Section 7

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LIFE, LIBERTY, AND SECURITY OF THE PERSON

Compilation of primary documents to assist in interpreting the public meaning of Section 7 of the *Constitution Act, 1982*

Second Edition: July 2023

CANADIAN CONSTITUTION FOUNDATION

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Life, Liberty, and Security of the Person

Compilation of primary documents to assist in interpreting the public meaning of Section 7 of the *Constitution Act, 1982*

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Short Table of Contents

Part 1	The Drafting History of the Charter of Rights and Freedoms Pertaining to Section 7's Public Meaning	**5**
Part 2	The Primary Record (Debates, Papers, Committees…) Pertaining to Section 7's Public Meaning	**11**
Part 3	Incomplete: not yet available	

The Constitution Act, 1982

Part I. Canadian Charter of Rights and Freedoms

Legal Rights

Life, liberty and security of person

Section 7 *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

PART 1:

Drafting History of the Charter of Rights and Freedoms Pertaining to Section 7's Public Meaning

Drafts of the Charter of Rights and Freedoms:

January 8, 1979: Canadian Charter of Rights & Freedoms, Federal Draft, tabled at Meeting of Officials on the Constitution, (January 11-12, 1979)

October 17, 1979: Rights and Freedoms within the Canadian Federation, Federal Draft, tabled at the Continuing Committee of Ministers on the Constitution (October 22-23, 1979)

November 5, 1979: Rights and Freedoms within the Canadian Federation, Federal Draft, tabled at the Meeting of Officials on the Constitution (November 15-16, 1979)

July 4, 1980: Rights and Freedoms within the Canadian Federation, Discussion Draft, Tabled at the Continuing Committee of Ministers on the Constitution (July 8-11, 1980)

August 22, 1980: The Canadian Charter of Rights and Freedoms, Federal Draft, Tabled at the Continuing Committee of Ministers on the Constitution (August 26-29, 1980)

September 3, 1980: The Charter of Rights and Freedoms, Revised Discussion Draft, Federal, tabled at the Federal-Provincial First Ministers' Conference (September 8-12, 1980)

October 2, 1980: Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada

January 12, 1981: Draft submitted to the Special Joint Committee on the Constitution of Canada

February 13, 1981: Draft Tabled in House of Commons from the Special Joint Committee on the Constitution [Final Report]

April 23, 1981: House of Commons Draft, used in *Reference Re: Resolution to Amend the Constitution*

November 18, 1981: House of Commons Draft

November 24, 1981: House of Commons Draft

November 26, 1981: House of Commons Draft

December 2, 1981: House of Commons Draft & Vote

Statutes and International Agreements:

1960: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms (The Canadian Bill of Rights)

1978: Bill C-60: An Act to amend the Constitution of Canada

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Drafts of the Charter of Rights and Freedoms

January 8, 1979: Canadian Charter of Rights & Freedoms, Federal Draft, tabled at Meeting of Officials on the Constitution, (January 11-12, 1979)

> 10. (1) Everyone has the right to life, liberty and security of his or her person and the right not to be deprived thereof except by due process of law, which process encompasses the following:
>
> [List of rights follows]

(**Source:** Meeting of Officials on the Constitution, *Canadian Charter of Rights & Freedoms, Federal Draft*, [January 8, 1979] (Ottawa: 11-12 January, 1979). Click HERE)

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October 17, 1979: Rights and Freedoms within the Canadian Federation, Federal Draft, tabled at the Continuing Committee of Ministers on the Constitution (October 22-23, 1979)

> 6. (1) In any criminal or penal matter, proceeding or process, everyone has the right to life , liberty and security of his or her person and the right not to be deprived thereof except by due process of law, which process encompasses the following:
>
> [List of rights follows]

(**Source:** Continuing Committee of Ministers on the Constitution, *Rights and Freedoms within the Canadian Federation Federal Draft* , [October 17, 1979] (Halifax: 22-23 October, 1979). Click HERE)

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November 5, 1979: Rights and Freedoms within the Canadian Federation, Federal Draft, tabled at the Meeting of Officials on the Constitution (November 15-16, 1979)

> 6. (1) In any criminal or penal matter, proceeding or process, everyone has the right to life , liberty and security of his or her person and the right not to be deprived thereof except by due process of law, which process encompasses the following:
>
> [List of rights follows]

(**Source:** Meeting of Officials on the Constitution, Rights & Freedoms within Canadian Federation, *Federal Draft*, [November 5, 1979], Doc 840-177/005 (Toronto: 15-16 November, 1979). Click HERE)

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July 4, 1980: Rights and Freedoms within the Canadian Federation, Discussion Draft, Tabled at the Continuing Committee of Ministers on the Constitution (July 8-11, 1980)

> 6. (1) Everyone has the right to life, liberty and security of his or her person and the right not to be deprived thereof except by due process of law, which process encompasses the following:
>
> [List of rights follows]

(**Source:** Meeting of the Continuing Committee of Ministers on the Constitution, *Rights and Freedoms within the Canadian Federation, Discussion Draft. Tabled by the Delegation of the Government of Canada*, 4 July 1980, Doc 830-81/027 (Montreal: 8-11 July 1980). Click HERE)

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August 22, 1980: The Canadian Charter of Rights and Freedoms, Federal Draft, Tabled at the Continuing Committee of Ministers on the Constitution (August 26-29, 1980)

> 6. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except by due process of law.

(**Source:** Continuing Committee of Ministers on the Constitution, *The Canadian Charter of Rights and Freedoms, Federal Draft* , [August 22, 1980] Doc 830-84/004 (Ottawa: 26-29 August 1980). Click HERE)

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September 3, 1980: The Charter of Rights and Freedoms, Revised Discussion Draft, Federal, tabled at the Federal-Provincial First Ministers' Conference (September 8-12, 1980)

> 6. Everyone has the right to life, liberty and security of the person and right not to be deprived thereof except in accordance with the principles of fundamental justice.

(**Source:** Federal-Provincial First Ministers' Conference, *The Canadian Charter of Rights and Freedoms, Revised Discussion Draft, Federal*, [September 3, 1980] Doc 800-14/064 (Ottawa: 8-12 September 1980). Click HERE)

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October 2, 1980: Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(**Source:** Canada, Parliament, "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" in *Sessional Papers* (1980). Click HERE)

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January 12, 1981: Draft submitted to the Special Joint Committee on the Constitution of Canada

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(**Source:** Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl, 1st Sess, No 36 (12 January 1981). Click HERE)

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February 13, 1981: Draft Tabled in House of Commons from the Special Joint Committee on the Constitution [Final Report]

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(**Source:** Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl, 1st Sess, No 57 [Final Report] (13 February 1981). Click HERE)

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April 23, 1981: House of Commons Draft, used in *Reference Re: Resolution to Amend the Constitution*

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(**Source:** Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 9470-9471. Click HERE)

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November 18, 1981: House of Commons Draft

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(**Source:** Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 12983-13011. Click HERE)

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November 24, 1981: House of Commons Draft

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(**Source:** Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 4128-4130. Click HERE)

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November 26, 1981: House of Commons Draft

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(**Source:** Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 13338-13346. Click HERE)

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December 2, 1981: House of Commons Draft & Vote

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(**Source:** Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 13632-13663. Click HERE)

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Statutes and International Agreements

1960: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms (The Canadian Bill of Rights)

> l. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) **the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;** [Emphasis is ours]

[…]

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> [...]
>
> (e) deprive a person of the right to a fair hearing **in accordance with the principles of fundamental justice** for the determination of his rights and obligations; [Emphasis is ours]

(**Source:** *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, SC, 1960, c 44. Click HERE)

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June 20, 1978: Bill C-60: An Act to amend the Constitution of Canada

> 4. To these ends, the stated aims of the Canadian federation shall be: [...]—to ensure that its society is governed by institutions and laws whose legitimacy is founded upon the will and consent of the people; and to ensure, as well, that neither the power of government nor the will of a majority shall interfere in an unwarranted or arbitrary manner with the enjoyment by each Canadian of his or her liberty, security and well-being;
>
> [...]
>
> 6. it is accordingly declared that, in Canada, every individual shall enjoy and continue to enjoy the following fundamental rights and freedoms:
>
> [...]
>
> **—the right of the individual to life, and to the liberty and security of his or her person, and the right not to be deprived thereof except by due process of law;** [Emphasis is ours]

(**Source:** Bill C-60, *An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain other matters*, 3rd Sess, 30th Parl, SC, 1978 (June 20, 1978). Click HERE)

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PART 2:

The Primary Record (Debates, Papers, Committees…) Pertaining to Section 7's Public Meaning

November 3, 1980, Debate in the Senate (click HERE), p. 1122
November 12, 1980, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 3 (click HERE), p. 79
November 18, 1980, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 7 (click HERE), pp. 17, 20, 30, 88
November 20, 1980, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 9 (click HERE), p. 130
November 25, 1980, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 12 (click HERE), p. 102
November 27, 1980, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 14 (click HERE), p. 28
December 1, 1980, Debate in the House of Commons (click HERE), p. 5221
December 2, 1980, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 17 (click HERE), p. 85
December 4, 1980, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 19 (click HERE), p. 28
December 8, 1980, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 21 (click HERE), pp. 9, 14, 20, 30, 49
December 9, 1980, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 22 (click HERE), pp. 21, 26, 35, 38, 42, 46
December 11, 1980, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 24 (click HERE), p. 100
January 20, 1981, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 41 (click HERE), pp. 15, 98, A:1
January 21, 1981, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 42 (click HERE), p. 6
January 22, 1981, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 43 (click HERE), pp. 30, 47, 48, 58
January 23, 1981, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 44 (click HERE), pp. 3, 4, 6, 7, 8, 10, 12
January 26, 1981, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 45 (click HERE), pp. 8, 9
January 27, 1981, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 46 (click HERE), pp. 3, 12, 30, 45, 62
February 20, 1981, Debate in the House of Commons (click HERE), p. 7525
March 5, 1981, Debate in the House of Commons (click HERE), p. 7952
March 12, 1981, Debate in the House of Commons (click HERE), p. 8160

March 19, 1981, Debate in the House of Commons (click HERE), pp. 8423, 8438

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May 29, 1972: Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Final Report, Recommendations (HERE)

> 16. The individual person should be constitutionally protected in his life, liberty and the security of his person so as not to be deprived thereof except in accordance with the principles of fundamental justice.

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February 5-6, 1979: Federal Draft Proposal, Federal-Provincial Conference of First Ministers on the Constitution (HERE)[1]

> c. Legal Rights
>
> Right to life, liberty and security of person and right not to be deprived thereof except by due process of law, including
>
> 1. Right against unreasonable searches and seizures.
>
> 2. Right against unreasonable interference with privacy.
>
> 3. Right against detention or imprisonment except in accordance with prescribed laws and procedures.
>
> 4. Rights on arrest or detention to be told promptly of reasons therefor, to retain and consult counsel promptly and to remedy by habeas corpus.
>
> 5. Rights as a person charged with a criminal or penal offence
> - to be informed of specific charge,
> - to be tried in reasonable time,
> - to presumption of innocence,
> - to a fair and public hearing before impartial tribunal,
> - not to be denied bail unfairly,
> - to protection against ex post facto offences and punishment.
>
> 6. Protection against double jeopardy.
>
> 7. Benefit of a lesser penalty where law is changed.
>
> 8. Protection against cruel or inhuman treatment or punishment.
>
> 9. Right when compelled to give evidence to counsel, to protection against self-crimination and to other constitutional safeguards.
>
> 10. Right to assistance of interpreter in any proceedings.

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[1] This is a summary of proposals. We hope to include the draft from this Conference into Part 1 of this report soon.

11. Right to fair hearing when rights and obligations being determined.

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July 5, 1980: Background Notes on Charter of Rights and Freedoms (HERE)[2]

Legal Rights
(Section 6 of the Discussion Draft)

Among the many important rights provided for under the draft Charter, each Canadian would be guaranteed the right to life, liberty and security and the right not to be deprived of these "except by due process of law" the major elements of which are listed in the Charter. The proposed Charter enumerates the various considerations which would guide law enforcement agencies and courts when a person is arrested, detained, tried or punished, or otherwise involved in the legal process. Although many of the rights contained in this section are already available to most Canadians, they are not mandatory and could be changed as the result of the decision of Parliament or, in some cases, of a legislature.

The draft Charter places no limitations on these rights other than in time of "serious public emergency threatening the life of the country". Even under those circumstances, the right to life, the right to be provided with opportunity to retain and consult a lawyer, freedom from cruel or unusual treatment or punishment and many other basic legal rights may not be infringed.

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November 3, 1980: Senator John M. Macdonald, Debate in the Senate, p. 1122 (click HERE)

Honorable senators, other sections of the proposed charter have been dealt with by other speakers. I wish to refer to only one other section at this time, and I direct your attention to section 7. It is short and reads as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Just what that means in actual practice, I confess I do not know. It reads well and sounds good, but it is not precise. There is no definition as to what is meant by "the right to life". Does it mean that the unborn have the right to be born and not to be killed before birth? I would hope it does, so that the evil of abortion will at least be diminished. What is meant by "liberty"? I would hope it means the liberty to enjoy good health without the danger to health from pollution of the atmosphere, and of our rivers and lakes. What is meant by the "security of the person"? I would hope it means economic security as well as the security to live in peace protected by good laws and good law enforcement. There is no definition of what is meant by the principle of fundamental justice. If this

[2] The draft can be found in Part 1.

> section is to mean anything it must be improved. It must state just what is meant by the high sounding terms it uses, and if this is not done by the committee then I hope it will be done when it comes to Canada.

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November 12, 1980: Senator Austin, Jean Chrétien & Roger Tassé (Q.C., Deputy Minister), speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 3 (click HERE), p. 79

> **Senator Austin:** I would like to turn your attention to section 7 and the phrase "Principles of fundamental justice". Some time ago I had the privilege of taking courses in jurisprudence from Lorne Fuller and Julius Stone and Henry Hart and John Hart, and I do not think there was any concept more difficult to define or understand than the principles of fundamental justice.
>
> How do you see a court beginning to examine the pleading of fundamental justice? Do you go back to St. Thomas Aquinas, that might be a good place to go, or Plato or Aristotle? Are the factums now going to be full of political philosophy?
>
> **Mr. Chrétien:** I would like to ask the drafter to make a comment.
>
> **Mr. Tassé:** We assume that the Court would look at that much like a Court would look at the requirements of natural justice, and the concept of natural justice is quite familiar to courts and they have given a good deal of specific meaning to the concept of natural justice. We would think that the Court would find in that phraseology principles of fundamental justice a meaning somewhat like natural justice or inherent fairness.
>
> Courts have been developing the concept of administrative fairness in recent years and they have been able to give a good deal of consideration, certainly to these sorts of concepts and we would expect they could do the same with this.

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November 18, 1980: David Crombie & Professor Walter Tarnopolsky (President, Canadian Civil Liberties Association), speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 7 (click HERE), p. 17

> **Mr. Crombie:** […] If we could turn to Section 7, it says:
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice.

What impact would that section have on the current debate with respect to abortion and the issue of abortion in this country. I have a second question, I would like you to answer both of them, if you do not mind.

If you could also turn to Section 12, that deals with the matter of cruel and unusual punishment:

12. everyone has the right not to be subjected to any cruel and unusual treatment or punishment,

What impact would that section in your view have on the debate concerning capital punishment in this country? So Section 7 and Section 12 if you would not mind.

[…]

Mr. Crombie: Well, I would like the answer on Section 7, but I am not sure I clearly understood that. Are you saying that the jurisprudence so far would indicate that Section 12, the cruel and unusual punishment, would argue against the adoption of the death penalty?

Professor Tarnopolsky: Well, Mr. Chairman, this would be our position in the Canadian Civil Liberties Association but one has to admit that in the United States the American Supreme Court has not held all forms of the death penalty in all circumstances to be contravention of the cruel and unusual treatment or punishment clause, and our court has come to the same conclusion although that precedent is somewhat clouded by the fact that Mr. Justice Ritchie based a great proportion of his judgment on the constitutional position and the intention of the bill of rights rather than on the substantive issue.

Mr. Crombie: Thank you. Can we have your reply on Section 7?

Mr. Borovoy: Yes, I was going to deal with that, I get the hard ones.

I think that one of the problems may be, part of the answer to your question might depend upon how one interprets the word "everyone", within the meaning of Section 7.

However, I must tell you this was one of the considerations that I had in mind when I suggested earlier that if the changes were made in Sections 8,9, 10 and 11 that we were recommending, it may be that the kind of protections you are looking for in Section 7 could be given without running that risk that Section 7 might well create.

The answer in short is that it might create the risk that you are talking about of having this matter of abortion dealt with through constitutional provision. It might create it, although one cannot say this with any certainty, and if you wanted to have the protections which appear to be granted by Section 7 without running that risk, perhaps you might do it by accommodating our requests with respect to those other sections and maybe at that point you would not need Section 7.

Professor Walter Tarnopolsky (President, Canadian Civil Liberties Association), Svend Robinson, & Alan Borovoy (General Counsel, Canadian Civil Liberties Association), p. 20

Mr. Robinson: […] I would like now to turn to Section 7 which has been referred to by Alan Borovoy, and touch upon a point not specifically raised, namely the reference in there, not to the principles of due process which have been established to a certain extent in Canadian jurisprudence, but to the principles of fundamental justice.

Would you care to comment upon the effects of the difference between the words. "due process" and "fundamental justice" and the extent to which these words "fundamental justice" have had any consideration on Canadian jurisprudence particularly in the area of criminal law?

[…]

Professor Tarnopolsky: […] We have given some consideration to Section 7, and the real difficulty that we see is that the term "principles of fundamental justice" is used interchangeably with the term "principles of natural justice"—a well-known administrative law description referring to fair hearing, and in our Anglo-Canadian jurisprudence has not referred so much to prehearing or to pretrial procedure, which is one of the matters of concern in any provision with respect to life, liberty and security particularly, and which is dealt with particularly in the following Section 8. Now, it is for this reason that when we considered this, the alternative would have been the "due process" clause.

In the last decade—in fact, in the last two decades-since the enactment of the Canadian Bill or Rights, there is no doubt that the due process clause has come in academic circles to mean more and more the over-all penumbra of fairness in the administration of justice. However, our courts have not yet adopted that interpretation, and there remains a fear in many circles that any reference to a due process clause, even without reference to property in this clause, could reintroduce the substantive "due process" interpretation in the United States.

