in terminating its capacity to legislate for Canada, would provide that all of the substance of Parts I to VI would come into effect in Canada and would have full legal force when, and only when, the entirety of those Parts had been approved by the legislatures of all the provinces. At that point, we would have, not only "patriation" and the amending procedure, but also the other provisions that have developed out of the discussions thus far. Here again, of course, until all the Provinces had approved the entire Draft Proclamation, any constitutional change which did not come under Section 91(1) or Section 92(1) would be subject to unanimous consent.

Let us revert, honourable senators, to the Constitutional Conference of June 16, 1971, in the deliberations of which, I think we would all agree from both sides of the house, the Right Honourable Pierre Elliott Trudeau played such an outstanding role. As all of you know, the Victoria Charter contained, among other things, not only a formula for amending the Constitution but also provisions relating to the entrenchment of fundamental rights and language rights. Those rights were, indeed, similar in many ways to the provisions contained in the present resolution, although what is contained in the present resolution is, in my opinion, an improvement over the rights that were envisioned before.

With his superb talents, Mr. Trudeau almost had in his grasp the Holy Grail of amending procedure as well as these other provisions. Unfortunately, on June 23, 1971, the Quebec government could not accept the charter because of the wording of certain clauses dealing with income security. Because of Quebec's dissenting voice, therefore, the new Premier of Saskatchewan—where they had just held a provincial election—did not proceed to have the charter accepted in his legislature. After all the other provincial governments had announced that the charter had been accepted, the Saskatchewan legislature did not go ahead.

I remember those days well, honourable senators, because we had had a good debate in the Ontario legislature, and I also had the privilege of debating the matter on national television with that outstanding, stimulating Canadian, whom we all knew and admired, irrespective of the side of the house we were on, Daniel Johnson.

In 1971 there was no question whatsoever that the federal government would proceed to have the charter enacted, despite the fact that only one province had dissented. Indeed, let me quote the Right Honourable Prime Minister Trudeau with respect to that:

> Despite the failure to secure the unanimous agreement that had been hoped for, the Charter . . . represents the most significant and comprehensive development in the search for a basis of constitutional revision since Confederation.

[Senator Thompson.]

If I may interrupt the quotation, I should like to say I agree with him. Now I continue:

> It is hoped that it may still provide the foundation for agreement in order that the Constitution may be "repatriated" and made amendable entirely in Canada.

Well, I have given you some of the words of the Right Honourable Prime Minister Trudeau concerning this amending procedure. Let me go back to another prime minister who, I am sure, is endeared in the hearts of everyone, but perhaps particularly in the hearts of Liberals. I should like to quote from *The Pearson Years* in *The Liberal Party of Canada, its Philosophy and History*. You all recall the concept of co-operative federalism. That is not a term you hear much these days, but for many of us it was a great rallying call. Listen to this quotation from that work:

> In order to counter growing dissension and to strengthen national unity, the Liberal government formulated the policy of co-operative federalism. This was defined as "co-operation between Ottawa and the provinces at three levels, pre-consultation in the formulation of federal policies, collaboration in the drafting of these policies, and co-ordination in their implementation."

Before I continue, may I refer to Senator Lamontagne's comments on the Fulton-Favreau "fourth principle." Senator Lamontagne suggested that the document does not say that the fourth principle has gained recognition, but is only gaining "increasing" recognition and acceptance. He referred to the nature of degree of participation in the amending formula not lending itself to easy definition. Well, as long ago as 1956, in replying to questions in the House of Commons, the Right Honourable Lester B. Pearson, on January 20 of that year, responded to a question by the Right Honourable John G. Diefenbaker concerning the Fulton-Favreau formula.

● (2140)

Mr. Pearson said:

> My right honourable friend also referred to the fact that we said very little in the Speech from the Throne about constitutional amendment, and that we seemed to have dropped the Fulton-Favreau formula. We have not dropped it, Mr. Speaker. We shall do our best to put it into effect if and when we get the agreement of all the provinces, but without that agreement it cannot be done.

Let us refresh our minds on the white paper published in 1965 by the Honourable Guy Favreau, the then Minister of Justice. It included four general principles. The fourth principle reads:

> 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. The nature and the degree of provincial participation in the amending

process, however, have not lent themselves to easy definition.

These were the words to which Senator Lamontagne referred, but I would suggest, honourable senators, that the Right Honourable Lester B. Pearson seemed to have no difficulty, in his answer to the Right Honourable John G. Diefenbaker, in understanding the implications of that fourth principle. The Right Honourable Louis St. Laurent, in his opening statement at the constitutional conference of federal and provincial governments of 1950 to define an amending formula, stated:

> —it is, and has always been, the view of the present federal government that the exclusive jurisdiction of the provinces which gives a federal character to the Constitution of Canada must be respected.
>
> I should like to repeat again the opinion I have expressed on many occasions that, regardless of the legal position, nothing placed by the Constitution under the jurisdiction of the provincial legislature should be dealt with or altered without provincial participation.

And he goes on further to emphasize that point. He describes how he expressed a similar view in the House of Commons on July 5, 1943 and on May 28, 1946. Mr. St. Laurent said:

> It has always been my view that any procedure for amendment of the joint portion of the Constitution must make proper provision for participation by both the federal and the provincial authorities.

Senator Lamontagne, in his speech, referred to that 1950 dominion-provincial conference and the remarks of Premier McNair of New Brunswick, which he used to indicate that several provincial premiers believe that there is no constitutional convention which obliges the Canadian government to seek the consent of the provinces.

Over the weekend, I read Premier McNair's speech. In discussing the method of repatriation and an amending formula, he said:

> In my view the Constitution of Canada should not be within the unfettered control of the Parliament of Canada or of any other legislative body. The Constitution of Canada and the power of amendment thereof should rest on a deeper basis than the will of a single legislative body.

He went on to say:

> These methods however require unanimous agreement on the part of the dominion and the provinces, otherwise there can be no treaty upon which the new Constitution may be founded.

And further on in his speech he said:

> Any change in the amending procedure should, of necessity, require their unanimous consent.

And by "their" he was referring to the provinces. With the greatest respect, I say to Senator Lamontagne that his choice of the speech of Premier McNair to support his comment that provincial premiers do not adhere to the theory of provincial consent—

Senator Flynn: Shame.

Senator Asselin: Shame, Maurice.

Senator Thompson: —does not seem quite as substantial after reading Premier McNair's speech.

Let me go back to the Right Honourable Mackenzie King, who formally approved these words uttered by his Minister of Justice, Mr. Lapointe. It was in 1925 and Mr. Lapointe was speaking on a motion for the enactment by the U.K. Parliament of a measure vesting the Parliament of Canada with the power of constitutional amendment. Before I read that quotation I would like to remind honourable senators of a comment by Senator Lamontagne on a statement by Mr. Lapointe, which was to the effect that provincial consent is not necessary but may be desirable. In 1925 Mr. Lapointe said:

> The British North America Act itself is not only the charter of the Dominion of Canada; it is just as much the charter of the provinces of Canada . . . Would it then be fair for us to arrogate to ourselves the right to change the act which is just as much the Constitution of the provinces as it is our own? . . . Within their sphere the provinces enjoy the powers of self-government just as much as the dominion Parliament does, and if so, surely the dominion Parliament cannot take upon itself the right to change a statute which gives to those provinces the powers which they enjoy—

Honourable senators, I suggest that those remarks are a little stronger than the statement by Mr. Lapointe which Senator Lamontagne quoted.

Senator Flynn: Selected.

Senator Lamontagne: He said the opposite in 1940.

Senator Thompson: I could continue back through the pages of Canadian history reading statements by the Right Honourable John Diefenbaker and other former Prime Ministers, or their federal spokesmen, right back to 1867. I hope that Senator Lamontagne, whom I respect deeply, does not mind that his remarks are being used as the substance of my discussion.

In his opening remarks Senator Lamontagne corrected Senator Macquarrie who had been quoting Sir John A. Macdonald by saying that Sir John A. Macdonald had no high regard for the provinces. Indeed, he would like to see them as municipalities. However, even though Sir John A. Macdonald had no high regard for the provincial legislatures, he disapproved strongly of any infringement upon the provisions of the British North America Act which would interfere with the rights of the different provinces of the dominion. And in that regard I would refer Senator Lamontagne to *House of Commons Debates* of April 8, 1875, where Sir John A. Macdonald says he:

> —deprecated any infringement on the provisions of the B.N.A. Act which would interfere with the rights of the different provinces of the dominion.