Now, one could argue that that is not a very likely reintroduction. Nevertheless, there is a certain fear that a reference to a due process clause might bring that kind of reintroduction. This is why, after consideration of the other articles, we came to the conclusion that a tightening up of the other legal rights would make a general clause not necessary, considering all the difficulties with the rewriting; and this is the reason why we came up with the recommendations we made today.

Mr. Robinson: Perhaps you could pursue that question of the differences between the due process concept and fundamental justice in your brief. It is certainly an important area which, I would imagine, this Committee would want to pursue. You referred, Professor Tarnopolsky, to the English Bill of Rights in passing. One of the rights which was certainly contained in that Bill of Rights, and also contained in the American Bill of Rights, and which is not referred to at all in this section, is the right to trial by jury, at least in the case of serious offences.

Did the Civil Liberties Association give any consideration to the omission of this, what I consider to be a fundamental cornerstone of the criminal justice system, and do you have any view on whether or not this trial by jury right, in the case at least of serious offences, should be included in a Charter of Rights?

The Joint Chairman (Mr. Joyal): Professor Tarnopolsky.

Professor Tarnopolsky: Thank you, Mr. Chairman. No, we did not consider that provision. I have no views on that at CCLA that we can express on it.

Mr. Robinson: Just a couple of more brief questions, Mr. Chairman. One other area which I wonder whether you have considered in the brief time that you have had to consider this matter and that is the question of the right on the part of the accused to remain silent. Did you consider the fact that this is

[Page 22]

not contained anywhere in the proposed Charter of Rights and, particularly, I assume that you noted that Section 13 refers to witnesses but does not in any way entrench the right to remain silent of the accused. Has that point been considered. Perhaps Mr. Borovoy might answer that.

The Joint Chairman (Mr. Joyal): Mr. Borovoy?

Mr. Borovoy: Not as such, Mr. Robinson. Perhaps it may be not the kind of careful reading that we should have given the document. With more time, of course, we would, but if that is so, I would like to take a second look at the document and consider some way of giving additional protection to that. I was rather assuming that it had, but if a more careful reading suggests that it does not, then any further representations we have to make to you would certainly include that.

Perrin Beatty & Professor Tarnopolsky, p. 30

Mr. Beatty: […] I wonder if I can get some guidance from you, I am not a lawyer myself but one of the things which struck me was the wording in Section 7:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof expect in accordance with the principles of fundamental justice.

Now, I have heard the expression used often, as have all members of the Committee, "without regard to due process of law", but I have never heard the expression "principles of fundamental justice" used before and I am wondering whether we can get some guidance from you as to what the legal effect

[Page 31]

of this term would be, what in fact does it mean? I have never heard it used before and I am not quite sure how the courts would interpret that.

Professor Tarnopolsky: Thank you, Mr. Chairman, It was suggested earlier that the term "principles of fundamental justice" or "principles of natural justice" is a term very commonly know in the field of administrative law with reference to the requirements of a fair hearing, and this has been one of the areas in which there has been the greatest flux in settling the full details. One could start essentially with the two basic requirements that a person has the right to be heard and that he has a right to be heard by someone who is unbiased, and from that flowed a whole number of provisions.

I think our difficulty with this clause, as we have indicated, is that essentially one is talking about an administrative law clause dealing more particularly with determination of property rights, let us say of certification of trade unions, review of administrative agencies, it is not a clause that we have on the whole used with reference to the criminal process in anglo-Canadian jurisprudence and therefore it seems inappropriate.

What would be the extent of it one does not know. Would the courts on the one hand feel that it adds almost nothing outside of the interpretation given to it in the administrative law process or, on the other hand, would they somehow try to equate it with the due process clause, and this is why we have decided that if it does not cover, that is the matter of right to life, liberty and security, if it does not cover anything more from the point of view of administration of justice than is already referred to in Section 8 really through to Section 14, then it is better not to confuse it with a clause there at all.

Professor Max Cohen (Chairman, Select Committee on the Constitution of Canada of the Canadian Jewish Congress), p. 88

Professor Cohen: […] Section 7: That raises some classical problems which will be familiar to all of you. Notice what it says:

7. Everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.

[Page 89]

That is one of the great concepts of the Franco-American, Anglo-American legal doctrine and system.

What is troubling there for some people, is the word "everyone". Does that embrace people who are in Canada illegally? We think it should include everyone, so that we do not have people here who may be here legally and deprived and are deprivable of these basic rights.

Why was the phrase "fundamental justice" used, instead of the classical phrase "due process of law"? Well, there is a long story attached to it and I would not go into that except to note procedurally what happened to due process of law in the American system, and you will find that in the Diefenbaker Bill of Rights.

If you go back a long enough way you can trace a whole systematic approach to what began as a simple phrase, I think in the Magna Carta, the Law of the Land, up through ideas of natural law, up through the idea of fundamental law, then due process of law, now fundamental justice which is a high bred term and which the Diefenbaker Bill of Rights used quite successfully in its own limited way and I see it has been taken into here.

Whether or not it is better to use it than the classical due processes of law, I am by nature a reactionary and I therefore would prefer-well, I am a radical reactionary let us say—and I would

> prefer a nice old term that lawyers know for a couple of hundred years such as due process of law. But if the draftsmen believe they are better off with fundamental justice, we will not cavil about it.

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November 20, 1980: Mary Eberts (Legal Counsel, Advisory Council on the Status of Women), speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 9 (click HERE), p. 130)

> **Ms. M. Eberts:** The right to life, liberty and security of the person except when denied by a law duly enacted; the right to being safe from cruel and unusual treatment and punishment; the right to a translator in judicial proceedings should in our view never be suspended because of war or apprehended insurrection, and all the language rights in Section 16 to 23 need in our view never be suspended because of any kind of civil or martial disability.

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November 25, 1980: John Clyne (Counsel, Canada West Foundation), speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 12 (click HERE), p. 102)

> **Honourable Mr. Justice Clyne:** […] Now another section to which I draw your attention and which I hope might be revised:
>
> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> Now you are leaving it entirely in the discretion of a judge without giving that judge or court any guidance which he should expect to receive in an act of the legislature.

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November 27, 1980: Roderick McLeod, Q.C. (Assistant Deputy Attorney General of Ontario) & Senator Roblin, speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 14 (click HERE), p. 28

> **Mr. McLeod:** […] I would refer as an example to Section 7, which I interpret Section 7 of the legal rights, being the first of the legal rights, as being a section which is in effect what we have referred to in criminal prosecution as a basket clause. It is a form of general overriding provision in relation to legal rights that gives the court a significant discretion to ensure that no person is deprived of the right to life, liberty or security except in accordance with the principles of fundamental justice. As we interpret that, fundamental justice means something very close to natural justice, which is a well-known Canadian legal term, which in turn means basic procedural fairness, and it would seem to me that, for example, as I understood the Canadian Civil Liberties Association, they said

Section 8 and Section 9 are wrong because Section 8 and Section 9 speak in terms of: on grounds and in accordance with procedures established by law. They say that means that Parliament could legislate anything, therefore there is no entrenchment.

I would suggest respectfully on the contrary that Section 7 might well provide a general overriding power in the court, and I have to confess I have not researched that to the point that I would be absolutely certain about it, but the wording tends to suggest to me that that very delicate balance between the certainty of the law as passed and the court's ability to protect the accused individual would flow from something as found in Section 7, that is one example at least.

Senator Roblin: I want to refer to Section 7 myself, because I was listening to the questioning of Mr. Munro on that point with respect to capital punishment. My understanding is that both the Chiefs of Police and perhaps the Crown Attorneys have expressed an opinion, no, the Crown Attorneys have not; The Chiefs of Police have expressed an opinion in favour of capital punishment. I am not sure I understand the answer given to Mr. Munro on the question, because Section 7 says that everyone has a right to life. I think I can stop there. That deals with my point.

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December 1, 1980, Svend Robinson, Debate in the House of Commons, p. 5221 (click HERE)

Mr. Robinson: Under section 7 of the proposed charter of rights it will be up to our courts to determine what constitutes the principles of "fundamental justice", a new concept in Canadian law. If reasonable amendments are accepted, as we certainly hope the Minister of Justice will see fit do, then important decisions concerning what constitutes unreasonable search and seizure, what constitutes unreasonable denial of fair bail, will be left to the courts to decide—not just the Supreme Court of Canada but the federal judiciary at every level.

Perhaps one of the most important obligations of our federal judiciary under the proposed charter of rights will be that under section 15; to determine whether there has been a violation of the right of all Canadians, men and women, to equality before the law and to the equal protection of the law. The record of our judiciary on the interpretation of the words "equality before the law" is not one of which we can be proud. That is why we in this party will be proposing amendments which are being urged upon the committee by a number of groups and individuals make it clear that when we talk about equality before the law we are not talking about the concept which has been determined by the Supreme Court in this country to be merely one of equality in the administration of the law but, rather, about equality in the law itself. We talk about no Canadian being denied equality before the law on the basis of some unreasonable distinction. As I say, we recognize that in the interpretation of the charter of rights our judiciary will have an increased role. And we welcome the entrenchment of a charter of rights.

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December 2, 1980: Rose Charlie (Western Vice-President, Indian Rights for Indian Women), speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 17 (click HERE), p. 85

> **Ms. Rose Charlie:** […] Section 7 refers to "the principles of fundamental justice." It would be ridiculous to suggest that a constitution should or could define these principles. But it is surely not too much to ask that these principles be specified, at least broadly. Specifically, could the decision in the Lavell case be confirmed under this provision? If so, we are unalterably opposed to it.

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December 4, 1980: Fred Pennington (Board Member, Canadian Council on Social Development), speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 19 (click HERE), p. 28

> **Mr. Pennington:** In our opinion, the right to privacy appears to have been addressed in an tangential way by Section 7, by the inclusion of the phrase "security of person".
>
> Because of its importance to the democratic process, we suggest the principle of the right of privacy be strengthened by forming a separate section with wording which clearly articulates both the scope and the importance of the concept.

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December 8, 1980: Normal Whalen (Vice-Chairman, Canadian Federation of Civil Liberties and Human Rights Associations), speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 21 (click HERE), p. 9

> **Mr. Norman Whalen:** […] We have found, Mr. Chairman, that this bill is inadequate. Section 7 alone reveals a bold initiative. This one section may move us one small step forward in our search for rights and freedoms. We cannot accept, however, that this is the best that we as Canadians can do.

Svend Robinson & Norman Whalen, p. 14

> **Mr. Robinson:** You have relied very heavily on the concept of fundamental justice in your brief, and at page 7 you refer to it in Section 7, revealing bold initiative.
>
> Again this is something of a new course which has not been embarked upon by any of the previous witnesses.
>
> In fact there has been some criticism of the inclusion of the words "fundamental justice," because we are embarking upon new waters, as it were, to the best of my knowledge and that of some of

the previous witnesses, in that there has not been any significant judicial determination as to what we mean by the concept of fundamental justice.

For example, you have suggested that Sections 8. 9, 10(c) and 11 should rely on that principle of fundamental justice.

Now, what does that mean, and why do you believe this concept is one which will adequately protect the important rights which we are dealing with in these particular sections?

Mr. Whalen: First of all, we agree with you that the concept of fundamental justice does not have a basis in judicial interpretation.

However, we believe it will attain an interpretation similar to the concept of natural justice. We have indicated in our brief that, to this extent, we are going to have to rely upon the courts to determine what that will mean.

However, we are satisfied that whatever ultimately it is determined to mean, it will fall within the general area of

[Page 15]

natural justice.

Chris Speyer & Edwin Webking (Chairman, Canadian Federation of Civil Liberties and Human Rights Associations), p. 20

Mr. Speyer: Well, I will not continue with that but I would like to ask you a question that has some relevance. in Section 7 I think you criticized the legal rights and in particular the meaning of the principles of fundamental justice. We know

[Page 21]

that in the Bill of Rights, the Diefenbaker Bill of Rights, that the words used were "due process of law", where Section 7 of the Charter speaks of the principles of fundamental justice. Now, my question is this: do you believe that we are defining with sufficient precision principles of fundamental justice? What exactly are those? Is it the same as due process of law?

Mr. Webking: Well, I think that they are the same but I would think that in a ranking, I would think that the principles of fundamental justice, what would then derive from that would be due process. So that if you have established the principles of fundamental justice, what would follow would be due process.

Mr. Speyer: But surely fundamental justice is what the courts interpret in a particular set of circumstances; is that not correct?

Mr. Webking: Truly. Surely.

> **Mr. Speyer:** And is that what we wish to have, is that what you would like to see. this large, broad clause that would be subject to judicial interpretation as opposed to just due process of law which historically has been in the American Bill of Rights and which is in the Diefenbaker Bill of Rights? Do you not feel that principles of fundamental justice is too ambiguous?
>
> **Mr. Webking:** Well, no, I think we feel that the principles of fundamental justice are more encompassing than simple due process and therefore we think that in an entrenched Bill of Rights, a Charter of Rights that is to have supremacy, that it is better to have the more encompassing statement than the rather limiting statement, and we think that the principles of fundamental justice is much more significant than the simple statement of due process.
>
> **Mr. Speyer:** Well, would you not agree with me that there could be a wide interpretation as to what principles of fundamental justice are?
>
> **Mr. Webking:** I agree, and I think that is not out of step or out of keeping with the concept of the constitution, especially an entrenched one, and entrenched bill of rights.

Professor David Cruickshank (Vice President, Canadian Council on Children and Youth), p. 30

> **Professor David Cruickshank (Vice President, Canadian Council on Children and Youth):** […] Generally speaking we believe that the rights contained in Section 7 through 15 apply to everyone and everyone ought to clearly be taken to mean children, that is persons from birth to the age of majority, whatever that age may be, 18 to 19, it varies from province to province.

David Cruickshank, p. 49

> **Professor Cruickshank:** We have looked at the Charter from this point of view and simply observe that in most statutes in the country the word child is defined as meaning from birth until the age of majority, so we assume that this definition would be read in the Charter, so that Section 7 dealing with the right to life could not apply to the child before birth. This has certainly been the line of interpretation in the United States Constitution which has a similar phrase. No one has been successful in suggesting that in the United States with that phrase "right to life" it does apply prior to birth.

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December 9, 1980: Wilson Head (President, National Black Coalition of Canada), speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 22 (click HERE), p. 21

> **Mr. Head:** I have to admit, Mr. Joint Chairman, that these kind of terms, are extremely imprecise, and I do not really know what they mean. What, for example, is "fundamental justice"? Are we talking about due process? Are we talking about some concept of British Common Law, or the Napoleonic Code? Are we talking about the principles of natural justice propounded by Rousseau, or the principles of justice propounded by Plato? I am not sure.

So that is what I am saying. It ought to be spelled out.

Denyse Handler (Journalist), p. 26

Ms. Denyse Handler: […] Not only is the right to life inherent, it is also fundamental. It is a cornerstone. What we see wrong with Section 7 is that this would enshrine "the right to life, liberty and security of the person" as a legal right rather than a fundamental right. If there is any such thing as a fundamental right, surely that is the right to life itself. Without this right we can have no others, since a person deprived of his rights is deprived of all other rights.

Now, we propose to re-title Section 2 as Fundamental Rights and Freedoms, to begin as follows:

Everyone has the following fundamental rights and freedoms: the right to life, liberty and security of person and property, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The other proposed subsections of Section 2 enumerating other fundamental freedoms should then be renumbered appropriately.

James McGrath, p. 35

Mr. McGrath: It is precisely because there are precedents and cases where the courts have upheld the right of an unborn child in certain circumstances and thereby granted legal rights to the child. That brings me to Section 7, Reference has been made to Section 7 where it is stated that everyone has a right to life, liberty and security of the person.

It can be argued—and the question is—when does life begin?

You gave very strong scientific evidence to indicate that it began at conception, and there is a growing body of scientific opinion which accepts that principle.

Svend Robinson & Barry DeVeber, M.D. (Head of Pediatrics at University of Western Ontario), p. 38

Mr. Robinson: You also make certain recommendations with respect to changes in Section 7 and in fact moving Section 7 to Section 2, out of the legal rights section into the fundamental rights and freedoms section.

Would you like to comment on a suggestion I would like to make with respect to the wording, even as you proposed it.

[Page 39]

You propose it should be stated very clearly that everyone has, among other things, the right to life; but it goes on to state, and you include the right to property which is not in the present charter; it goes onto state that the right not be deprived thereof, except in accordance with the principles of fundamental justice.

Now, there will be those who argue that under that proposed wording our judiciary would be able to uphold the present laws of this country with respect to abortion on the basis that evidence has shown very clearly that in those jurisdictions where abortion has been banned that one of two things often occurs: that either women will in desperation—poor women—will go to what has been described as the back street butchers, or, on the other hand, they will attempt to induce abortions themselves, and that it would be completely in accordance with the principles of fundamental justice, as they are understood in Canada, to uphold the law which grants women the right to choose rather than which would deny any opportunity under any circumstances to have accessibility to abortion. Would you care to comment on that?

Dr. DeVeber: Well, there are two points. The statistics about illegal abortions have always been very difficult and even the pro-abortion groups now admit that they are wrong.

What happens in the case of a back street abortion is very difficult to get a handle on. In fact, illegal abortions have generally gone up in countries with widening of the laws paradoxically; I can prove that.

So I think that would be the main answer to your concern about illegal abortions.

The second thing, of course, is that women who are pregnant and trying to decide, should be supported. You alluded to this. I agree with that. There is a group called Birthright—and other groups—which would support and encourage women to carry their pregnancy once it has started. and hopefully have them adopt the baby where there are hundreds of couples waiting.

Our population of Canada is dropping, as you know. I do not think there is any such thing as an unwanted baby after birth in our country.

Mr. Robinson: In accordance with our concern for respect and reverence for life, that we would also be very concerned about respecting and having reverence for the life of the mother.

Coline Campbell, Philip Cooper (Vice-President, Coalition for the Protection of Human Life), Barry DeVeber, M.D. (Head of Pediatrics at University of Western Ontario), & Don McPhee (Executive Director, Coalition for the Protection of Human Life), p. 42

Miss Campbell: I would like to then question you on your proposed Section 2, fundamental rights and freedoms, and that may be confusing but this is your proposal. We did talk about the other clause, too. just a moment ago.

What protection do you feel—you say, "and the right not to be deprived thereof except in accordance with the principles of fundamental justice", and I suppose I should go one step further for the public and say, "the right to life. liberty and security of person and property, and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Where do you see capital punishment. where do you see the right to abortion in that, because, deprived thereof except in accordance with the principles of fundamental justice? You may have 75 per cent of the people voting for capital punishment or you may have people demanding that there be an abortion. Now, where do you see your clause excluding that?

Mr. Cooper: Well, contrary to accusations which are sometimes made, pro life people are not all bloodthirsty capital punishment advocates. I think a case can be made for saying that it may be necessary to have capital punishment in order to protect human life. This is it prudential question. If that can be shown, there may be some merit in that argument. Unless that can be shown, I would myself, and I think many people with me, are inclined to be opposed to capital punishment.

Miss Campbell: I will follow that further, then, because there were two questions in that. Do you then propose to the Committee that there are times when abortion can be had?

[Page 43]

Mr. Cooper: Well, perhaps Doctor DeVeber should answer this, if he wants to deal with medical questions. What we are in fact acutely conscious of these days is that most abortions are not performed for anything resembling medical reasons at all. They are performed for reasons of social convenience.

Miss Campbell: Capital punishment might be for social convenience, too.

Mr. Cooper: It may be, but when we are dealing with capital punishment, and I am not advocating it, I want this clearly understood: I am not advocating capital punishment, but an important difference is that capital punishment, we hope, we presume is applied only when you are dealing with someone who is guilty of an offence. Abortion is the taking of innocent human life, that is a fundamental distinction. We do not take the lives of other people who are guilty of no offence whatsoever.

In the present arrangement we take the lives of, we say, 60,000 human beings every year where there is nothing resembling due process of law, and I wonder how many of you have read the abortion provision of the present code. It says that an abortion may be performed if, in the opinion of the therapeutic abortion committee, a woman's life or health might be endangered, et cetera.

There is no way of testing this in the courts. It is, if in the opinion of the committee; in other words, they are the law, they are the judge and jury.

Dr. DeVeber: I would just like to comment on Sven Robinson's comment: I really would hope nothing we would do would force anyone to do anything; my position is if we understand what is going on with the unborn child more, women would be responsible in what they are doing. That is all I could really hope for, I would not see us forcing anything on anybody. I do believe that if young women particularly understand what is going on with the unborn, they would be much more careful about what they were doing, and that would be a beginning.

Mr. McPhee: I would like to make one brief comment, to have on the record that Coalition for Life does not take a particular stand on the topic of capital punishment as an organization.

Also, as a supplementary answer to your question concerning the fundamental justice mentioned under Section 7, the subsection that we have added as a rider to Section 15 defining the word "everyone" again would apply, this is a definition that would apply throughout the entire Charter, so the word "everyone" under Section 7 would be from conception onward.

Miss Campbell: I would like to go on to another area of concern in having this group before me.

I personally feel that the unborn child. they do have parents. sometimes only one parent, but the euthanasia area and the mentally and physically handicapped area, I feel there is no protection and I wonder if you have figures readily on hand as to how many euthanasia or, the physically and mentally handicapped people whose lives are terminated, the deformed child at birth. I really do not have that much time and I want

[Page 44]

to use your ability here, so if you have the figures, yes or no, and if not I would like to go on to one other question before my time is up.

Dr. DeVeber: I do not think there are figures. it happens.

Senator Connolly & Philip Cooper, p. 46

Senator Connolly: Well, Mr. Chairman, I have not too much to say and I was going to pass up the opportunity but I think this presentation, which has been so clear and concise and forthright, is one of the best that we have had, and certainly nothing that we have had earlier on this subject, or even touching it, compares with what you have done here.

[Page 47]

I take it that the fact that you have in Section 7 the reference to the right of everyone to life, but that concept is a desirable concept in your minds to have entrenched in a charter providing the definition of life is the one that corresponds with the discussions carried on in the earlier part of your presentation by Dr. DeVeber and by Dr. Callahan.

Now, what you do specifically suggest is that you enlarge it by an amendment to Section 15 which really defines life as beginning from the time of conception. I wonder what you think about the prospect of preserving or establishing your concept, perhaps not through the charter, leaving the word "life" as it is in whatever part of the charter you think it should be, but perhaps relying upon the courts to say that life is in being from the time of conceptions?

Mr. Cooper: May I answer that, Senator Connolly?

Our first inclination was simply to say that everyone shall have these rights from the first moment of life, but then we realized that some courts need to be given no room whatever to maneuver. They have to have things spelled out very, very clearly.

It is very interesting what happened in the United States earlier in this decade, 1973, and what happened in West Germany just two years later. In 1973, in the United States, the US. Supreme Court ruled that an unborn child was legally not fully a person. Two years later, in West Germany, an attempt to introduce a permissive abortion law was ruled as unconstitutional because it violated the right to life.

It is interesting that the German experience, interesting in view of what they have gone through, what they know, what they learned about the importance of the right to life. The West German court, we feel, acted much more wisely than the American court.

Someone was asking about capital punishment earlier. It is very interesting to compare the two Germanies. West Germany has no permissive abortion and no capital punishment. East Germany is very permissive of abortion and capital punishment.

Senator Connolly: Thank you very much.

The Joint Chairman (Senator Hays): One more question, Senator Connolly.

Senator Connolly: Yes, and I only have one more.

It arises from Dr. Callahan's evidence where she described in medical terms what in fact the process is, and she said, as I have it in my notes, that once the ovum is fertilized there is a new genetic code established, and the ovum becomes no longer an ovum and the sperm no longer a sperm but the new entity is an independent entity.

Now, I think it is highly important for a materialistic group like a bunch of parliamentarians to say it this way, but I would like to suggest something and it arises out of what Mr. Epp has said. I think you have also, and this is more an observation than a question, I think you have also a great deal of backing from the proposition that Mr. Epp put to you that one of your strong arguments is the argument based upon morality, and really, for most people, that comes down to a question of

[Page 48]

religious persuasion on the point of morality or on the issue of morality. I do not go quite as far as that, for you people, in your argument to establish the proposition that both doctors here today have given us so clearly and so beautifully, and that is that I think you are ignoring not the moralists but the philosophers. There is such a thing as a new, vital principal that scents to come into being at the time the ovum is fertilized. That new vital principal is not going to result in the production of an elephant or a monkey or a hen, it is going to result in the production of a human being, and that human being becomes human from the time that vital principal is instilled into that fertilized ovum or is present in that fertilized ovum, no matter how you do it.

I would suggest that that is a very basic kind of concept, it perhaps has more appeal to the practical minded people to whom you must address your arguments, more even perhaps than the problem of morality because morality does not always reach people.

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December 11, 1980: J. Robert Kellermann (Legal Counsel, Canadian Abortion Rights Action League, speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 24 (click HERE), p. 100

> **Mr. J. Robert Kellermann (Legal Counsel, Canadian Abortion Rights Action League): […]** Particularly dealing with Section 7 of the Charter of Rights here you see the right to life mentioned and we are all familiar with that phrase, a phrase which is being used today to suggest that the fetus or the embryo have rights in law. This of course is not correct historically. These rights have never been recognized in common law or statutory law. In our present law, there is no recognition of the rights of the fetus or the embryo. There has to be a live birth in order for any rights to vest in the child. The child must be living, and have been born, in order for it to gain any rights.
>
> Here we have in Section 7 the phrase everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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January 20, 1981: Svend Robinson & Robert Kaplan, speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 41 (click HERE), p. 15

> **Mr. Robinson:** What is there, Mr. Minister, in Clause 7 contained within the rubric of principles of fundamental justice that is not contained in the remaining legal rights section?
>
> What does that section mean, what specifically does it mean, and for example what is the meaning of the right to be deprived of your right to life as long as that is done in compliance with the principles of fundamental justice?

[…]

> **Mr. Kaplan:** Well, I think generally, the generally recognized rights affecting life, liberty and security are specifically referred to in the provisions that follow, and the reason for a
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> [Page 16]
>
> general introductory statement like that is to permit the evolution and expansion of rights of life, liberty and security over time.
>
> For example, rights of security at the moment may be just at the dawn of their evolution. What is a right of security? The following provisions, search and seizure, give some reference to rights of security but an evolving democratic society could well develop new ideas of rights of security, and the purpose of that provision is not a kind of flim flam, as you might suggest; the purpose is to open the door…
>
> **Mr. Robinson:** Those are your words, Mr. Minister.
>
> **Mr. Kaplan:** Yes, but that is what you were getting at. It is to open the door for the possibility of rights of security that are not conceived of now, generally recognized now.

Jake Epp, p. 98

> **Mr. Epp:** […] Section 7: we propose that Section 7 should be amended so that it will reflect the Canadian Bill of Rights. It would read as follows:
>
> Everyone has the right to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except in accordance with principles of natural justice.
>
> It is desirable that any encroachment on the enjoyment of property should only occur under the appropriate framework. We believe also that natural justice, those words, as proposed are superior wording to fundamental justice in view of the greater body of Canadian law supporting the former concept.

Summary of Proposed Amendments to Joint Resolution on the Constitution Presented to the Special Joint Committee by the Honourable Jake Epp, A:1

> 7. Everyone has the right to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except in accordance with principles of natural justice.

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January 21, 1981: Svend Robinson, speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 42 (click HERE), p. 6

> **Mr. Robinson:** On Clause 7, dealing with the question of fundamental justice, we will be suggesting that this concept be expanded, Mr. Chairman, to include the principles of due process of law, so that any jurisprudence which may exist on that subject may be preserved and that "fundamental justice" would be a broader concept.
>
> We are also proposing two new subclauses to Clause 7—the right to a fair hearing in accordance with the principles of
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> [Page 7]
>
> fundamental justice for the determination of one's rights or obligations.
>
> This is contained in the Canadian Bill of Rights, and certainly with the exploration of administrative and quasi-judicial tribunals, I believe this is an important addition; and also, the right to protection against arbitrary or unreasonable interference with privacy will be proposed as a new subclause of Clause 7.

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January 22, 1981: Svend Robinson, speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 43 (click HERE), p. 30

> **Mr. Robinson:** In addition to that, Mr. Chairman, I would like to draw to the attention of members of the Committee the 1978 report of the Lamontagne-MacGuigan Committee, which was considering the proposed Bill C-60.
>
> In that report—and I would like to quote from that report and hope that the government will listen to the concerns which were expressed by that particular Committee:
>
> The case for justifiable limitations on rights by the War Measures Act applies principally to political rights and freedoms in Clause 6 rather than to the legal rights and freedoms of Clause 7. Many of the more precise legal protections in Clause 7 should not require limitation even in war time crises. For example, we do not see how the state could ever be justified in imposing cruel and unusual punishment.

Robert Bockstael, p. 47

> **Mr. Bockstael:** […] The original submission by the government in Clause 2, they used the word "everyone" and in its own amendments uses the word "everyone" in Clause 2. Now, if we are going to change "everyone" in Clause 2 to "every person", does it follow that we are going to go down to Clause 7 which has the right to life, and change "everyone" there to "every person"?
>
> During the discussion, I made the point that International Human Rights uses the word "everyone" 27 times at the start of their wording, and we had absolute representation and an advocate, a proabortionist or one who is favouring abortion or that the government should allow it, is the member who just spoke and said he acknowledges that those who came here said that they wanted "every person" because that would clearly delineate to them that a fetus was not a person. Now they tell us there are precedents in the court for both ways, that a fetus was interpreted as a person and in another case it was not. You say it does not make any difference.
>
> My question is then, why do we have to adopt an amendment from the opposition when we have put in our own initially. Now why should we be changing it for them, and does it have any effect on Clause 7, that is my main point?

Robert Kaplan, p. 48

> **Mr. Kaplan:** […] Clause 7, although it appears to address the question of the right of termination of life or existence of life, I wanted members to note that it is really a due process provision and the right that it deals with is the right to a fair procedure for the determination of other rights and interests. So it is less relevant to the issues that we are discussing now than Clause 2 is.

Jean Lapierre, p. 58

> **Mr. Lapierre:** […] Now, as far as the enjoyment of property is concerned, Mr. Crombie, I think this is a bit repetitious. Do you want that we also refer to the enjoyment of property at Section 7? In this case, I wonder where is your logic. Why do you insist twice on the right to property, why do you want to mention it at Section 2 and at Section 7?
>
> You are asking twice for the same protection. I prefer the protection that Section 7 provides and which refers to the rule of natural justice and I am convinced that the government will be more willing to accept your amendment to Section 7 which follows quite well the general thrust of the charter.

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January 23, 1981: Svend Robinson, speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 44 (click HERE), p. 3

> Mr. Robinson (Burnaby), moved.—That Clause 7 of the proposed Constitution Act, 1980 be amended by striking out line 24 on page 4 and substituting the following:
>
> "7. Every individual has the right to life, liberty"
>
> After debate, the question being put on the amendment, it was negatived on the following show of hands: YEAS: 2; NAYS: 20.

Perrin Beatty, p. 4

> Mr. Beatty moved,—That Clause 7 of the proposed Constitution Act, 1980 be amended by striking out lines 24 to 27 on page 4 and substituting the following:
>
> "7. Everyone has the right to life, liberty. security of the person and enjoyment of property and the right not to be deprived thereof except in accordance with principles of natural justice."
>
> After debate, at 11:05 o'clock a.m., the Committee adjourned to the call of the Chair.

Serge Joyal (Chairman) & Svend Robinson p. 6

> **The Joint Chairman (Mr. Joyal):** I think Mr. Robinson, if I have well understood what I have been informed by our Clerk, I think it is to substitute on line 25 of page 4, the first word "everyone" of Clause 7 by the word "every person".
>
> **Mr. Robinson:** "Every individual", Mr. Chairman.

Svend Robinson p. 7

> **Mr. Robinson:** […] In any event, I would move then formally that we delete in line 24, I believe it is of the original clause, the word "every one" and insert in its place the words "every individual",

and of course the French version would be to delete the word "chacun" in Clause 7 and substitute the word "chaque individu". I believe that would be the appropriate translation.

Mr. Chairman, the purpose of this proposed amendment is to specify very clearly that what we are talking about in Clause 7 is precisely what we are talking about in Clause 15. That is "natural persons" and not "artificial persons" or "corporations".

Section 15 originally read "everyone" and the government, and I certainly think the government correctly changed those words to "every individual" and the explanatory notes read:

The word "everyone" would be replaced by the word "every individual" to make it clear that this right would apply to natural persons only.

Now Mr. Chairman, when we look at the rights which are dealt with in proposed Clause 7, we are talking about the right to life, to liberty and security of the person. And the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Surely it cannot be argued that any of those rights in any way adds to the rights of corporations or of artificial corporations. There may be some who suggest, for example, that the reference to security of the person, could be extended to corporations. However, any extension which might be made under the rubric of fundamental justice, would I submit, be covered already by protections from unreasonable search or seizure in Section 8. And to anyone who would suggest that, in some way, the security of the person as applied to the corporate sector would be expanded in Clause 7, I would ask them what is the nature of that expansion and what are you attempting to give to the corporate sector that is not already contained in Clause 7.

Clearly the right to life, and the right to liberty are ones which apply to natural persons, and do not apply to the corporate sector.

Now Mr. Chairman, I recognize that the government is tabling a proposed amendment that would add the right to the enjoyment of property and would change the words to "the principles of natural justice". For the right to the enjoyment of property, if this is to be accepted, and there will be a debate on that proposed amendment, again, should surely be restricted in this particular instance when we are talking about natural justice to individuals. That is the concern, even if the proposed government amendment is accepted.

So Mr. Chairman, in recognition of the fact that it is human beings we are talking about, and natural persons, very clearly in Clause 7, I suggest that the logic which compelled the government to change Clause 15 from "everyone" to "every individual" would be similarly applicable in Clause 7.

Perrin Beatty & Robert Kaplan, p. 8

Perrin Beatty: […] I listened Mr. Chairman, with a great deal of interest to my friend Mr. Robinson as he explained the NDP's rationale for changing the wording in Clause 7 and if I understood him correctly, he indicated that none of the rights which were conferred in this clause, could be construed in any way as applying to corporations at the present time.

If indeed that is the case, there is no need to change the wording so as to specifically exclude corporations. In other word, corporations could not claim the right to life, they could not claim the right to liberty or claim the right to security of person. Then there is not a need to specifically exclude them. I think that the concern of the NDP was indicated when Mr. Robinson spoke about the amendment which will be moving next, and that is to extend the right to enjoyment of property, and I gather that the reason why the NDP wants the amendment made at this point, is to ensure that the right to enjoy property, that one cannot be deprived of except in accordance with principles of natural justice, should not extend to corporations.

Mr. Chairman, I would indicate to members of the Committee, that they should look at this area very, very seriously because, and perhaps I would ask the question of Mr. Robinson, is it fair if we extend property rights for example, for a family farm, to individuals to own a family farm, and not to have that family farm taken away from them except under the principles of natural justice. In other words, that they be given the opportunity for a fair hearing and the expropriation that would take place, would be in accordance with legally acceptable means.

How is it different, from the family which incorporates its family farm, where the husband and wife and perhaps one of the children decide to incorporate their family farm because federal tax legislation makes it advantageous or desirable for them to do that. Why should that family then be deprived of their right to enjoyment of property because they have chosen to incorporate a family farm? I would argue that this would be discriminatory and most unfair, and that millions of Canadians would be deeply concerned about the elimination of this sort of protection for people who have incorporated small businesses or who have incorporated family farms.

The same thing. Mr. Chairman, clearly applies in the case of family who would incorporate a small business.

Surely, Mr. Chairman, if we believe in justice, we believe that property cannot be taken away from people, including people who have incorporated themselves in a business or in a family farm, except by legal methods, lawful means, and except after they have had a fair hearing, the right to express themselves and to express the reasons why they should not be deprived of that property. I see no way, Mr. Chairman, in which the national interest, the public interest, is harmed by insuring that those two principles be respected. First of all, that property cannot be

[Page 9]

taken away without legal means, and secondly that it cannot be taken away until after someone has had a fair hearing. And I would suggest to you that the NDP amendment, which would exclude family farms and family corporations, would do a grievous injustice to literally thousands and thousands of Canadians and that members of the Committee who have indicated previously that they were prepared to support the extension of property rights into the Charter, would be making a very grievous mistake and doing a serious injustice to large numbers of Canadians if we accepted the NDP amendment.

[…]

Mr. Kaplan: Mr. Chairman, I have very little to add to what we indicated yesterday about "every person" and "every individual".

We think an "individual" clearly applies to human beings only, and the other two expressions are interchangeable and that their scope is determined by the context.