I am almost tempted to throw in a quote by Mr. Stanley Knowles which I feel would be fitting in indicating my position. However, I will not do that, but I assure honourable senators that it is there. It will be interesting to see where Mr. Knowles stands in the vote. I know that he is a man of strong principles, and I do not think that he will be swayed.

There have been many serious attempts to find an amending formula—in 1927, 1935, 1936, 1950, 1961, 1964, 1968, 1971—and in each conference the federal government refrained from proceeding with a joint resolution to the U.K. government because of a lack of unanimous agreement among the provinces. In some cases there was only one province dissenting.

But federalism is a fragile form of government, as expressed by Prime Minister Trudeau who wrote an article in *Federalism and the French-Canadians*, which had also been published in *Social Purposes for Canada* (1961). Incidentally, I treasure that publication in which Mr. Trudeau writes with great lucidity and logic, and frankly, I wish that I had had the privilege and opportunity of studying under him. Prime Minister Trudeau, in that article, wrote:

● (2150)

> But at all times, co-operation and interchange between the two levels of government will be, as they have been an absolute necessity.

I will quote further from this article since I think you will find it to be of interest. In fairness, I would stress that Mr. Trudeau wrote the article in 1961 when the federal government, through its financial powers, was encouraging the provinces to accept a medicare program and a contributory pension plan, of both of which I am very proud. Many felt that if such national social policies continued, the provincial powers, to initiate their own priorities, could be eroded. I believe it was on that basis that Mr. Trudeau was writing this article.

On page 148 of the book I referred to, Mr. Trudeau argued against the centralizing policies of socialists. He stated:

> And there is surely some good in trying to improve upon, or modernize, the rational but perhaps aging division of powers adopted by the Fathers of Confederation. I am inclined to believe, however, that Canadian socialists have exaggerated the urgency of rewriting or reinterpreting the B.N.A. Act. Most of the reforms that could come about through greater centralization could also follow from patient and painstaking co-operation between federal and provincial governments. And the remaining balance of economic advantage that might arise from forcefully transferring more power to the central government is easily offset by the political disadvantages of living under a paternalistic or bullying government. Granted the foregoing statement, it is difficult to see why socialists devote such energy to constitutional might-have-been's or ought-to-be's, instead of generally accepting the constitution as a datum. From the point of view of "making available to all what we desire for ourselves," it is not of such momentous consequence that the subject matter of some particular law falls within the jurisdiction of the federal as opposed to the provincial governments, since in either case the governments are responsible to one electorate or another. In other words, laws—whether they issue from one central government or from ten provincial governments—benefit the same sets of citizens. The only important thing, then, is that these latter clearly know which level of government is responsible for what area of legislation, so that they may be aroused to demand good laws from all their governments.
>
> This would not prevent socialist parties from stating in certain limited cases that reforms might be carried out more efficiently if the constitution were amended. But in such cases, amendments would be clearly mentioned, and not sly encroachments which inevitably result in confusing the electorate as to which level of government is responsible for what. Nor would the proposed amendments all, and as a matter of course, tend to be in the direction of centralization.
>
> For example again, when socialists advocate a constitutional amendment enacting a bill of rights for all Canadians and all governments in Canada, they might simultaneously advocate the abolition of the federal right to disallow and to reserve provincial laws, since such safeguards would then be obsolete.

[Senator Thompson.]

Honourable senators, each of us, in our conscience, has to decide whether the eight premiers against this resolution—six of them involved in court proceedings against this measure—are taking this action because they feel they are living under a paternalistic or bullying government. Are we exaggerating the urgency of rewriting or reinterpreting the B.N.A. Act? Are we practising sly encroachments with our dubious doctrine of asking the British Parliament, if it dare, to judge the propriety of the resolution rather than relying on a decision from the Supreme Court of Canada?

Remember, honourable senators, no Prime Minister in our history has dared to break the rules of our fragile federation. What deeply concerns me, frankly, is that wretched Kirby paper—which I accept was only one of several position papers prepared by the bureaucracy—and, for no reason I can understand, we are adhering to the Kirby procedure. It states:

> There would be a strong strategic advantage in having the joint resolution passed and the U.K. legislation enacted before a Canadian court had occasion to pronounce on the validity of the measure and the procedure employed to achieve it. This would suggest the desirability of swift passage of the resolution and U.K. legislation.

Honourable senators, I will turn very briefly to the question of convention raised by Senator Lamontagne. I have read Sir Ivor Jennings' explanation of constitutional convention which includes the statement:

> —providing the flesh which clothe the dry bones of the law.