I would agree with Mr. Beatty that, if the rights provided in this clause, as amended, could extend to corporations, that they will do so if you used the word "everyone", but would not if Mr. Robinson succeeds with his amendment; so that in effect when we come to add the provision about property Mr. Robinson would have us deprive incorporated family farms and religious corporations, personal holding companies of individuals from receiving any protection of Clause 7.

I know perfectly well that he is prepared to show how all of those rights are protected elsewhere in the Charter; but he uses exactly the opposite argument when it suits his purpose to do so, that every right should be protected in every clause.

Robert Kaplan, p. 10

Robert Kaplan: […] I suppose Mr. Robinson will have an amendment to propose every time the word "everyone" or the phrase "every person" appears. I think if it would be of any assistance to him to know that he would be wasting his time, we indicate that we are not prepared to support amendments which just give him a chance to listen to himself talking.

Serge Joyal (Chairman), Perrin Beatty, Jean Lapierre, Sven Robinson, Jim Hawkes, Senator Tremblay, Lorne Nystrom, Jake Epp, Bryce Mackasey, Bob Kaplan, James McGrath, p. 12

The Joint Chairman (Mr. Joyal): I would like to go the next amendment, which is the amendment identified by the letter N-10, Clause 7, page 4, and invite Mr. Robinson on behalf of the New Democratic Party to move the proposed amendment.

I am sorry, but I have been informed by our Clerk that we should go on the amendment moved by the Conservative Party, the one identified by the letter C.P.—for Clause 7, page 4, and I invite the honourable Perrin Beatty to move the proposed amendment.

Mr. Beatty.

Mr. Beatty: Thank you, Mr. Chairman. Perhaps I can read the amendment in both official languages.

I move that Clause 7 of the proposed constitution act, 1980 be amended by

(a) striking out line 25 on page 4 and substituting the following:

security of the person and enjoyment of property and the right not

and (b) striking out line 27 on page 4 and substituting the following:

with the principles of natural justice

Mr. Chairman, I will attempt also to read it in the other official language without inflicting any damage on anyone's ears. I should indicate that I am a graduate of the Harry Hays School of language training.

Article 7, page 4, [Translation] motion by Mr. Beatty.

Clause 7, page 4, motion by Mr. Beatty.

I move

that Clause 7 of the Proposed Constitution Act, 1980 be amended by:

(a) striking out line 25 on page 4 and substituting the following:

Security of the person and enjoyment of property and the right not

and (b) striking out line 27 on page 4 and substituting the following:

with the principles of natural justice

[Page 13]

[Text]

The Joint Chairman (Mr. Joyal): I would like to say, Mr. Beatty, that this is a clear case where the pupil supersedes the master.

Mr. Beatty: Mr. Chairman, if the country is able to stay together with my accent, then it was built very strongly, I think.

Mr. Chairman, in explaining that we are moving, I would like to make a few comments.

The family farm, family business and family home are some of the most fundamental elements of Canadian society; yet, anyone who has ever dreamed of his own home or a family farm or business, would be disturbed by the fact that while the Diefenbaker Bill of Rights included the right to the enjoyment of property, the Charter of Rights proposed by the government in the constitution is mute on the subject.

Mr. Chairman, it is not uncommon at all for federal constitutions or national constitutions to include recognition of party rights. Indeed, a cursory check of various constitutions we have been able to locate more than 30 countries around the world which include India Constitution the right to own property as one of the fundamental constitutional rights. I will name just a few of them, which I think would be instructive, covering a broad spectrum: Belgium, Portugal, France, Germany, Ireland, Italy, Luxembourg, Japan, and of course, the United States.

So what we are proposing, Mr. Chairman, is not novel in any way. It is not an experiment which has not been tried in other areas. It is a recognition of the hopes and dreams of millions of Canadians who believe that the right to own property is a fundamental right which should be enjoyed by all Canadians.

Mr. Chairman, this right was included in the Diefenbaker Bill of Rights and it was proposed to us that it should be included in the Charter of Rights in the constitution by the Canadian Organization of Small Business and by the Canadian Bar Association.

Mr. Chairman, concern has been raised as to whether or not this involves an intrusion into areas of provincial responsibility, and it has been suggested from time to time that property rights are exclusively reserved to the provinces.

First of all, I would like to point out that there is some property which belongs under federal jurisdiction, for example copyright and patent rights, clearly areas falling under federal jurisdiction.

But in addition to that, we do recognize the fact that the bulk of property rights, for example, control over real property by and large resides under provincial jurisidiction.

But I would point out to members of the Committee who are concerned in this area that the position of the Progressive Conservative Party from the outset has been that no provision of the Charter of Rights should apply to any province against its will; that obviously the proposal we have made is that provinces should have the right to determine what provisions within the charter would apply in their jurisdictions and would not be imposed on them by Ottawa.

[Page 14]

We are establishing a principle here, as we propose to establish a principle in the case of freedom of information, which we believe should extend across the board, but as we felt in the case of freedom of information, we feel here that because these are areas falling under provincial jurisdiction, the extent to which they fall under such jurisdiction, the provinces should have the right not to have Ottawa simply imposing those rights and responsibilities on them and they have a right to be heard and to make that decision, and we are confident, Mr. Chairman, that sooner or later and eventually all provinces will agree that the right to the enjoyment of property should be included in the constitution and that they would move in this direction.

A second concern has been expressed as to whether or not this provision will prevent provinces from legislating in areas of property rights. For example, concern was expressed at the First Ministers conference about Prince Edward Island and whether or not they would have the right to ensure that their land in that province was not held by people from out of the province who were not there to take advantage of it, and local people were not deprived of their rights to use property within their province.

Mr. Chairman, it is our contention in the Progressive Conservative Party that the amendment we are proposing would not prevent provincial governments from making or passing legislation which they feel was essential and justified.

We are asking two things; one, that the principle of the right to ownership of property should be recognized in the constitution; secondly, that that right should not be taken away from anyone unless he has had a fair hearing and this is done by lawful means.

We believe that such provisions would not prevent provincial governments from expropriating property if the public interest demanded it, as long as there were fair hearings and was done legally; it would not prevent legislation from being passed by provincial governments which would reserve land to local people, if it were done fairly and by lawful methods.

So we do not feel we would therefore be imposing in the constitution an obligation of the provinces which would greatly circumscribe the rights of the provinces to operate in a field under their jurisdiction, but rather that we would, first of all, recognize a central principle in the Charter of Rights and, secondly, we would say that all governments have the responsibility in dealing with their citizens to do so in a way which recognizes basic principles of law, that it is lawful and done after a fair hearing.

Mr. Chairman, I might indicate that there are two aspects. The first is the right to the enjoyment of property. Secondly, you will note that we have changed the words "fundamental justice" to "natural justice". We do that because we believe there is a greater body of law defining what constitutes "natural justice" and we are more comfortable with a word included in the charter which is more clearly defined, ans we should be very careful, as Mr. Robinson stressed, to be cau-

[Page 15]

tious when we are including wording in the constitution to ensure that we know what we are doing.

We believe that "natural justice" properly represents what the vast majority of Canadians want to see take place when it comes to property rights or the right to life or to the security of the personor the right to liberty.

Mr. Chairman, we are opposed to the concept. We could, of course, have included the proposal for due process of law instead of natural justice, but that simply implies that governments have the right as long as it is lawful. As long as they pass legislation to authorize what they are doing, they have the right to go ahead and do whatever they want, and we believe their fundamental principles here regarding process, and whether or not people have a right to be heard and whether or not they have been fairly heard, that this should be included in the constitution when we are dealing with such fundamental areas of individual rights.

Finally, Mr. Chairman, Mr. Robinson indicated that the NDP was not attempting to take away family farms or to threaten the position of family farms or family businesses, and I accept their word on that, but he said that a different case could be made in the case of corporations, and I think, Mr, Chairman, that we should ask ourselves if we have concerns about whether or not corporations should be entitled to the same rights as we are giving to all Canadians and to small businesses and to family farms.

I think we have a right to ask our friends in the NDP, to ask anyone who is opposed to this provision, what would they propose to do in the case of large corporations, be it even foreign owned multinationals, would they deny them the right to a fair hearing; would they deny them the right to expect that before property was taken away that that should be done by lawful means; and how is the national interest damaged? How is the national interest damaged by conferring these rights to corporations as well as to individuals?

Do we not feel that anyone operating lawfully in our society is entitled before property is taken away from them to a fair hearing and to have that property taken away only by legal means.

Mr. Chairman, I think that property rights should extend both to corporations and to individuals, and this is why we have moved the amendment in the way that we did. l think it is an amendment which deserves the support of all members of the Committee; and that it be welcomed by literally millions of Canadians.

The Joint Chairman (Mr. Joyal): Thank you very much, honourable Perrin Beatty. Jean Lapierre.

[Translation]

Mr. Lapierre: Thank you, Mr. Chairman.

I think that Mr. Beatty has clearly demonstrated that property rights should be included in the new Constitution. Since I am the same man I was yesterday, the same man who made a commitment to his colleagues opposite, I am still willing to go along with their suggestion.

[Page 16]

There is, however, a technical problem. In the French version, you said:

la sécurité de sa personne et la jouissance de ces biens

C-E-S. I would prefer that you say S-E-S, to show that we are talking about his property.

The Joint Chairman (Mr. Joyal): Fine.

You may continue, Mr. Lapierre.

Mr. Lapierre: As you know, the Canadian Bill of Rights grants property rights.

Over the summer, in July, consideration was given to including this right in the federal proposal, but a number of provinces were concerned about the inclusion of a provision of this type because of zoning, environmental and industrial development legislation.

We are convinced that this new provision will not prevent the provinces from passing legislation and I assure my colleague opposite that their proposal would certainly raise the ire of our colleagues like Mr. Garon, Mr. Léonard and others, particularly in Quebec, except that what they are proposing is quite different.

As for the second part of your proposal, it is entirely realistic to ask that the notion of fundamental justice be changed and a number of associations, including the Canadian Civil Liberties Association, the National Association of Japanese Canadians, Indian Rights for Indian Women, the National Black League and others, have asked that the notion of fundamental justice be more clearly defined, since it is not a well-known legal expression.

For this reason, the members of this Committee are willing to recognize this principle. Also, property rights have intrinsic value in Canada and we are prepared to go ahead with this.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Lapierre.

Mr. Robinson, do you wish to comment on this proposition?

[Text]

Mr. Robinson: Thank you, Mr. Chairman. I would indeed. Again I have listened with interest to the statements of Mr. Beatty and Mr. Lapierre and I can certainly fully endorse the remarks which have been made with respect to the vital importance in Canadian society of the small business, of the family farm and the family corporation, but with great respect to those two individuals that is not the issue in this particular amendment.

No one around this table would deny that those are some of the cornerstones of Canadian society, and that they deserve full protection and full recognition in any charter of rights.

However, Mr. Chairman, what we are doing in this proposal is going far beyond that. We are entering waters which in fact have not been entered before in any of the discussions, certainly in recent years, between federal and provincial governments,

[Page 17]

at least on the part of the federal government for putting forward a proposal of this nature.

If one looks at the July 1980 draft; if one looks at the February 1979 document; if one looks at Bill C-60; if one looks at the Lamontagne-MacGuigan report; if one looks at many earlier documents, one can suggest that this particular right extending as it does right across the board, right across the board both to provincial and to federal governments, extending not just to Canadian citizens, but to all persons, foreign corporations, large Canadian corporations, no distinction whatsoever represents a sweeping extension of this right.

Mr. Chairman, there has been some reference made to the Canadian bill of rights, and indeed there is a reference in Clause 1 of the Canadian bill of rights to the right to the enjoyment of property without being deprived thereof, except by due process of law.

Mr. Chairman, the fundamental fact that must be kept in mind with respect to the Canadian bill of rights is that that applied it within the federal jurisdiction, and I would suggest that those who are interested in looking at how that particular right has been applied would search the law books in vain to find any particular jurisprudence on that subject, because the courts of this country have

recognized that property rights fall within the provincial domain. So to say that because this is a right which is contained in the Canadian bill of rights some how it should be extended to the provincial level, with great respect to those who argue in that position, it simply does not deal with the fundamental fact that this is a matter which is directly within provincial jurisdiction.

I am surprised, Mr. Chairman, I am very surprised to see this amendment coming forward from the Conservative Party of all people, because it is the Conservative Party that has suggested that the federal government is attempting to ram something down the throats of provincial governments.

Well, for heaven's sake, if this is not ramming something down the throats of provincial governments, if this is not something which has been strenuously resisted by a number of provincial Conservative premiers, I do not know what is, because they have made the point quite properly that in a number of jurisdictions they want, for example, to protect their land from foreign ownership, from foreign corporate ownership in many cases.

The Province of Prince Edward Island: their Premier, Angus MacLean, have made this argument very clearly and very eloquently, and I think very persuasively that they have a right to protect their land from the encroachment of foreign corporate interests.

What does the Conservative Party have to say about this particular imposition, this imposition which, as I say, is on the table for the first time in any significant sense.

[Translation]

Mr. Lapierre: On a point of order, Mr. Chairman.

The Joint Chairman (Mr. Joyal): Mr. Lapierre, on a point of order.

[Page 18]

[Text]

Mr. Lapierre: I would like to tell Mr. Robinson that he should go back to his July 1980 document, to Clause 9, where we proposed that everyone has the right to use an enjoyment of property individually or in association with others, and the right not to be deprived thereof, except in accordance with the law and for reasonable compensation.

[Translation]

In case he should forget, I would say to him, "Dont't bite off more than you can chew", because one should not get the impression that it is something new. It had been discussed a long time ago.

The Joint Chairman (Mr. Joyal): Thank you, Mr. Lapierre.

Mr. Robinson.

[Text]

Mr. Robinson: Mr. Chairman, merci. With great respect to my friend, Mr. Lapierre, I am glad that he pointed out that Clause 9 is contained in there because I was coming to that point in just a moment.

Clause 9 is a very different formulation from what is being proposed by the Conservative Party. What was proposed in Clause 9, and indeed what has been proposed by the Canadian Bar Association, and what was proposed by Mr. Walter Tarnopolsky, who I certainly think all members of this Committee would recognize as an authority in this area, was that if we are to talk about the right to the enjoyment of property, a right which is so fundamentally within the provincial jurisdiction, an area which surely if it is argued that courts must exercise some hesitation in dealing with this particular item; this is one area that the courts should be hesitant in embarking upon, that that should be very narrowly worded.

Mr. Chairman, Clause 9 quite properly was worded very narrowly in accordance with the recommendations of the Canadian Bar Association and in accordance with the recommendations of Professor Tarnopolsky in stating that this right to the enjoyment of property and the right not to be deprived thereof, except in accordance with law and for reasonable compensation, well "in accordance with law" is surely the fundamental test there.

If we are to get into this area we must ensure that the provinces are left with a relatively free hand as long as they act in accordance with the principles of law in dealing with property.

I would like to turn to another argument on this subject, Mr. Chairman, and that is this.

As I say, the Conservative Party has argued that this should be imposed on the provinces, or perhaps they might say that because they are splitting their package that they are not really imposing this particular right, but they are prepared to urge this upon the provinces. They have indicated that very clearly, that if this is to be in the Charter, they are prepared to urge this on the provinces.

And if we are talking about the right to the enjoyment of property, that is all very well for those who have property to enjoy, but if we are going to get into this area of economic rights and property rights, it is all very well to protect the corporate sector and protect their right to enjoy property, but if we are going to embark in these waters, let us start looking

[Page 19]

at some other areas, some other economic and social areas. Let us start looking at the right to a clean environment, while the corporate sector is busy enjoying our property, let us make sure that they keep our environment clean.

If we are going to talk about the right to enjoyment of property by the corporate sector, let us also insist that when they enjoy our property that our workers are not killed, and are not injured and do not become sick on the job.

If we are going to talk about this right to the enjoyment of property, Mr. Chairman, if we are going to get into this area, then let us deal with some of the implications of that.

Mr. Chairman, I would like to conclude then by saying that certainly while we recognize the importance of the principles of natural justice and their application, I would point out that by substituting the words "natural justice" for "fundamental justice" in this proposed section, that we are regressing from an area which the Deputy Minister of Justice, supported by the Minister of Justice in earlier appearances, had indicated was an evolving area.

At that time the words "fundamental justice" were justified as leaving some opportunity for the court to move in to new fields of jurisprudence.

We are restricting that opportunity, Mr. Chairman. We are trying the hands of the court to the recognized principles of natural justice.

I suggest that we should allow the courts some leeway in talking about, for example, liberty and security of the person, to evolve in tune with changing Canadian society. And fundamental justice would allow that. Natural justice would not. It would restrict us to the existing principles of natural justice.

Mr. Chairman, as I say, in conclusion, I believe that this amendment must be rejected; rejected on a number of grounds on the basis of its incursion into the provincial spheres so vigorously resisted by a number of Conservative premiers. If there was one amendment and one amendment which really raised the ire of those Conservative premiers, it was this, at the discussions. I point out that the amendment that was on the federal table was far less strong than this. If they were prepared to vigorously resist that according to law, for heaven's sake, how much more vigorously will they resist this?

We are attempting to build consensus in this country, Mr. Chairman, and this is a vehicle to destroy any consensus which might arise.

Mr. Chairman, I strongly urge rejection of this amendment.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Robinson. I see that Mr. Nystrom and Mr. Hawkes have requested the Chair to speak on the proposed amendment, but I would like to inform Mr. Nystrom that I have already asked around the table if there were other speakers before I invited Mr. Robinson to conclude, and l have at this point to call the vote, because Mr. Robinson has concluded . . .

Mr. Beatty: It is my motion, Mr. Chairman.

[Page 20]

The Joint Chairman (Mr. Joyal): I am sorry, you are right. The Chair is confused. I have still Senator Tremblay. Mr. Hawkes, you can go on with your remarks.

Mr. Hawkes: Thank you, Mr. Chairman.

Just a brief interjection in light of Mr. Robinson's comments, but I think the record of the Conservative Party, unlike that of the New Democratic Party, is rather clear and consistent that

from the day we first saw the government proposal we have indicated in the strongest possible terms that the nature of the Federation of Canada, the relationship between federal government and provincial government has been under attack by this proposal. We have amendments before this Committee that we believe in very strongly are the way out of the impasse which has been created, and our amendment, which splits this package, acknowledges the nature of the Canadian federation, and as we approach the provinces, the Parliament of Canada is making a statement to the legislatures of the different provinces, and I think it is important that as part of that statement that we ask them in their consideration, in their involvement in this process of constitutional renewal, that they pay special attention to the issue of property rights, because this nation has been founded by people who value their property, and as we move towards the concept of entrenching rights in the constitution of Canada, the concept of property is important, but it needs to be vetted with the wisdom which accrues to those levels of government who are charged with the responsibility; and the responsibility under the BNA Act in large measure for the issue of property has resided, since the beginning of this federation, in the hands of the provinces.