In his text, *The Law and the Constitution,* at page 136, he suggests three questions:

(1) What are the precedents?

(2) Did the actors in the precedents believe that they were bound by a rule?

(3) Is there a reason for the rule?

There were conflicting opinions about a Constitution convention being clearly established by learned witnesses who appeared before the special joint committee. As Senator Lamontagne pointed out, Professor La Forest made a strong case against a full-blown and operative convention being established.

On the other hand, Professor Wade, an eminent scholar of constitutional law and a Professor of English Law at the University of Cambridge, argued that the fourth principle contained in the 1965 white paper was concurred in, as he understood, "by all of the provinces before it was published and, therefore, is a convention in the most literal sense of the term, agreed to by all parties."

Honourable senators, I would quote the Right Honourable Pierre Trudeau who is certainly a constitutional expert. He said:

> In practice, of course, the federal government has in the past sought the unanimous consent before seeking amendments that have affected the distribution of powers.

Practice may not be a convention, and it is a too thorny and a too difficult field for a layman like myself to possibly give a decision on, but I would urge all of us to consider Senator Austin's creed contained in his passionate and brilliant speech. He said:

> Justice must not only be done but must be seen to be done.

Why do we not let the Supreme Court decide on the validity of this resolution and on the questions Senator Lamontagne and others have raised? Why the haste?

I find it hard to understand those who have—and no doubt others will—spoken with great passion on the necessity and urgency to enshrine our rights because they do not trust their Parliament or their legislatures, and feel the matter must be decided by the courts. Yet, in connection with this matter of momentous importance the supreme law which will govern all governments—they argue, in essence, to ignore the process of law in Canada, and to ignore and forget that six premiers have taken this resolution before the Canadian courts. I honestly hope that some of those who may follow me will explain the reason for such haste, and, if not, explain the inherent contradiction between their statement and their action in connection with this resolution. I might even suggest that from now on, the advocates of pushing through the resolution at least qualify their positions by stating, "I believe the courts must be the supreme and final arbitrator of our rights but not, on this occasion, of judging the propriety of this resolution."

● (2200)

Perhaps the advocates might ponder on the role of the Supreme Court with respect to Bill C-60. Why did they advocate sending the question of the role of the Senate to the Supreme Court for adjudication, and not advocate patience to allow the Supreme Court of Canada to decide on this resolution which affects all the people and all levels of government in Canada? If, in their advocacy, they draw on the decision of the Manitoba Supreme Court alone, I ask them if it is not logical to continue such reliance on the process of law and permit that process to proceed right through to the Supreme Court of Canada.

For those who are advocating the protection of the minorities through the authority of court decisions rather than those of Parliament and legislatures, I ask them, particularly those in the Senate, to consider their ambiguity towards minorities, the provinces. Think of little Prince Edward Island. I do not know if many of you have read the brief of Prince Edward Island to the United Kingdom parliamentary committee. It had to rush over to the Foreign Affairs Committee of the United Kingdom House of Commons because we, the senators of Canada, their protectors, may ignore their right to have their case heard in the Supreme Court of Canada prior to the enactment of this resolution.

Let me just quote for you a few words from the brief:

> It is submitted that the United Kingdom's role as trustee of the B.N.A. Acts must be as unpleasant for your country as it is unpleasant for P.E.I. to oppose, in the forum of your committee, a probable course of action by the Government of Canada.

Honourable senators may argue that this resolution will not affect the exclusive jurisdiction of the provinces. I find that hard to accept, despite the one provincial supreme court decision. The second amendment of the B.N.A. Act in 1949 gave Parliament the power to amend the Constitution in matters within its sole jurisdiction. Why does the government not then use this authority if there is no interference in provincial jurisdiction?

Let me read the federal government's explanatory notes which accompanied the bill:

> An entrenched Charter of Rights and Freedoms will limit the power of Parliament and provincial legislatures to pass laws or take actions that contravene or restrict unduly these guaranteed rights of Canadians.

Senator Frith: What is so sly about that? It is pretty straightforward.

Senator Asselin: Oh, come on!

Senator Flynn: Come on!

Senator Thompson: I am not talking about that being sly. I wish you would follow more closely, Senator Frith, and I hope you will read my speech.

Senator Frith: I will.

Senator Thompson:

> In this sense, therefore, power of the legislatures, including the Parliament in Ottawa will be restricted.

Let me read section 31 of the proposed charter:

31.(1) This Charter applies (a) to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province and to all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this Act, except Part VI, comes into force.

Certainly, all the provinces understand that this charter's purpose is—

Senator Frith: So does everybody else.

Senator Thompson: I think you are missing the point, Senator Frith, and I hope you will read my speech rather than interrupt me continuously.

Senator Flynn: It wouldn't be the first time.

Senator Asselin: It wouldn't be the first time he has missed the important parts.

Senator Thompson: Certainly, all the provinces understand that this charter's purpose is to limit legislative jurisdiction by rendering inoperative provincial laws, which are, in the judgment of the court, inconsistent with the charter. The fact that it will also limit federal jurisdiction does not alter that fact of infringing on provincial jurisdiction.

I am not talking about slyness; I am talking simply about the basic fact that I consider this charter will infringe on provincial jurisdiction.

Senator Frith: So does everybody else.

Senator Flynn: He doesn't want to understand.

Senator Thompson: One of the provinces' many questions is:—

Senator Flynn: His mind is blocked.

Senator Thompson: —Will freedom or religion interfere with provincial and municipal legislation concerning the closing of stores on Sundays and provincial aid to denominational schools? I would assume that we have provincial administration with respect to mental illness.

I remember writing a speech in days long ago for the Honourable Paul Martin, the then Minister of Health and Welfare, and having to avoid the suggestion that the federal government had the responsibility for the mentally ill; that this was a provincial concern. And yet in our Charter of Rights we now include this. The point I am making is that we are going to require the provincial governments to spend three years in bringing their laws into line with a charter in which they themselves have had no input officially.

Honourable senators, I want to deal with the Bill of Rights, but I have taken up far too much of your time.

Senator Smith: Not at all; not at all.

Senator Thompson: Perhaps I will continue then. I appreciate your encouragement.

[Senator Thompson.]

One of the difficulties of talking about the charter is that people assume that if you discuss it with some apprehension or concern you do not believe in minority rights. Honourable senators, I find it annoying to hear that, but I intend to take a back seat to no senator in this chamber concerning fighting for the rights of minorities.

Some Hon. Senators: Hear, hear.

Senator Thompson: When I was a provincial member I was trying to help the Italians in my riding. I spent a week living with an unemployed Italian family, dressing as shabbily as I could, and walking around to see the kind of treatment they were receiving. Following my experience, Pierre Berton wrote a series of three articles in the *Star*, and Premier Frost mentioned to me that I had shown him some of the needs of those minorities. As a result, the Ontario legislature enacted some safety legislation. I could go on about my fight for many minority groups across Canada.

Senator Austin focussed on Japanese Canadians. When I was doing graduate work at the University of British Columbia, one of my research papers was on the odious laws that the British Columbia legislature had with respect to Asiatics, and the struggle that took place to try to achieve their naturalization. Although I believe other senators have done a great deal with minorities, I believe I am the only one in the Senate who has hanging in his office—and I am proud of it—an inscribed poem donated to me by former internees at a Japanese internment camp. It speaks of their struggle to achieve citizenship. It says:

As final resting place
Canada is chosen.
On citizenship papers,
Signing
Hand Trembles.

In questioning the validity of entrenching our Charter, I do so hoping that no one is going to suggest that I do not have a deep and consuming interest in minority groups. I discard as irrelevant the argument that the Soviet Union and other tyrannies of the right or left may have enshrined inspiring noble charters.

As an editorial in the *Financial Post* pointed out:

> The Soviet bill of rights includes such qualifiers as 'enjoyment by citizens of their rights and freedoms must not be to the detriment of the interests of society or the state' and 'the freedoms of speech, the press and assembly are granted in accordance with the interests of the people and in order to strengthen and develop the socialist system'.

In other words, to bring up the Soviet charter and to try to equate the Canadian people with the Soviet communist system is like comparing oranges and sour grapes.

I think it is more reasonable for us, when we look at entrenchment of rights, to look at the Commonwealth. I looked at the Commonwealth to see where rights had been entrenched. I found that the United Kingdom had not entrenched them, that New Zealand had not, and that Aus-

tralia had not. Then I found that India had, and I thought, "Well, I won't ponder very long on India as far as guaranteeing rights is concerned." So I thought that perhaps the fairest thing I could do would be to go to the American Bill of Rights. The United States is a country that has a similar background of tradition and values.