We need their wisdom, and I suggest that Mr. Robinson's basic argument essentially provides support for the position which this Party has adopted from the start, that we need collective wisdom and we need time to renew this federation and therefore I urge members to vote for its inclusion on the understanding that this principle will be clearly enunciated as one which should be considered by the provinces as they become engaged in the process of constitutional renewal.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Hawkes. Mr. Nystrom, followed by the honourable Senator Tremblay. Mr. Nystrom.

Mr. Nystrom: Mr. Chairman, I want to first of all make request to the Committee, a request that you acceded to earlier today to the Conservative Party, and that was to stand the clause on mobility rights, and I want to ask the Committee whether or not they will grant the same request on this.

I will explain why, Mr. Chairman.

The whole area of property rights has been a very, very controversial thing, and it was on the agenda this summer as Point 9 in the Charter under property rights, and the draft there was quite different from the draft before us today.

I think the draft last summer was a more liberal draft, in terms of giving the provinces more leeway, than the draft we have before us today.

[Page 21]

It was a very controversial draft. It was opposed by many of the provinces during the negotiations this summer. Not only my province of Saskatchewan and Premier Blakeney opposed it, but some of the provinces represented by Conservative governments opposed it as well.

My argument here this morning is that I think it is only fair, since last night this was dropped on us by the government that they were going to accept this amendment, that we stand this until Monday evening. It will give us a chance to reflect. It will give us a chance, since we come from all the provinces of this country, to consult with different provincial governments. I think that is only

right in a federation that we should do that, since this is one of the more controversial areas discussed during the summer.

I want to raise this morning as a non-lawyer and as a layman who feels at a distinct disadvantage when I deal with some of the terms that are used here, with some of the concerns that I have.

The first thing that I wanted to say, Mr. Chairman, is that I think we need, in this country, protection to own a farm, protection to own a small business, protection to own a home. I think we need some of those economic rights.

Now the Conservative amendment that is going to be accepted by that government gets us into the area of economic rights, and if we are going to get into that area, and I am certainly one that is interested in looking at social and economic rights; the right to medical care; the right to health care I think is a basic fundamental human right that should be enjoyed by all; the right to housing, I think, should be enjoyed by all people; I think the right to an income should be enjoyed by all people.

My colleague, Mr. Rose, says clean air and environment. There are a lot of basic social and economic rights that I think could be contemplated, and probably should be contemplated, included in the constitution. And I am not sure if I want to just include this one economic right at the exclusion of all the others, and I appeal to my fellow Committee members this morning to let this clause stand.

I look, for example, at the word "everyone", and I wonder what that means. It does not refer to a Canadian citizen. "Everyone" I think would mean everyone; a Japanese businessman in America, and someone from France, or anywhere in the world. I remember the eloquent plea made by the Conservative Attorney General in Prince Edward Island at the conference of premiers this September in the constitution, the eloquent plea made by Premier MacLean's Attorney General as to why, in the Province of Prince Edward Island, they needed to legislate farm size and ownership of farm land in that province to protect the heritage of Prince Edward Island. It was one of the most moving pleas made during that week of the constitutional conference.

I do not know whether or not this type of thing would interfere with Prince Edward Island's right to determine who owns their land, who controls their land, and the future destiny of that province.

[Page 22]

I am not sure, Mr. Chairman, what this would do, for example, in Saskatchewan if this had been enshrined in the constitution five years ago before the premier and the government of my province, the legislature of my province, decided to take under public ownership over 40 per cent of the potash industry by purchasing foreign owned potash mines. I am not sure what that would do. Perhaps they could still do it. Perhaps it would have taken long court battles. Perhaps because of the inclusion here that these things can be done only in accordance with the principles of fundamental justice, that would have allowed them to do it because of the expropriation laws. But I am not sure of that, and I think we need time to reflect. We need time to consult legal opinion, legal counsel, time to consult the provinces.

So for that reason as well, I want Mr. Chairman to have this thing stood until Monday evening.

The other thing I referred to very briefly was Prince Edward Island and land, but I can refer to M. Lapierre and the Province of Quebec, and look at some of the land legislation that has been introduced by the province. Does this or does this not interfere with the rights.

I look at my own province and the concern about foreign ownership of land, absentee ownership of land, and I wonder whether or not this might interfere.

I also look at the argument of provincial rights, and here I am really surprised with my colleagues in the Conservative Party. I know they want to split this package, and have it referred to the provinces for their approval, but I think they also know that we have before us a majority government, and regardless of what the Opposition says, if the majority government is determined to get its way, in a parliamentary system, they usually get their way, and they may be doing this country a great disservice in terms of forcing something on the provinces the provinces do not want; because property rights comes under the administration of the provinces of this country, and again, because of that, I want time to consult, and time for members of this Committee to properly reflect as to whether or not we are doing the right and proper thing.

So for those reasons, Mr. Chairman, I ask this Committee to stand this. I oppose doing this at this time, I oppose the words that are before us. Perhaps we should be looking at amending them, striking them out totally, striking them out completely, and if we are to get into the area of economic rights, I am more concerned about people that perhaps do not even have property, but that have rights. What about people that rent their homes, that cannot afford property, that are paying huge interest rates in this country, and high rents in this country, do they have a right to housing? Do they have a right to income? Do they have a right to health care? Do they have these other basic rights? We have been told in this Committee that, well, we should really get onto these things and we should just include a charter of rights, patriate the constitution with an amending formula, and maybe consider a few other things, you know, like resources and equalization.

So, Mr. Chairman, I would like to ask you to stand this clause until Monday evening if possible.

[Page 23]

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Nystrom.

[Translation]

The hon. Senator Tremblay.

Senator Tremblay: Thank you, Mr. Chairman.

I only intended to make a comment which supports what my colleagues, Mr. Beatty and Mr. Hawkes, have already said about the issue which preoccupies Mr. Lapierre as well as our friends from the NDP because the provinces are obviously affected by the enshrinement of this right to property. But before that, I would like to say a few words about the kind of analysis which Mr. Nystrom has just made on what will happen to the propositions we must develop.

He basically says that since the majority will have its way, the proposition should not contain anything which we are not prepared to impose to the provinces. But if you do not want to impose anything on the provinces, you may as well suppress the whole charter because, presumably, the majority will not accept the rationale of our arguments.

I hope the majority is still open to this rationale and that it is going to consider its fundamental intentions of unilateralism.

As to the point which is of concern to Mr. Lapierre, Mr. Nystrom, and his colleague, Mr. Robinson, you must keep in mind that the objective which we are pursuing comes into the framework of the whole charter, the whole proposition where nothing will be imposed to the provinces, if our proposition is accepted, we shall hand the provinces back with a proposition from the Canadian Parliament and we are not trying to improve the proposition of the Canadian Parliament before it is submitted to the provinces according to our recommendation.

Consequently, by doing what we are doing now, we do not impose on the provinces, we propose.

Mr. Lapierre: We cannot hear you.

Senator Tremblay: You are trying to bring us back to the brutal mechanics of the majority game. Maybe we are going to lose but, again, we hope that the majority is open to the rationale of our arguments and that upon establishing in due time the rationale behind a reference to the provinces instead of a reference to London for a Canadian Charter of Rights, we hope that even the majority will rally our arguments.

Therefore, we assume that on behalf of the Canadian Parliament we are now preparing a proposition for the provinces.

Mr. Beatty and others have demonstrated that it is substantially justified to put our amendment in this proposition which will be submitted to the provinces; and I will not come back to this, but I wanted to emphasize the fact that we do not impose anything on the provinces.

Thank you, Mr. Chairman.

[Page 24]

The Joint Chairman (Mr. Joyal): Thank you very much, Senator Tremblay.

I think that you have clearly expressed your opinion. Mr. Lapierre.

Mr. Lapierre: Mr. Chairman, I am vigourously opposed to the suggestion put by Mr. Nystrom to stand these very important clauses until Monday; indeed, we know that the amendments from the Conservative party have been presented Tuesday evening in a most orderly way and we also know that yesterday afternoon I have given our agreement in principle; they have had the whole day yesterday and the whole evening and as to Mr. Robinson, we know that he already has made up his mind; one wonders who is talking on behalf of whom and I must confess that the Conservatives have done their homework in the same way as we have and we are in agreement on these questions.

He said that he needs time to think about it, but he has had the holidays to do so because many groups who have appeared before us have talked about the right to property and, therefore, I do not think it is a new concept.

Mr. Nystrom: It is since yesterday evening.

Mr. Lapierre: Yesterday afternoon I stated that on our side we were ready to accept it, but the right to property is not a new concept and I personally wonder whether . . .

[Text]

Mr. Nystrom: A point of order, Mr. Chairman.

The Joint Chairman (Mr. Joyal): A point of order. Mr. Nystrom.

Mr. Nystrom: Mr. Chairman, I hesitate to interrupt Mr. Lapierre. But he did the same thing to Mr. Robinson on something that was very important. Mr. Chairman, this was talked about last summer, but it has never been in the resolution as presented to this Committee. It was only last night when the government said they would accept the amendment that was sprung on the Committee; and we would suggest to you that we have not had a chance to reflect seriously on this.

We were given to understand by the government that it was not their intention to move this as an amendment.

Mr. Epp: On a point of order.

The Joint Chairman (Mr. Joyal): A point of order, the Honourable Jake Epp.

Mr. Epp: Mr. Chairman. I have to mention to Mr. Nystrom that we came up front with our amendments Tuesday to put them before the Committee so that they could be evaluated. and every member would have an opportunity to do so.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Epp.

[Translation]

Mr. Lapierre, I understand that you are through.

Mr. Lapierre: I am through. Our position is clear.

[Page 25]

The Joint Chairman (Mr. Joyal): I now invite the Honourable Bryce Mackasey.

[Text]

The Honourable Bryce Mackasey.

Mr. Mackasey: Mr. Chairman, I listened to the debate. I sometimes resent people speaking in my name, because I usually make my mind up. My mind is that I would support my party, provided my conscience is clear on the issue. There are some fundamental things which do concern me at times.

The point that bothers me a little and will frankly affect my decision in what I will be doing is that the area that Mr. Robinson has touched on, the implications that this clause vis-a-vis the ability of foreign investors, not simply to buy land—because we buy an awful lot of land in the United States—but what they could do with this.

Before I make up my mind on the understanding of this clause, I would like to put a question directly to the Minister as to the validity, in his opinion, because as far as I am concerned it is his guidance I seek when I am confused.

I would like to ask the Minister a question on the validity of Mr. Robinson's argument. Should we be included in the words "Canadian citizens" rather than "everyone"? That is the point that bothers me.

The Joint Chairman (Mr. Joyal): The honourable, the Acting Minister of Justice.

Mr. Kaplan: Mr. Chairman, I would like to be brief in my answer, but I would like to indicate that from the very beginning the Liberals have favoured the notion and concept of the protection of economic rights and rights of property, and that our reasons for withholding that provision from this Bill was for the reasons that some members indicated, that there were strong provincial objections to the inclusion of that type of protection.

Now, the Conservative members have put the provision forward and on the basis of their being prepared to see that contentious issue addressed by this Committee, and addressed by Parliament at this time, the Liberals are prepared, knowing the Conservatives are prepared to support this, since we do believe that economic rights and the rights of property should be recognized and protected, we also are prepared to see that provision move forward.

Now, the arguments that Mr. Robinson and Mr. Nystrom advanced are largely irrelevant to this particular provision, because this provision deals with process and not with the question whether foreign interests, for example, should be allowed to acquire assets and own property on the same basis as Canadians. This has nothing whatever to do with that.

All this deals with is the question of due process and provides that anyone—and I can assist Mr. Nystrom again by confirming that "anyone" means anyone as he suspected it did. So that is not something with respect to which anyone would need much time to reflect on. Anyone means anyone—foreign, domestic, incorporated or unincorporated—has the right not to be deprived of the enjoyment of their property except according to the principles of fundamental justice or of natural justice, whichever this Committee determines.

[Page 26]

The narrow answer to your question is yes, we could restrict the right to be treated fairly in process to Canadian citizens. We could indicate by implication, as I think Mr. Robinson wanted to do, that foreigners should be subject to unfair rules, if that is what Parliament decides; that they should be denied due process in the enjoyment of property in our country. We do not agree with that.
We feel that the due process rules should apply to everyone—and I mean everyone—who is allowed by whatever other laws are relevant, to own and enjoy property in Canada.

Thank you, Mr. Chairman.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Minister.

Mr. Robinson.

Mr. Robinson: Mr. Chairman, in the last few minutes, I have just attempted to locate the extract to which I had earlier referred. I would like to draw to the attention of the Committee the viewpoint of both the Canadian Bar Association and Professor Tarnopolsky which I think should be quoted. I believe it is persuasive.

This is from the Canadian Bar Association submission called Towards a New Canada.

I think it is important to point out, Mr. Chairman, that this Committee was one which contained representatives from right across Canada. It was chaired by Mr. Jacques Viau from the Province of Quebec, and there were representatives from Alberta, British Columbia, Ontario, Quebec, Prince Edward Island, New Brunswick, Nova Scotia, Saskatoon, Newfoundland.

Mr. Chairman, this was a very broadly representative group. They conducted a number of hearings and asked for many submissions. Following that they came together as a group and drew up a which is certainly worthy of serious consideration by this Committee.

Mr. Chairman, on the fundamental question before us and the question of property rights, this is dealt with at page 18 of the report of the Canadian Bar Association and the heading Legal Rights in their general section on fundamental rights, constitutional objectives. What they stated was this: that the federal government in their proposal, The Constitution and the People of Canada, suggested the inclusion of the following rights: one, the right of the individual to life and the liberty and security of the person and the right not to be deprived thereof except by the due process of law.

Now I would like to pause there for a moment. Mr. Chairman, to indicate that I am sure the Minister of Justice subconsciously perhaps, certainly erroneously referred himself to due process, that this would somehow guarantee due process. I certainly hope that is not what we are talking about, because if we start talking about due process, as the Minister did at one point, we are getting into the whole area of substantive due process, which is the last area we want to get

[Page 27]

into in this particular country when dealing with economic rights.

I will go on to the second section that the Canadian Bar Association looked at, which was the right of the individual to the enjoyment of property and the right not to be deprived thereof except according to law.

Now that was a very weak formulation, but they said:

We agree with the general thrust of these proposals as did the Joint Committee. That Committee would in fact have gone further and provided that an individual should not be deprived of property except for the public good and for just compensation. However, we are convinced that the question whether the talking of property is for the public good is clearly one for the legislatures. We did have some sympathy for the view that just compensation for such taking should be consistently guaranteed, but in the end we think consistently with our view that economic rights are not appropriate for protection in a Bill of Rights, that this question, too, is fundamentally one for the legislatures.

It can be argued whether or not certain economic rights should be dealt with in the context of a bill of rights, and we will be dealing with that argument at little later.

But certainly, they say these bodies, that is the legislatures are best equipped to judge what is for the public good and what is just in economic matters.

So, Mr. Chairman, what the Canadian Bar Association recommended was that the right of the individual to the enjoyment of property should only be to the extent that it was according to law.

Mr. Chairman, it was another fundamental change, and that is that the federal government's original proposal dealt with the rights of individuals, the right of the individual to the enjoyment of property.

Well, Mr. Chairman, that was precisely the amendment which I attempted to propose. There was no suggestion by the Canadian Bar Association or the government that we were extending this right and this whole area of jurisprudence to the corporate sector; no suggestion whatsoever. We were dealing with natural persons in that case, and the federal government was dealing with natural persons in that particular case.

Then there was Professor Tarnopolsky, in a recent article in the Canadian Bar Review, dealing with provisions of Bill C-60 who made the following arguments. That was in 1978.

He makes reference to some of the problems with the due process of law clause with respect to the enjoyment of property and goes on in dealing with the separation of property from the due process clause to say:

With the adoption of such an amendment, however, the question that arises is whether to include any clause for the protection of property rights and if so, whether a phrase such as "except in accordance with law", which is the one most frequently recommended, would be sufficient protection to ensure "just" treatment and "just" compensation for the taking of property. For this purpose

[Page 28]

one could add to that clause the requirement that expropriation shall only be "in the public interest" and for "compensation". The problem with such formulation, however, is that unless a further provision is made to exempt taxation of forfeiture by way of penalties from the protection for "just compensation", then some court could extend the coverage of the property protection clause to provide an argument against the paying of taxes or the levying of forfeitures of property.

Mr. Chairman, the whole concept of natural justice is one, as l have indicated, is restrictive so far, but which some court could certainly and conceivably extend to deal with the whole area of compensation. If that were the case, can you imagine the nightmare we would be in in this country with courts deciding a question of that nature.

Professor Tarnopolsky goes on to make that point.

Besides, there could be extensive litigation over the "justice" of "just" compensation. Therefore it is probably preferable to provide merely that there shall be no deprivation of property "except in accordance with law", and rely, thereby, on the representation of propertied interests in our legislatures to prevent the enactment of laws providing for expropriation without "just" compensation and confiscation without justification.

So, Mr. Tarnopolsky, who is a member of the United Nations Human Rights Committee as well as a member of the Canadian Human Rights Commission and the author of the leading text on the Canadian bill of rights.

The Joint Chairman (Mr. Joyal): A point of order, Mr. Robinson. You are giving us the pedigree of Mr. Tarnopolsky. I would like you to address the very content of the motion.

I think you will understand that. I would like to remind you that when we are on amendments of subamendments, interventions should deal with the content of the amendments and not with the personality of any authority you might quote in support of what you are advancing.

Mr. Robinson: Mr. Chairman, I certainly appreciate that. l merely wanted to remind Committee members of the outstanding qualifications of Professor Tarnopolsky in this particular regard and to hope that perhaps his words might be listened to particularly seriously in the light of that.

Mr. Chairman, as I say, this amendment while it was proposed by the Conservative Party on Tuesday night, it was only yesterday that the government indicated that they were prepared to accede to this.

Surely, it is not unreasonable to ask that we be given some opportunity to consult on this matter which is of such vital importance and which could affect fundamentally some very important rights.

Now, the Conservative Party has objected on many occasions to the lack of consultation, the lack of an attempt to arrive at a consensus. What we are saying is, let us consult over the weekend on a proposal which is a new proposal and which has never been on the table before and which provinces

[Page 29]

have never had to consider in the history of federal provincial negotiations in this country. This is the first time that this has been proposed.