When I was in the United States and did some research in social welfare, particularly in child welfare, I recall reading a book called *The Dead Hand of the Law*. I tried to get it, and I could not. In the book it described the blocking by Supreme Court decisions of the abolition of the frightful and appalling conditions of child labour. Professor Browne, whom Senator Cook referred to, pointed out that the rights to "liberty" and "enjoyment of property" which were applied by the American Supreme Court through its interpretation of the "due process clause" disallowed laws imposing maximum hours and minimum wage standards, prohibiting discrimination against trade unionists.

● (2210)

Then I thought of the outrages committed in the McCarthy era. Where were the enshrined rights that the Americans had to protect them from changes made only on the basis of association? What about the treatment of blacks and, indeed, of their own Japanese Americans, to mention some who thought that their rights were secure and guaranteed by entrenchment?

Frankly, I wish I felt the excitement that others profess to feel over the transfer of protecting rights to the courts from the sovereignty of Parliament and the legislatures. I believe that the rationale, the explanation, for that transfer needs much less emotional rhetoric and more deliberation by all of us.

There are great libertarians who are uneasy about this transfer. I could quote from the McRuer Commission in 1969, and I could quote D'Arcy McGee, admired by Senator Riley, who stated:

> There is more liberty and tolerance enjoyed by minorities in Canada than in the U.S.

A. V. Dicey, in the nineteenth century, wrote that a written Constitution was inferior because it would only act as a brake on the liberal spirit with which he expected Parliament to be imbued forever.

I also recognize and agree that the legislatures have not had a proud record. I would hope that there would be an entrenched Bill of Rights, but that it would compliment the work of the legislatures. I would go along with that. But I do not have enormous aspirations as to what it is going to do for us immediately.

I would like us to think of the alternatives before we take this final course. There have been approaches made to us in this regard. Senator Cook mentioned Professor Browne and his idea of having a priority of rights. That might be something worth looking at. Priority of rights should be further examined, because it is important.

Another matter that concerns me is the reference to a referendum. Frankly, I feel that a referendum is foreign to our system. I have looked at Australia's experience with referendum as a means of amending its Constitution. Quoting from an exhaustive work on the subject by Don Aitkin entitled "*Referendum: A Comparative Study of Practice and Theory*", he refers to Australia's experience as being, on the whole, a dismaying one.

I am sure that all honourable senators know the arguments against having a referendum: it weakens the power of elective authorities; the inability of ordinary citizens to have the time to study. These are all arguments against it. There is the inability of ordinary citizens to study complex issues. I can say, with respect to this issue, that if it were not for the fact that I am a senator and have been able to devote my time to it, I really could not spend the time in delving into such a complex subject to make rational decisions. There is no measurement of intensity of feeling. I hope that the proponents of minority rights will pause and think a bit about any reference to a referendum, because with the intensity of belief there is no means of a compromising consensus, and minorities are in real danger when it is the majority rule that will decide, when the decision will be by majority vote only.

Because of the necessity for a consensus in reaching agreement on this resolution, I would like to ask the government the following question, because there is concern expressed by the provinces that we are usurping their sovereignty through the use of a referendum: Would the government consider that the use of a further referendum to solve a deadlock be dropped and placed on the agenda of the First Ministers' Conference after the enactment of the resolution? I say that with deep sincerity and appreciation that the government has shown considerable flexibility toward amendments. We should remember that the joint committee adopted 67 amendments altogether.

Honourable senators, why am I so deeply concerned about this resolution? Principally it is because, to my mind, the resolution does not have the credibility of public consensus or the eligibility of provincial consent which raises the question: What will occur when the resolution reaches the British Parliament.

I would hope that the British—and I am sure Senator Lamontagne agrees—will look on it in the way that the Right Honourable Louis St. Laurent looked at Newfoundland when that province entered Confederation. As honourable senators know, when that province voted to enter Confederation there arose the question as to whether it should have responsible government prior to taking that step. The question was asked of Mr. St. Laurent in the House of Commons, to which he replied that he felt the question of responsible government was a matter for the British government, and that it was not proper for him to interfere with respect to that. I hope that the British Parliament will adopt the same kind of approach with regard to the resolution that is sent to them.

If the British Parliament decides that the resolution is procedurally proper and enacts it, and later the Supreme Court decides that the act is not valid, what will be the

situation? Dr. La Forest, the authority mentioned by Senator Lamontagne, pointed out that:

> —the act would be valid in the United Kingdom; the United Kingdom would have abdicated its power. We would be left in a judicially created limbo from which it would be hard, if not impossible, to extricate ourselves by legal means.

Honourable senators, constitutional experts far more knowledgeable and objective than I are perplexed over what this resolution will do to our federation. I refer you to Professor Wade, Professor of English law at Cambridge University, a world recognized authority on constitutional law, who when he was before the British Foreign Affairs Committee stated:

> The federal government cannot take away the powers of the province. This is something which the Government of the United States is unable to do, and the Government of Australia is unable to do. It is absolutely fundamental to a federal country, and if Canada is to remain a federal country that must be the situation.

● (2220)

Honourable senators, as I am sure you all know, I have anguished over making this speech, and I am sure that many other senators must have anguished over theirs. I am sure, too, that Maxwell Cohen must have been deeply troubled when he wrote the article in the *Globe and Mail*, which I am going to quote, about the lack of consensus that we see in Canada today. I think he believes in the substance of the resolution, and in the entrenchment of the Charter of Rights, but in his article in the *Globe and Mail* of February 11, 1981, he said:

> The only means to satisfy a Canadian sense of legitimacy and credibility, and to remove the temptation from Britain to define the Canadian federal system or interpret the Canadian Constitution, is to have the legal meaning of the package resolved, finally, by the Supreme Court of Canada. In that one move, legitimacy would be determined, credibility achieved and relations with Britain would return to normal by Britain's acceptance of whatever the Supreme Court rules. The package, charter, amending formula and all, would thus be rescued from a demeaning debate that engulfs the nation and threatens its sometimes fragile unity.

Honourable senators, I felt so strongly about this need for the Supreme Court to give legitimacy to the resolution, that I had intended—and I have it in my hand here—to move a motion that I will read to you. It is as follows:

> That this Order be discharged and that the subject matter of the motion for an Address to Her Majesty the Queen respecting the Constitution of Canada or any matter relating thereto be referred to the Standing Senate Committee on Legal and Constitutional Affairs for examination and consideration, and that the committee report thereon no later than six months from the date of the adoption of this motion.

I am not going to move that motion, because I feel I should give myself the opportunity of hearing from other senators. I am not convinced that there is a need for haste. I am convinced that there is a need for consensus and legitimacy with regard to this resolution, and I beg some honourable senator, and I look forward to his doing so, to convince me accordingly.

[Senator Thompson.]

Hon. D. G. Steuart: Honourable senators, I do not intend to take a great deal of your time tonight. I will speak for a short time and then ask leave to adjourn the debate and conclude my remarks tomorrow. I felt, however, that I wanted to go on record and make a few comments this evening, after listening to the excellent speeches of Senator Macdonald and Senator Thompson, particularly that of Senator Thompson which, though I am unable to agree with it, was a speech that was fully researched. Furthermore, I am sure that I speak for every one of us when I say that I recognize the sincerity of the views held and put forward by Senator Thompson. I am sure his speech represents his deeply held convictions on this vital question of the constitutional resolution.

I must say, however, honourable senators, that I honestly believe that in his effort to remind us—and he has reminded us—of the long and tortuous efforts by Canadians for over half a century to establish our own Constitution totally within our own power and our own jurisdiction, he has made a strong case for doing little or nothing, or, on the other hand, for proceeding with the utmost caution, almost to the point where there is an abrogation of the powers given to the House of Commons through an election, and to us through appointment, as the Parliament of Canada, by handing that responsibility over to an appointed body in the form of the Supreme Court of Canada. For my part, I say that that would be dereliction of our duty.

Senator Flynn: You are confusing the argument.

Senator Steuart: He has made the case for this generation of Canadians to do exactly what every generation of Canadians has done for the past half century when faced with the difficult task of bringing the Constitution to Canada, and developing a practical formula of amendment, as any mature, developed nation surely would want to do—that is to say, that we should follow the example of those who have gone before us and do little or nothing.

We are all aware of the tremendous efforts made by Canadian statesmen of all political parties to bring the Constitution home, and have an amending formula. They all failed, and they failed in the final analysis, I think, because they did not have either the conviction or the courage to proceed in the face of tremendous odds.