Now reference has been made to the July 1980 draft, and as I have already pointed out that draft dealt what the deprevation of property according to law. Well, Mr. Chairman, there was such bitter resistance to that particular proposal by provincial governments that when we look at the final proposal which went to the September 1, Ministers conference we find there is no reference whatsoever to it, that there is no reference to the right to the enjoyment of property. The reason for that is simply that even the reference to the right to the enjoyment of property in accordance with the law was felt to be totally unacceptable to the provinces.

Now, we have this new concept, Mr. Chairman, and this new concept would add principles of jurisprudence which, as I say, the provinces should be consulted on.

I would hope, Mr. Chairman, that the Conservative Party would follow through on the principles they have spoken on in many cases in the past and agree that we should give the provinces, give the Attorney General of the Province of Prince Edward Island, and the Attorney General of the Province of British Columbia, Saskatchewan, an opportunity at least to study this new proposal, this unprecedented proposal, over the weekend and then come back and consider the substance of it and whether we might not wish to restrict the wording to a certain extent.

Let us allow at least that minimal consultation which surely should be taken place on so fundamental and so unprecedented a change!

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Robinson.

The Honourable James McGrath.

Mr. McGrath: Mr. Chairman, we feel there has been adequate debate on this. It is not a new principle. It was first introduced 20 years ago in the Diefenbaker bill of rights and was the subject of many witnesses who appeared before this Committee. It has been well covered by my colleague, Mr. Beatty. We would like the question to be put now.

The Joint Chairman (Mr. Joyal): Thank you.

Mr. Nystrom.

Mr. Nystrom: Mr. Chairman, we have had many discussions in the last two or three months between Mr. Austin, Mr. Epp and myself and we have always carried on some very cordial talks and negotiations, and we have pretty well come to an understanding that if some member of this Committee wants to have something stood for a short period of time to reflect and consider, that would be acceded to.

I find it very strange this morning that we cannot have this done when we are dealing with something that is new, basic— something that caused a great deal of concern on the part of the provinces last summer.

You will know, Mr. Chairman, that my main role here is to try and build a consensus amongst Canadians.

[Page 30]

There is obviously a lot of opposition to what the government was doing when it first introduced this resolution, and it was obviously causing some division in the country. I think it is important that all of us should lay aside some of our partisan labels and some of our original bias and try to build a consensus in this country.

Mr. McGrath: On a point of order, Mr. Chairman.

The Joint Chairman (Mr. Joyal): Mr. McGrath, a point of order.

Mr. McGrath: Mr. Chairman, it is evident to me what Mr. Nystrom is attempting to do is patently unfair, to put it mildy.

He is trying to suggest—and there is an audience out there who will judge the fairness of what he is attempting to do—he is trying to suggest that we are denying him a reasonable request because this is something new on the table and they would like to have time to think about it.

There are three points. First, the amendment has been on the table since last Tuesday night. Secondly, it has been the subject of debate before this Committee amongst a number of witnesses, and it comes as no surprise to Mr. Nystrom that this is one of our amendments—and there were a lot of written briefs.

Thirdly, Mr. Chairman, the principle has already been embedded in the Diefenbaker Bill of Rights for the past 21 years.

Now, I do not know why he needs to consult, because he has had the proposition before him all week and he has had the evidence before the First Ministers conference last fall.

I would respectfully suggest to you, Mr. Chairman, that it is reasonable to expect that there comes a time in this Committee when enough has been said and we should proceed to vote; and I think that time has arrived.

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January 26, 1981: Serge Joyal (Chairman), speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 45 (click HERE), p. 8

The Joint Chairman (Mr. Joyal): We are then on the amendment as moved by the honourable Perrin Beatty:

> That Clause 7 of the proposed constitution act, 1980 be amended by (a) striking out line 25 on page 4 and substituting the following:
>
> security of the person and enjoyment of property and the right not (b) striking outline 27 of page 4 and substituting the following:
>
> with the principles of natural justice.
>
> We are then on the second amendment dealing with Clause 7.

James McGrath & Jean Chrétien, p. 9

> **Mr. McGrath:** But perhaps I can get the matter back on the rails by reminding the Minister that we moved our amendment, our property rights amendment, which was originally moved on Clause 2; the record will show an intervention last Thursday, in the unedited transcript at page 163 by Mr. Lapierre, when presumably speaking on behalf of his colleagues he "indicated that the government would be disposed to accept the property rights amendment not on Clause 2, but on Clause 7.
>
> In order to obtain clarification, my colleague, Mr. Crombie, at page 164 of the transcript of last Thursday afternoons sitting, asked the following question of the Acting Minister of Justice—and I quote:
>
> You accept the comment made by Mr. Lapierre that the government would accept the right to enjoy property in Clause 7 as opposed to Clause 2.
>
> […]
>
> So my question to you, Mr. Minister, is very simply this: will the government accept our amendment for property rights to Clause 7?
>
> **Mr. Chrétien:** The answer is no.

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January 27, 1981: Perrin Beatty & Svend Robinson, speaking in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue 46 (click HERE), p. 3

> The Committee resumed consideration of the motion of Mr. Beatty,—That Clause 7 of the proposed Constitution Act, 1980 be amended by striking out lines 24 to 27 on page 4 and substituting the following:
>
> "7. Everyone has the right to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except in accordance with principles of natural justice."
>
> After debate, the question being put on the amendment, it was negatived on the following division:

YEAS:

The Honourable Senators

Asselin
Roblin
Tremblay

YEAS:

Messrs.

Beatty
Crombie
Epp
Fraser
McGrath—8

[Page 4]

NAYS:

The Honourable Senators

Austin
Connolly
Hays
Lapointe
Lucier
Petten
Rousseau

NAYS:

Messrs.

Campbell (Miss) (South West Nova)
Bockstael
Corbin
Gingras
Irwin
Mackasey
Nystrom
Robinson (Burnaby)—15

Mr. Robinson (Burnaby) moved,—That Clause 7 be amended by adding thereto immediately after the word «justice» the following:

"including the principles of due process of law."

After debate, the question being put on the amendment, it was negatived on the following show of hands: YEAS: 2; NAYS: 18.

Mr. Robinson (Burnaby) moved,—That clause 7 of the proposed Constitution Act, 1980 be amended by

(a) adding immediately after line 27 on page 4

"8. Everyone has the right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations";

(b) adding immediately after the proposed new clause (8) the following:

"9. Everyone has the right to protection against arbitrary or unreasonable interference with privacy."; and

(c) renumbering all subsequent clauses accordingly.

After debate, the question being put on part (a) of the amendment, it was negatived on the following division:

YEAS:

The Honourable Senators

Asselin
Roblin
Tremblay

YEAS:

Messrs.

Beatty
Crombie
Epp
Fraser
McGrath
Nystrom
Robinson (Burnaby)—10

NAYS:

The Honourable Senators

Austin
Connolly
Hays
Lapointe
Lucier
Petten
Rousseau

[Page 5]

NAYS:

Messrs.

Bockstael
Campbell (Miss) (South West Nova)
Corbin
Gingras
Irwin
Lapierre
Mackasey—14

[…]

The Committee resumed consideration of the motion of Mr. Robinson (*Burnaby*),—That Clause 7 be amended by adding immediately after Clause 7 the following new Clause:

"8. Everyone has the right to protection against arbitrary or unreasonable interference with privacy."

By unanimous consent, on motion of Mr. Crombie, the amendment was amended by adding after the word "privacy" the following words:

", family home and correspondence"

After debate, the question being put on the amendment, as amended, it was negatived on the following division:

YEAS:

The Honourable Senators

Asselin
Roblin
Tremblay

YEAS:

Messrs.

Beatty
Crombie
Epp
Fraser
McGrath
Robinson (*Burnaby*)—9

[Page 7]

NAYS:

The Honourable Senators

Austin
Connolly
Hays
Lapointe
Lucier
Petten
Rousseau

NAYS:

Messrs.

Bockstael
Campbell (Miss) (*South West Nova*)
Corbin
Irwin
Lapierre
Mackasey
Tobin—14

Clause 7 carried.

Serge Joyal (Chairman), Jake Epp, Senator Austin, Jean Chrétien, Sven Robinson, Ron Irwin, Lorne Nystrom, David Crombie, James McGrath, Senator Roblin, Perrin Beatty, Bob Kaplan, p. 12

Resuming consideration of the document entitled Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, referred to the Committee from the Senate on November 3, 1980, and from the House of Commons on October 23, 1980; resuming the debate on Clause 7 of the Constitution At and resuming the debate on a motion of Mr. Beatty.

On Clause 7—*Life, Liberty and security of person.*

Mr. Epp: On a point of order.

The Joint Chairman (Mr. Joyal): Honourable Jake Epp, on a point of order.

Mr. Epp: Thank you, Mr. Chairman.

Members will recall the events of last night and the reversal that took place, namely, that a Minister of the Crown, namely Mr. Kaplan at an earlier session, had given the word on behalf of the government and as a Minister of the Crown that the government was willing to accept the Conservative amendment on enjoyment of property rights, as amendment to the proposed resolution on the constitution.

All of us know the traditions of this place; that tradition is that the word of a Minister of the Crown, that that word is accepted, that there is an understanding that that word can be trusted. That tradition was broken yesterday.

The Prime Minister and the Minister of Justice has stated publicly that they will not accept any more amendments, that they will not accept any conservative amendments. We also know in conversations, not with our members but Liberal members and NDP members, members on this Committee that conversations have been such that they have, in their own private discussions. agreed that there will not be any Conservative amendments received or accepted on the basis that no matter what amendments that we might put forward and that might be accepted by the government would not change our opposition to the unilateral action of the government in the first place.

Those conversations, Mr. Chairman, we know have taken place, and that decision and that agreement between the NDP and the Liberals, in fact, is for their own decision and for their own participation. We will not participate, obviously, in either one.

The question then this matter raises, Mr. Chairman, is if the Prime Minister, if the Minister of Justice and certain members of the Liberal party sitting on this Committee, all are saying that no matter what amendments the Conservative party puts forward, that they will not accept them, not on the basis of merit but on the basis of who proposed them, then the question becomes very serious and it must be asked, then what is the purpose, what is the use of either proposing amendments and

[Page 13]

trying to improve the package or, for that matter, the participation of our party on the Committee. Mr. Chairman, we have decided this morning that we will continue working on the Committee on the basis of good faith, by which we began our participation on the Committee. We feel, though, that there has been a serious breach of the word of a Minister and if further action is to be taken, that action will be taken at another place in another venue. But the coercion that we saw yesterday which resulted in the change of a word. that coercion we believe is despicable. So we will continue, Mr. Chairman, but with a very clear understanding that the events of yesterday, the agreement between the Liberal and the NDP party and the coercion that we saw, that we reject it and we abhor it and it is simply on the matter that we feel that this party a contribution to make and represents the views and minds of many Canadians that we will continue.

The Joint Chairman (Mr. Joyal): Thank you very much, honourable Jake Epp.

Honourable Senator Austin.

Senator Austin: Thank you, Mr. Chairman.

I am a bit amazed with Mr. Epp's statements of fact in two respects. First of all, in no way am I aware of any conversations or agreements that say that this side will accept no amendments proposed by the Conservative party.

I really want to deny most emphatically that we have any arrangement amongst ourselves or with the NDP on that score. If the Prime Minister or Mr. Chrétien, as Minister of Justice has said such a thing, Mr. Epp, I am unaware of it and I would like you to let us know when and where it was said. As far as we are concerned. we will deal with your proposed amendments on their merits as we see them. We have no prior arrangement or commitment.

Mr. Epp: Maybe I can answer your first question.

Senator Austin: I find that quite astonishing.

Mr. Epp: Maybe I could answer your first question.

Senator Austin: Yes, please.

Mr. Epp: Possibly you should recall your own conversation with Mr. Robinson.

Senator Austin: What conversation was that. Would you recall it for me, Mr. Epp?

Mr. Epp: I believe I have.

Senator Austin: Recall the details of it. So far this is just innuendo.

Mr. Epp: I just revealed the details to you.

Senator Austin: What were they, that I made an arrangement with Mr. Robinson that we would accept no further amendments from the Conservatives, is that what you are saying?

Mr. Epp: That is exactly what I am saying.

Senator Austin: That is totally untrue. It never happened. I never had such a conversation with Mr. Robinson, and I do not know how you could know about such a conversation, except in your imagination.

[Page 14]

The second point I wanted to make, if I may, is that I was very sorry to hear press stories that you might not return because I want it acknowledged on the record that the Conservative party here has made a good contribution to this discussion and it is a valued contribution. The fact that we do not agree, I hope is not taken as any denigration of the kind of contribution you have been making, and I am surprised again to have heard that point. But I wish Mr. Robinson would respond to the first point that you have made, because it is quite startling.

The Joint Chairman (Mr. Joyal): Thank you very much, Senator Austin.

The honourable Minister of Justice.

The Hon. Jean Chrétien (Minister of Justice and Attorney General of Canada): I think that being involved, that I made such a statement, I never made such a statement at all; and in fact, if you recall some of the conversation that has been around this table and led me to accept some amendments, and I just have in mind, for example, the amendment that we have accepted on the war criminals, the member for Rosedale was one of the first persons to speak about it and we have accepted that. I think that the statement of Mr. Epp's is not founded. I never made such a statement to anybody and we will take every amendment and look at them, and we do not pay attention at all where they are coming from. We look at the amendment and see if we can accept it or not.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Minister.

Mr. Robinson.

Mr. Robinson: Mr. Chairman, just with respect to the remarks made by my friend Mr. Epp, I wish to categorically deny any suggestion that there was a conversation of the nature to which Mr. Epp referred, and I would challenge him, if he has any evidence whatsoever to substantiate that statement, that he should put it forward, and if he has no evidence to substantiate it, that he should withdraw that kind of insinuation because there is not basis for it whatsoever in fact.

I understand that there has been a good deal of stress around this Committee but to think that it might have led to certain people hearing voices is rather disturbing.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Robinson.

Mr. Irwin.

Mr. Irwin: Mr. Chairman, I am surprised and discouraged by what Mr. Epp said this morning. I know of no such agreement or suggestion that we will not accept any amendments. Naturally, in most cases, we will be on the opposite side of the issue.

Many years ago Mr. Diefenbaker, who was in my riding, said the thing about democracy that makes it work is the clash of wills, and without this clash of wills, I really believe that there cannot be a true democracy, and I would hate to see this attitude prevail that there is no use you putting amendments forward because there will not be a debate or we have closed our minds because that certainly is not the case on my side.

[Page 15]

Just previous to this one, on the "every person" issue, I know that the overwhelming majority of our side came here to vote one way, but after hearing what you said, specifically you and Mr. McGrath, we changed our minds.

Now, that is just the issue before last. As far as I am concerned there is no such feeling on our side that we will not accept amendments, and that is not saying we are going to vote for your amendments but I hope it is dealt with on the merits.

Our debate may be coloured by political affiliation and strategy, but it is not a flat refusal to hear and to reason and to use logic for the betterment of the country, and I say that sincerely.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Irwin.

Mr. Nystrom.

Mr. Nystrom: I just want to make a bit of a plea this morning, Mr. Chairman, that we keep an optimistic frame of mind and that we hope that this Committee is an independent committee, that the government members are going to keep an open mind as well, that they will study each amendment according to its merit.

I want to say to you, Mr. Chairman, as I have said before, I think in this country we are in sad need of really radical parliamentary reform to make the committees really meaningful.

However, I do want to say to you, Mr. Chairman, that we have had amendments go both ways. We had an amendment that the Minister said he would accept last week in terms of Clause 2, I believe it was, and the word "everyone" which we wanted changed to "every person". We had a commitment from the Acting Justice Minister saying it was acceptable to the government in a very similar way to what happened to the Conservative Party on Thursday of last week.

He said it was acceptable to the government, but after considerable debate in the Committee led by the Conservative Party the government members changed their minds and the indications we had were that they were going to vote with us to change "everyone" to "every person", and that was an important amendment to many groups in this country, women's groups in particular came here and argued that point of view. I see Miss Campbell is nodding her head in agreement.

We had many commitments privately from many of those members and signals publicly that they would support us.

[Page 16]

You will recall a little bit of a hassle at the Committee where we had Mr. Corbin saying one thing, Mr. Irwin saying another thing and a certain amount of confusion, and then we had a break for lunch and after the lunch hour we had a vote on that particular amendment of ours and every single Liberal member of the Committee voted against it.

Now, we had a very similar thing happen on Thursday. The Conservative Party are absolutely correct when they say that Mr. Kaplan gave his word that they would accept the property amendment. On Friday he said the same thing. Well, I made the same kind of argument as Mr. Robinson did. We made the same kinds of arguments against that amendment that the Conservatives made against ours a couple of days earlier, and the government had said they would accept the Conservative amendment, there were indications from the government members across the way that they would vote that way, but we put up an argument, we made a plea that we hold

the vote until Monday, we reflect, we go back and consult the provinces, that we think about the process over the summer and then perhaps, perhaps when people have done some reflecting they will vote in a wise fashion against the amendment proposed by the Conservative Party.

Now, Mr. Chairman, that is exactly what appears is going to happen. And that is no different than what happened to our amendment last week when we had a commitment they had accepted and all of a sudden they voted against it.

Now, Mr. Chairman, just because they did a flip flop on us, just because they disappointed us in terms of the amendment we thought was very important to a large part of our constituency cut there in the country, we did not pick up our marbles and go home; we did not act like a little child whose candy has been snatched and run home crying to momma. We decided to stay here and keep on fighting, trying to build a constitution that will stand the test of time, that will be good for Canada and pull this country together, and we have every intention of participating in this Committee to fight for changes.

There are things in this resolution that I do not like personally. There are amendments that we are moving and will continue to move and changes we will fight for, and I make an appeal to all members to keep an open mind, to try to set aside some pettiness and some petty partisanship and to build a constitution in this country that will be good for Canada and bring the country together.

I just say that in closing, let us all continue participating. I say to the government: keep an open mind, listen to the arguments, listen to the people, and build a constitution that will pull this country together.

[Page 17]

[Translation]

The Joint Chairman (Mr. Joyal): Thank you, Mr. Nystrom.

[Text]

Hon. David Crombie.

Mr. Crombie: Thank you, Mr. Chairman.

I had not intended to intervene on a procedural matter because I know that Senator Roblin, indeed I myself have some comments to make with respect to the substance of the issue with respect to property rights, but after hearing the comments from members of the Liberal party and the New Democratic' Party I feel a little awkward because it was an undertaking given to me the other day from the Minister and from Mr. Lapierre, and I feel like I have been run over by the car and then I get up to complain and somebody is offering regrets and somebody else is being concerned that somehow I should not have been down on the road but it was somebody else's fault.

Let me say, Mr. Chairman . . .

Mr. Epp: It was your fault you were down on the road.

Mr. Crombie: Yes, fine, I have a right to be on the road and I think perhaps I should be the one who complains a little when the car knocks me down rather than having to apologize to the car. I hope Mr. Nystrom does understand that.

When I asked the Minister, it was through you, if you will recall, Mr. Chairman, I asked the Minister if he would accede to the request to include my amendment on behalf of the Conservative Party, I am sure every member has it here, and I asked the Minister would he be willing to do that and he said yes. Mr. Lapierre gave that undertaking, Mr. Irwin gave that undertaking and everyone nodded, Mr. Mackasey nodded.

I did not have any difficulty, Mr. Chairman, in believing the Minister, Mr. Kaplan, or Mr, Lapierre or Mr. Irwin, or indeed any one of those people across the way because I had done some research and noted that the Liberal party in 1969 had included the right to enjoyment of property, not to be deprived thereof except according to law, that was in the proposed federal charter of 1969.

Then in Bill C-60, introduced in 1978 and concluded in 1979, they also included property rights, the right to use and the enjoyment thereof and not to be deprived thereof except in accordance with the law. That was the Liberal party position in 1979. I had no difficulty because that was the position of the Canadian Bar Association in their submission in 1978.

So that there was good background to believe the Liberal party that they were serious in all of those times, that they supported the protection of the right to use and enjoy property except when it was deprived as a consequence of due process of law.

Finally, it was understandable to me that they would take that position because it has been one of the oldest rights that we have had, it has been the one right in all the charters of rights and bills of rights and petitions of rights in our tradition, it has been the one right which we depended upon to avoid the arbitrary acts of government. There are some who do not like the right because it gets in the road of government plans, and that is true; it gets in the road of government plans, that is why you have it, that is why generations of Canadians have insisted

[Page 18]

upon it, and that is why generations of Canadians are going to continue to insist upon it.

So, Mr. Chairman, we are not dealing with something light, when all of a sudden over the weekend Mr. Chrétien, speaking on behalf of the government, disavows what Mr. Kaplan said two days before on behalf of the government, on the protection of the right to enjoyment and use of property, an ancient right, and these guys just fall for it like so many logs and disavow the Liberal position of generations. That is why there is regret on this side, and it is not just a question of procedure, the Minister, one minister or ministers of the Crown speaking out of both sides of their mouths. What do I do now? What does any member of this Committee do, indeed any member of the public, when they get the word of the Minister of the Crown of this government?

Well, I read in the paper, I hope it is correct, that Mr. Chrétien said: over the weekend I talked with the Prime Minister and we decided to change the position. I can tell you every time, Mr. Chairman, from here on in that I get any undertaking from the Liberal caucus or a Liberal minister, I will wait,

I will wait to see whether Mr. Chrétien or somebody else is meeting with Mr. Trudeau and then I will know whether or not that commitment will be kept.

So you have to revert to perhaps a more ancient wisdom, Mr. Chairman: fool me once, shame on you; fool me twice, shame on me. And you are not going to fool me the second time.

Thank you.

The Joint Chairman (Mr. Joyal): Thank you, hon. David Crombie.

I remind the hon. members that we are still on a point of order as was raised by hon. Jake Epp and seeing no more speakers on that very point I would like to invite the hon. Senator Duff Roblin, unless—I am sorry, hon. Senator Roblin; hon. James McGrath.

Mr. McGrath: I apologise for interrupting but it is a new point of order and it has to do with our procedure.

I would make a request that the steering committee meet as quickly as possible in order to deal with the question of the allocation of time on clause-by-clause, otherwise our two friends down here now involved in a reactivated coalition can get a disproportionate amount of time, can in fact hold up our amendments when it is convenient for them and deal with their amendments because the government, of course, is more receptive.

I think the steering committee has to deal with this. My own view is that a member should be allowed to intervene only once on an amendment because we are dealing here with strict allocation of time. we are operating under closure, and my view is we should not have another form of closure, and that is the kind that was imposed on the Committee last Friday by the New Democratic Party.

[Page 19]

The Joint Chairman (Mr. Joyal): Thank you very much, the hon. James McGrath.

On behalf of the hon. Senator Hays, I see that the hon. Senator Austin is indicating to the Chair that he is willing to have such a' meeting later on today.

I see no sign on the part of Mr. Nystrom; I understand if members of the different parties agreed to meet later on today that there will be such a meeting.

I would certainly accept your request. the hon. James McGrath.

That being so, I would like now to invite the hon. Senator Roblin on the substance of the amendment as moved by the hon. Perrin Beatty.

Senator Roblin: Thank you, Mr. Chairman.

When I listened to the undertaking given by the government on Thursday that they would support our position on property rights. it seemed to me then that that was one of the rare occasions when common sense had intruded into our deliberations.

It is a little disillusioning to find that, in reality, expedience has won the field.

So I suppose you might say it is an example of hope triumphing over experience, if I should think that my efforts to promote the merits of enshrining property in our constitution will meet with the approval of the majority on this Committee today.

In spite of the fact that the government has warned us that it is a lost cause, I feel that it is our responsibility to advance some argument as to why it should be a winning cause.

I would like to refer to two matters: I would like to discuss the rights of property; I want to discuss the rights of the provinces; because in this discussion they are very closely intertwined indeed.

I think the Canadian people understand what one means by "the rights of property". I do not think that anyone can argue for one minute that, philosophically speaking, the people of this country are opposed to the idea that property has rights and that rights of this nature could well be enshrined in a constitution of this sort.

They understand very well, if not the historical details, at least in their concept of the growth of our democratic system, that the rights of property have been associated from the beginning with the development of the growth of free institutions in this and other lands. That is a point which should not be overlooked.

But they are also well aware that the rights of property are not absolute. We know that none of the rights, as I understand it, that we have enshrined in this bill before us are absolute.

They are all conditional for very important reasons.

[Page 20]

They know that there are times when the rights of property insofar as individuals are concerned will take a place behind the rights of the community. That is not a point that is in issue in this discussion, I would submit to you, Mr. Chairman.

The rights of property, as David Crombie has said, has been historic. I am looking at a set of books called The Constitutions of Nations, and whether you go to Magna Carta 1215 or the Bill of Rights in 1627, or in the American Constitution of 1783, I guess it was, you will find that all those constitutions and constitutional measures contained within them recognition of the rights of property.

If you were to examine the constitutions of the nations of the world; if you look at constitutions of nations such as Sweden, Norway, Denmark, Finland, the German Federal Republic or 20 other states in reasonably good democratic standing, that I could mention in this discussion, you will find that the rights of property are included as a fundamental rights of their citizens.

If you care to take a look at the Universal Declaration of Human Rights, Article 17, you will find that the same circumstances are present.

Insofar as our position in Canada is concerned, we have bills of rights of our own, and we know that the right to property is enshrined in the Diefenbaker Bill of Rights, and that a number of the provinces with acts to protect certain rights include this right; the Saskatchewan Bill of Rights Act includes property—and I could read it; paragraph 9, states that every person and every class of person shall enjoy the right to acquire by purchase, to own in fee simple or otherwise, to lease, rent and to occupy any land, messuages, tenements, or here ditaments, corporeal or incorporeal of every nature and description and of every estate and interest therein, whether legal or equitable without discrimination because of race, creed, colour, religion, sex, nationality, ancestry or place of origin of such person or class of persons.

Well, you cannot do very much better than that when you want to enshrine the rights of property in a constitutional document—and I would submit that this document is.

It is even more interesting when you know that, according to the Statute of Interpretations in Saskatchewan the word "person" includes corporations.

So the idea of including property rights in bills of this kind is nothing new, either in the history of the world or our own experience. I think there is a similar clause or one like it in the Quebec Bill of Rights as well.

So I submit to you that, on the basis of our understanding of the world live in, of the development of the democratic institutions which we enjoy, of the actual experience in our own nation, in the measures put before us by the federal government on previous occasions, such as Bill C-60 and measures of that kind, the question of property rights occupied a place in our constitutional structure.

[Page 21]

I think our people will insist that that shall continue to be the case, and that while we recognize that these rights are not absolute, nevertheless, they are well worth stating, even though we know that in certain instances the rights of the community will take precedence over the rights of individuals.

So I think the case for property rights in our constitution is unanswerable.

The point that has been raised, however, has nothing whatever to do with that, because they say: "Well, we believe in property, all right; but we do not think this is a way to do it. Why do we object to it? We object to it because, for example, the Province of Prince Edward Island has told us that they do not wish to have this body legislating property rights for their province".

Mr. Chairman, they could not be more correct! When Premier Angus MacLean sent his telegram asking us not to legislate on property rights for his province, he could not be more correct. I agree with him fundamentally and wholeheartedly; because this particular example has exposed, in my opinion, the constitutional illegitimacy of what the government is trying to do.

They come to us and say on this one issue of property rights in Prince Edward Island; "We want to respect the province's point of view". But on all—those other massive measures which are included in this bill affecting the province of Prince Edward Island and other provinces, "Why that of course, we will put into discard, and we shall pay not attention to their protests on that particular view".

The Minister of Justice would have done better, it would seem to me, when referring to the situation of the Province of Prince Edward Island if he had referred us to the brief that the Premier of Prince Edward Island gave us when he was here and then he would have placed the matter in its proper perspective; because Angus MacLean made it quite clear that constitutions in Canada should be written by the representatives of all 11 legislatures and that he felt so badly about the way this government was proceeding, not just in land matters, but in everything, that he is taking the Government of Canada to the court.

I am bold to prophesy, and I may live to regret this; prophecy is a dangerous avocation, but I think the courts of this country will have something to say about this issue, which may, perhaps, be more palatable to the Premier of Nova Scotia than they will be to the Prime Minister of Canada.

But Angus MacLean made it perfectly plain that the basic principle of the federal state was at challenge here because of the unilateral action that is implied in this bill.

We Progressive Conservatives reject it, and if we say that there should be property rights, as we do, enshrined in our constitution, it is not that we are going to impose that clause unilaterally on the Province of Prince Edward Island or any other province of this country. If we have our way and if this Committee listens to the good judgment of the Canadian

[Page 22]

people as expressed so many times in recent days, they will separate this question of rights from the issue of patriation, and while they will proceed with patriation, the issue of rights will go back to the provinces where it belongs, because who around this table can challenge the constitution of Canada when it says that property and civil rights belong to the provinces. Of course they do: that has been the accepted position for 113 years.

I say that while it is perfectly in order for us to produce a Bill of Rights that suits us, that is appropriate in the federal sphere in which we are common to the legislature, it by no means follows that that same thing is to be imposed on the provinces without their consent, and it seems to me that we have a duty to make this Bill of Rights the best one we can from our point of view, but we do not proceed beyond that point to say, "The 10 provinces of Canada will like it or lump it", We are going to say to them. "You will have your place in coming to an amicable arrangement on this point".

Premier Angus MacLean was the man that told us that this could be done, because in his brief that was before us at the time, he made it perfectly clear, if I can use his words, negotiate further because we had reached a plateau from which a sound agreement was attainable.

It seems to me and I say to this Committee, Mr. Chairman, that it is ironic that the government should say, "Vote the Conservative's amendment on property down because the Province of Prince

Edward Island does not like it", when all the other things that the Province of Prince Edward island and nine other provinces—1 had better be careful—a majority of the provinces do not like—are going to be foisted on them willy nilly if we follow the policies of this administration, supported, I might say, by the NDP and their going to insist that the Parliament of Canada adopt them.

I have no philosophical problem whatsoever in recommending the entrenchment of property rights to this Committee, and no philosophical problem whatsoever in going further to say this is a matter which you will have to continue to negotiate with the provinces until you get a solution that is satisfactory to all parties.

It seems to me that the issue is very clear. The government has changed its mind on the subject. I do not like it and I think it is a most lamentable breach of parliamentary ethics. I share the opinion of my colleagues around this table; it is going to be hard to know who to believe from now on, but they have done it.

The Minister said this morning he is still open to a reasonable argument. I hope I have given him some reason to reconsider the position which has been taken, that we can and should put property in our constitution as one of the rights of the citizens of Canada and at the same time recognize that we have no authority to impose our views on this matter on the provinces of Canada and that this is something that must be decided by continued negotiations.

Once you allow impatience to take the place of patience, then you are on the road to difficulty and problems when you are dealing with the constitution of this country. I had the

[Page 23]

privilege of sitting around those council tables for some time, and I know that patience works and I know that a calm and careful elucidation of the problem over time solves the situations that perplex us and beset us at first hearing.

I can recall only too well some of the things that Mr. Bryce Mackasey ought to recall well in connection with great social developments in this country, which in the beginning were a very difficult solution but which over the years, and it was several years, allowed themselves to be compromised to the extent that we got a solution that everyone could live with.

We can do the same thing with our constitution. My plea to this Committee is to be careful; my plea to this Committee is to be patient; my plea to this Committee is to use common sense. Do not depart from the principles of federalism. Do what we must do as members of the federal legislature, but let us leave to the provincial legislatures the responsibilities that belong to them.

The Joint Chairman (Mr. Joyal): Thank you very much, Senator Roblin.

I do not see any other speakers on my list. I would like then to invite the honourable Perrin Beatty to conclude on the proposed motion.

Mr. Beatty: Mr. Chairman. I want to return briefly to the issue that is before the Committee because I think that in the discussions which have taken place because of the betrayal by the government

of the commitment made to members of the Committee, that perhaps the focus has been shifted away from the central issues relating to what the amendment stands for.

I want to say at the outset, Mr. Chairman, that I as mover of this amendment, as someone who believes very strongly that the right to the enjoyment of property should be included in the constitution and that it should not be taken away without fair practices being followed first, that I feel betrayed by the government's action. They have betrayed their members; they have betrayed the Canadian people because they gave a firm undertaking, It was one, Mr. Chairman, which was shown on nationwide TV, as the proceedings of this Committee are carried from coast to coast. It is one which was widely reported in the press and yet now we find that the Minster of Justice, because of the position taken by the NDP, is prepared to reverse that position.

Mr. Chairman, there has been a fair amount of discussion as to whether or not indeed a mistake was made by Mr. Kaplan, whether or not he was not aware of the discussions which had taken place last summer, and whether it was necessary for Mr. Chrétien to come before the Committee last night to remind the Liberal members of those discussions. Mr. Chairman, the very same officials who flank Mr. Chrétien, the Minister of Justice, today, flanked the Acting Minister of Justice last week and gave him advice as to what course should be followed, and I think that the Ministers statement that his colleague, the Solicitor General, acting on behalf of the Minister of Justice, that he was not aware of these commitments that were being made is an indictment by the Minister of Justice as well of the officials who surround him. I think it is most unfortunate that

[Page 24]

that would have taken place because what he was in essence saying was that either those officials who have participated since the outset of these hearings were totally unaware of commitments that were made by the government and of what Mr. Chretien indicated was the most serious objection raised by the provinces over the course of the summer discussions, or else they did not inform Mr. Kaplan when he appeared here as Acting Minister of Justice of that fact.

Mr. Chairman, I do not believe that the officials were deficient. I do not believe they were negligent; I do not believe they were asleep at the switch in terms of not being aware of concerns expressed by the provinces before. What I do see happening though, Mr. Chairman, was that an ultimatum was issued to the Liberal members, the Liberal government by the NDP over the course of the weekend where they indicated that they would withdraw their support, a support which has given the only western support of any substance for the government's constitutional package, that support would be withdrawn if the government kept its commitment to property rights. This is why then, Mr. Chairman, the Canadian Press yesterday morning ran a story which quoted the Parliamentary Secretary to the Minister of Justice as indicating that he was deeply concerned about the possibility that the NDP might withdraw their support if the property rights amendment was supported that the government had committed itself to doing. It quoted the Parliamentary Secretary in this way:

There is a possibility the government will vote against the property rights amendment because NDP support for the package is very important to the Liberals, said Irwin, MP for the Northern Ontario riding of Sault Ste. Marie.

Mr. Chairman, when Canadians ask themselves why the government broke its word, I think that it need look at the record, and it need look at what members of the government have said, and I think that they will find that there was one reason for that and that is that the NDP had increased the pressure and they had indicated that they would withdraw their support.

Mr. Chairman, on this issue it appears as if the NDP will win this victory, but it will be a Pyrrhic victory, because what they have done is to indebt themselves to the Liberal party. They have said once again that as a condition of their continuing support of the government's constitutional initiatives, which we consider to be improper and which 64 per cent of the Canadian people believe to be improper, that it was necessary that the government take a particular action. The government has taken that action. It has swallowed itself. It has broken a commitment, Mr. Chairman, a solemn commitment that it made in order to maintain that support of the NDP.

I warn the members of the NDP as they revel in their success in this particular amendment that the price by them has yet to be paid as this resolution goes back into the House of Commons, because it will be expected that because the government has met the conditions set by the NDP on yet another occasion, it will be expected that the NDP will have to keep their side of the deal, namely, that their continuing

[Page 25]

support of the government's package will have to be maintained.

Mr. Chairman, what will this mean as the members of the NDP go back to their constituencies? I want to bring the focus again back to the amendment itself and remind members of the Committee and remind the Canadian people that what the Progressive Conservative members of Parliament are asking for is that within the concept of the Charter of Rights, that the constitution should recognize that Canadians should have the right to enjoy property and that that right should not be taken away from them, except in accordance with the principles of natural justice.

This is what is opposed by the members of the NDP and this is what the members of the government have now said they are prepared to oppose as well.

The NDP has raised concerns about the question of what constitutes natural justice. is this something which could infringe upon the abilities of legislatures to legislate? I want, Mr. Chairman, to simply read into the record a very simple definition that was given by Robert F. Reid and Hillel David in the book Administrative Law and Practice, second edition and under Chapter 6 entitled Natural Justice it says this:

Natural justice is a simple concept that may be defined completely in simple terms: natural justice is fair play, nothing more.

What we are asking for, Mr. Chairman, is that we are saying that when legislatures or when Parliament seek to deprive people of their property, that they should abide by the principles of fair play. That is what the members of NDP, that is what the members of the Liberal party will be voting against.