Frankly, I think that the time has come when we need the kind of statesman that we have now.

Senator Flynn: Like you?

Senator Steuart: I refer, of course, to the Prime Minister we have today, who has the courage to grasp the nettle, to take a stand and cut through the red tape and the fog of discontent and disunity that has hindered a solution to this question for over half a century, in order at last to do what he thinks is right, and to take what I think history will say was the right course to take.

Senator Thompson posed a question that bothers him, and that bothers a great many Canadians. He asks if we should do this in the face of all odds, or if we should try to please everybody, and thus risk pleasing nobody. Until we get total agreement, should we cower back and get no agreement? That is the path that has been followed too often in this nation. If, on the other hand, we follow the lead of our present Prime Minister, we will cease to follow those who have gone before us, and do what is right.

Senator Thompson poses another very serious question which is: Does the end justify the means? I am sure that has troubled all of us. Well, honourable senators, I say that in some cases, of course, the end justifies the means.

Senator Flynn: Oh, no!

Senator Steuart: Oh? In no case does the end ever justify the means? Well, honourable senators, I am afraid I disagree. I think there are many cases where the end justifies the means. It depends on the end, and on the goal, and, of course, it depends on the means.

An Hon. Senator: Did you ever hear of Christianity?

Senator Steuart: Let us look at the end we have in mind today. The end is a modern Constitution in Canada, amendable in Canada by Canadians. The end is a Charter of Rights to protect the basic rights and freedoms of all Canadians, regardless of their race, colour or creed, regardless of their station in life, regardless of where they live in this great nation. This charter is designed to protect, as never before, certain old rights and freedoms, but as well, some new rights and freedoms, such as rights for our natives, the original inhabitants of this nation. These are rights, I point out to you, that have never been protected before by provincial legislation or federal legislation, and I tell you that those native people are looking at a new concept and a new opportunity, as are the disabled people and many other minorities in the nation, as a result of the entrenching of a basic Charter of Rights in the Constitution, if we have the courage, as Canadians, to bring this about.

Senator Asselin: No more clause 44!

Senator Steuart: This is worthy of great effort and great sacrifice. I would point out to honourable senators opposite that it is also worthy of all enlightened Canadians.

Senator Asselin: No more clause 44!

Senator Steuart: What about the means? We are now engaged in dealing with the means. The passage of this resolution through the Senate, representing every region in Canada, and its passage through the House of Commons, composed of 284 men and women freely elected a year ago—

Senator Flynn: With no free vote!

Senator Steuart: —with a mandate, I point out, to govern—

Senator Flynn: With no free vote!

Senator Steuart: —with, I would point out, a fresh, strong mandate to govern—

Senator Flynn: With no free vote!

Senator Steuart: —and sent here from every part of Canada with full power to change, to rewrite and to amend this constitutional proposal, as they have already done, and as I am sure they will continue to do. If the Leader of the Opposition says that they will not do it, I ask him only to speak for his party because our party members have already shown, on this side of the house, that they have the courage to speak up when they dissent—witness two senators, one on the left and one on the right. If that is not true on the other side of the house, that is their problem, and that is why they are on that side of the house, I would suggest.

● (2230)

Some Hon. Senators: Hear, hear.

Senator Steuart: This will pass eventually; it will pass or be defeated by a Parliament exercising its full power and its free will. If the members opposite say "nay," they show their contempt for the elected members of the other house and for the appointed people in this place, and I do not have that contempt.

Senator Flynn: You have no mandate—

Senator Steuart: I have a great deal more confidence than they obviously have.

Senator Flynn: You have no mandate to do that.

Senator Steuart: Again, I say that this is a worthy and honourable goal, but it does call for courage and it calls for unity, something that the honourable senators opposite obviously do not recognize, as witness recent events.

Senator Flynn: You have not read clause 44, then. You did not have that courage three months ago.

Senator Steuart: I am not sure if that was a question, an outburst, or a knee-jerk reaction—a reminder of their late difficulties. However, if it is I would withdraw; I do not want to get the honourable senator too upset.

However, what we are engaged in, honourable senators, is the building of a new Constitution, a new framework to help us build a stronger and, I point out, a more united Canada. That is what I think we will accomplish.

Honourable senators, I shall have more to say tomorrow.

On motion of Senator Steuart, debate adjourned.

The Senate adjourned until tomorrow at 8 p.m.