Let me also quote to the Committee, Mr. Chairman, another brief quotation, which is quoted in a book by S. A. deSmith, a professor at the University of London, Judicial Review of Administrative Practice, and under Chapter 4, the heading Natural Justice: The Right to a Hearing, he quotes a decision of the courts as saying this:

No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the case against him, unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary.

That is what they are talking about; that is what we are talking about when we refer to natural justice. We are saying that people have a right to a fair hearing before their property is taken away from them.

Mr. Chairman, the members of the NDP have asked, is there a real concern? They have said that a family business, a family store is not in jeopardy of government simply taking it away. They have said that the family home is not in jeopardy or simply being taken away and that it need not have this protection in the Charter of Rights because there is not a great threat there.

[Page 26]

Mr. Chairman, what member around the table of this Committee has not had constituents come to him with cases in his constituency where the right to hold property has been taken away unjustly? How many of us who live near the Toronto area do not have constituents who have raised concern about the expropriation of their property as a result of the Pickering decision? How many of us from the the Montreal area have not heard of complaints from constituents about the expropriation that took place in the case of Mirabel? How many other Members of Parliament have not heard about other complaints from their constituents who have found that their homes, or their farms, or their businesses have been taken away from them, often without a just hearing, without just procedures being followed, and are they now to go back to these constituents and to say that they believe there is no need to protect those rights in the constitution, that those rights are adequately protected today?

Mr. Chairman, if the Committee votes, as it appears that it will. to deny Canadians the right to enjoy property and the right not to have their property taken away from them without a proper hearing, then they will be doing a serious disservice to all Canadians. They will be eliminating one substantive provision of the Diefenbaker Bill of Rights, namely, the right to enjoy property and not to have it removed from them except by due process of law. That will be dropped.

The other substantive provisions of the Diefenbaker Bill of Rights will be included, but a conscious decision is being made here. Mr. Chairman, to exclude property rights, to no longer mention property rights in the Charter of Rights.

Mr. Chairman, the members of the NDP and members on the government side have mentioned from time to time the Universal Declaration of Human Rights to which Canada is a signatory. and to which we have an obligation. I want to put it on the record that Article 17, the right to enjoy property, is included as one of the fundamental rights that people must have, it reads as follows:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitarily deprived of his property.

Mr. Chairman, that is the Universal Declaration of Human Rights. The government is a signatory to that. This principle to which the government of Canada is committed is precisely the principle the Progressive Conservative members of Parliament are asking to be included in our Charter of Rights, and yet the combination of Liberal members and NDP members will be voting to deny that protection for Canadians, which the Canadian government is obligated to give under the International Charter of Human Rights.

Mr. Chairman, this is an essential issue. It is one that millions of Canadians are watching. Any Canadian who has ever wanted to own a home of his own, any Canadian family who believes that the family homes is essential, will recognize the fact that their rights are in jeopardy here.
As my colleague Mr. Crombie says, those Canadians who participate in pension funds will be concerned because their rights are being sacrificed here. Canadians who put aside for

[Page 27]

their retirement by buying stock in Canadian corporations, and how many of them are in each of our constituencies, will find that their rights are left unprotected. Owners of family farms will find tht the family farm is left unprotected. Owners of family businesses will find that the family business is left unprotected. Owners of copyright, owners of patent rights will find all of these rights are areas where the constitution is to remain mum.

Mr. Chairman, I want to deal just very briefly again with this question of whether this is an area in which the Progressive Conservative members are proposing that we should invade an area of provincial rights, and would this prevent provinces from legislating in areas which come under their jurisdiction.

As Senator Roblin has pointed out very eloquently, the position from the outset of the Progressive Conservative Party has been that in areas which are currently falling under the jurisdiction of provincial governments, the federal government should not be imposing new obligations or new restrictions upon the ability of the legislatures to pass laws and that the provisions of the Charter of Rights would come into effect only after the legislatures themselves had approved the fact that they should come into effect. So we would not be imposing these rights upon provinces. We are saying what is wrong from the outset with the government's activities is that they have been seeking to override the rights of provincial governments and that it is essential that we go back to the provinces and that we try to work out an agreement which all of us can feel is in the best interest of Canadians.

But we do have an obligation here as well, to set national standards and to set goals which we would hope would be met by all jurisdictions in Canada, and then we will go back to the provinces and say, "We hope that you will subscribe to the principles which we put into the constitution here. but they will not apply in your jurisdictions until such time as you have indicated that you do support it".

I listened to Mr. Robinson last Friday as he very strongly spoke against the proposal that we were making on the grounds that it was an attack on provincial rights. Mr. Chairman, it was Mr.

Robinson who spoke in favour of imposing the right to freedom of information on provinces and on municipalities on the basis that that was an essential right which Canadians should be entitled to at all levels of government. When it suited the NDP's convenience to argue that the federal government should impose rights, that they should be included in the charter when they fell under areas of provincial competence, then they would act; but when it did not suit their convenience, when they felt that there was a particular right which they did not want included, then they brought out the argument that somehow this infringed upon provincial rights.

Mr. Chairman, I think that even the members of the NDP have a responsibility to be consistent. The Progressive Conservative members have been consistent. We have said that yes, we can set standards in this Charter. Those standards must not apply in areas falling under provincial jurisdiction

[Page 28]

until the provinces have had themselves a chance to pass judgment as to whether or not they would be allowed to do so.

Mr. Chairman, I want to put on the record again the response that was made by Mr. Kaplan, the Acting Minister of Justice, in response to a question from Mr. Mackasey, who last Friday asked Mr, Kaplan about the argument being made by the members of the NDP that the rights of the provinces would in some way be infringed upon by the action proposed by the Progressive Conservative members.

Let me read to you in its entirety Mr. Kaplan's response:

Mr. Kaplan: Mr. Chairman, I would like to be brief in my answer but I would like to indicate that from the very beginning the Liberals have favoured the notion and concept of the protection of economic rights and rights of property, and that our reasons for withholding that provision from this bill was for the reasons that some members indicated, there were strong provincial objections to the inclusion of that type of protection.

Now the Conservative members have put the provision forward and on the basis of their being prepared to see that contentious issue addressed by this Committee and addressed by Parliament at this time, the Liberals are prepared, knowing the Conservatives are prepared to support this, since we do believe that economic rights and the rights of property should be recognized and protected, we are also prepared to see that provision move forward.

That is a firm commitment on behalf of Mr. Kaplan on behalf of the government. He goes on to explain why he rejects the argument that was made by the NDP. He said this:

Now, the arguments that Mr. Robinson and Mr. Nystrom advanced are largely irrelevant to this particular provision because this provision deals with process and not with the question of whether foreign interests, for example, should be allowed to acquire assets or own property on the same basis as Canadians. This has nothing whatsoever to do with that.

All this deals with is the question of due process and provides that "anyone", and I can assist Mr. Nystrom again by confirming that "anyone" means anyone as he suspected that it did, so that it is

not something with respect to which anyone would need much time to reflect on. "Anyone" means anyone, foreign, domestic, incorporated or unincorporated, has the right not to be deprived of the enjoyment of their property except according to the principles of fundamental justice or of natural justice, whichever the Committee determines.

The narrow answer to your question

This is the question by Mr. Mackasey:

is yes, we could restrict the right to be treated fairly in the process to Canadian citizens. We could indicate by implication, as I think Mr. Robinson wanted to do, that foreigners should be subject to unfair rules, if that is what Parliament decides, that they should be denied due pro-

[Page 29]

cess on the enjoyment of property in our country. We do not agree with that. We feel the due process rule should apply to everyone, and I mean everyone who is allowed by whatever laws are relevant to own and enjoy property in Canada.

That was the statement that was made by the Acting Minister of Justice just last Friday as he explained the opinion of the Department of Justice and of himself that the amendment which we were putting forward would not infringe upon the rights of the provinces to legislate, that all that it would do would be to ensure that anyone who had property taken away from him would have had the right to due process, to a fair hearing. Mr. Chairman, that is what today the members of the New Democratic party and the Liberal party will be voting against.

Mr. Chairman, let us make it abundantly clear as well that in our opinion, and I believe in the opinion of Mr. Kaplan on the advice of the Department of Justice, that there is nothing in this amendment, if adopted by the provinces, which would limit the rights of the provinces, for example, to expropriate property in the provincial interest, or to prevent out of province ownership of property. Nothing in this would prevent that, but what it would ensure is that the restrictions be reasonably justifiable, first of all, and secondly it would ensure that when property was taken away from an individual he would have the right to a fair hearing.

Mr. Chairman, why do the members of the Liberal party, why do the members of the New Democratic party feel that Canadians and all individuals should not be entitled to that right? The provinces would be able to exercise their jurisdiction unfettered, as they can now, with the sole proviso that when they took away an individual's property they would be required to give him a fair hearing first, and surely, Mr. Chairman, that is not too much to ask to be included in the constitution of Canada. That is all that we are asking on this side of the Committee and we believe that it is something that all members of the House should be supporting and it is an issue which we will be taking back into the House of Commons and across this country.

Mr. Chairman, when the members of the New Democratic party, as this issue goes back in the House, when they talk about why it is to their constituents in Western Canada that feel strongly that this package should be defeated, that it should not go forward in the way in which the government is proposing, that there should not be this sort of unilateral action, when they are

forced to defend their support of the government what will they be able to claim as their trophy, what they got in exchange for their support and for the rights of their constituents?

They will claim two things, Mr. Chairman: they will be able to claim that Mr. Broadbent in a letter to Mr. Trudeau was able to get the assurance that the provinces would have something slightly less than the rights over natural resources than they have today, they can claim that as the first victory.

[Page 30]

The second victory they can claim, Mr. Chairman, is that they were able to deny Canadians this right to due process and the holding of property, if property is to be taken away from them, that the owners of family farms, the owners of family businesses, the families who want to have a home of their own would not have this right included in the constitution.

Mr. Chairman, I think that their constituents, and I think the people from one coast to another in Canada, will feel that the price paid was far too dear. The price paid was far too dear, that the interests of Canadians were sacrificed, that the unity of Canada was sacrificed because of these decisions.

Mr. Chairman, we are prepared to see the vote take place. I once more implore the members of the government to recognize that they made a commitment, a firm commitment to which they are bound, and that integrity and honour demand that they keep that commitment. These is no out for it, there is no easy answer by reverting to Clause 2 that they can undo the commitment that was made. They are committed, and if they are honourable, Mr. Chairman, they will keep that commitment in this vote.

Thank you, Mr. Chairman.

The Joint Chairman (Mr. Joyal): Thank you very much, honourable Perrin Beatty.

The Chair would like to then call the vote.

Mr. McGrath: We would like a recorded vote, Mr. Chairman. If you could just delay it for a few moments, there are a few colleagues out of the room, at least one.

The Joint Chairman (Mr. Joyal): Yes, the Chair has been advised, honourable James McGrath, that some of the honourable members who were attending this morning's session are not around the table, they would be advised to take their seats so that the Chair may invite the Clerk of the Senate to call the vote in the usual way.

Amendment negative: Yeas 8; Nays 15.

Serge Joyal (Chairman), James McGrath, Sven Robinson, Lorne Nystrom, Jean Chrétien, Barry Strayer (Assistant Deputy Minister, Public Law, Department of Justice), Fred Jordan (Senior Counsel, Public Law, Department of Justice), Senator Tremblay, John Fraser, David Crombie, Senator Connolly, Coline Campbell, p. 30

The Joint Chairman (Mr. Joyal): I would like then to move on and invite the honourable members to take the next amendment, the one that is numbered N-10, Clause 7, page 4, and it is an amendment moved by the New Democratic Party and I would like to invite Mr. Robinson to move the amendment in the usual way.

Mr. Robinson.

Mr. Robinson: Thank you, Mr. Chairman.

I move that the amendment to Clause 7 be amended by adding thereto immediately after the word "justice" the following:

including the principles of due process of law.

[Translation]

Must I read it in French, also?

The Joint Chairman (Mr. Joyal): If you please, Mr. Robinson, according to the usual procedure.

Mr. Robinson: Mr. Chairman, I move that

[Text]

Que l'article 7 soit modifié par adjonction, après le mot «naturelle», de ce qui suit:

«y compris le principe de la légalité.»

[Page 31]

The Joint Chairman (Mr. Joyal): Mr. Robinson, before I invite you to go on, on the presentation of your motion, I would invite you to make corrections because you have read that . . . *[Translation]* it is moved that Clause 7 be amended by adding the word "natural".

Since we have not accepted the preceding amendment, therefore…

Mr. Nystrom: After the word "justice."

The Joint Chairman (Mr. Joyal): No, the exact word is still the term "fundamental" and not "natural."

So in your amendment, you must substitute the word "fundamental" to the word "Natural." *[Text]* I invite you to make the correction.

[Translation]

You may go on.

[Text]

Mr. Robinson: Thank you, Mr. Chairman.

The purpose of this proposed amendment is to take into consideration the recommendations of a number of witnesses who appeared before this Committee, including in particular the recommendations of the Canadian Bar Association.

It was the Bar Association who pointed out that the concept of fundamental justice, as is contained in Clause 7, is one which is virtually unknown in Canadian jurisprudence and that the Canadian Bill of Rights in Section 1(a) contains the concept of due process of law.

Now, we recognize that the principles of fundamental justice are subject to some interpretation and expansion as was pointed out by the Minister of Justice the week before last when he was explaining what was meant by fundamental justice. We therefore do not wish to suggest that the concept of fundamental justice should be swept aside and replaced with due process, but we would merely suggest that the existing jurisprudence on the question of due process should be incorporated in the concept of fundamental justice.

Now, this is not a new recommendation, Mr. Chairman. I would point to Bill C-60, for example, which included the concept of due process of law rather than a reference to fundamental justice. This was affirmed by the MacGuigan-Lamontagne Committee in their hearings, in their report on Bill C-60.

In the proposals of the federal government before the First Ministers' conference of February, 1979, once again the concept of due process of law was that which was proposed by the federal government, and again in both July of 1980 and in August of 1980 the federal government proposed not fundamental justice, not that vague concept which is as yet untried in Canadian jurisprudence, but rather the concept of due process of law which, as I say, is certainly contained in the existing Bill of Rights.

So, Mr. Chairman, that is the purpose of the proposed amendment, to include within the scope of Clause 7 the existing jurisprudence on due process of law, to permit some expansion by the courts if necessary of this concept, recognizing that the concept of fundamental justice may itself lead to some new jurisprudence on the questions of life, liberty and security of the person. That is the purpose of the amendment, Mr. Chairman.

[Page 32]

I do have a couple of questions for the Minister, if I may just ask those questions with reference to the existing provisions in Clause 7.

Mr. Chairman, if I may, then, ask a couple of questions of the Minister with respect to the existing wording of Clause 7, I would first of all again like to obtain some clarification from the Minister as to whether or not the words "principles of fundamental justice" and the concept of fundamental justice contained in Clause 7 is intended to incorporate the concept of due process of law from Section 1 of the Canadian Bill of Rights?

Mr. Chrétien: Yes, fundamentally, but in terms of procedure there are some nuances and perhaps I can ask Mr. Strayer to . . .

Mr. Robinson: Certainly.

Mr. B. L. Strayer, Q.C. (Assistant Deputy Minister, Public Law, Department of Justice): Mr. Chairman, it was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to the policy of the law in question.

This has been most clearly demonstrated in the United States in the area of property, but also in other areas such as the right to life. The term due process has been given the broader concept of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness.

Mr. Robinson: Mr. Chairman, may I ask, following up with a couple of questions, may I ask, the, what the basis for Mr. Strayer's statement that the concept of fundamental justice has no substantive component? Where is the jurisprudence on that particular section, what evidence does he have to support his interpretation that this might not have a substantive component?

Mr. Strayer: We have not been able to find any evidence of that term ever having been given a substantive content.

Mr. Robinson: Well, can you point to any interpretation of that term whatsoever within the context of the Canadian legal system that might assist us?

Mr. Strayer: Which term do you want?

Mr. Robinson: Fundamental justice.

Mr. Fred Jordan (Senior Counsel, Public Law, Department of Justice): Yes, Mr. Chairman.

This expression appears in Section 2(e) of the Canadian Bill of Rights now in terms of the right to a fair hearing in termination of ones rights and obligations.

The Chief Justice in the Duke case in 1972 in the Supreme Court spoke about the meaning of Section 2(e) and said a fair hearing in accordance with the principles of fundamental justice, without attempting to formulate any final definition of those words, I would take it to mean generally the tribunal which adjudicates upon his rights must act fairly, in good

[Page 33]

faith, without bias and in a judicial temper and must be given an opportunity adequate to state his case, and I think that is the classic definition of the rules of natural justice or the principles of fundamental justice.

Mr. Robinson: Do you make any distinction, then, between the principles of fundamental justice and the rules of natural justice?

Mr. Jordan: Not in light of the interpretation which the Chief Justice gave it in this case here.

There is a possibility that in a particular context one could see it as having a somewhat expanded meaning but there is no jurisprudence which would indicate that it is clearly broader than the principles of fundamental justice that have been articulated in all of the various common law decisions. I believe you quoted from Professor Wade or perhaps it was Mr. Beatty earlier.

Mr. Robinson: Well, Mr. Chairman, I am sorry to belabour this point but it is an important point because this is an important clause and it is a new principle of law.

Mr. Jordan, you have pointed out that the concept of fundamental justice has been interpreted with respect to the requirement of a fair hearing. With respect, that is not what we are talking about in Clause 7, we are going well beyond that and we are applying the principles of fundamental justice, whatever they may be, to the right to life, liberty and security of the person.

Now, can either you or Mr. Strayer, or perhaps the Minister with his legal knowledge, point to any interpretation of these words in that sweeping context?

Mr. Strayer: Obviously not in this specific context because these words have not appeared in a constitution or in any type of statute before, but I am bound to add, Mr. Chairman, that there is a good deal of jurisprudence on the term "due process", both in Canada and the United States, and some of the jurisprudence in the United States gave rise to the problem that we were trying to avoid with the term, "fundamental justice".

Mr. Robinson: Perhaps, then, now that you have admitted that this concept of fundamental justice is not found in any statute or any constitution anywhere else in the world to the best of your knowledge in connection with these principles, what is the particular concern with respect to the application of the principles of due process of law which continue to apply, certainly within the federal context by virtue of the Bill of Rights, what specifically is your concern with respect to their application? How could these be applied in a substantive sense to any of the provision of Clause 7?

Mr. Strayer: Well, there are various possibilities. The term "security of the person", for example, could be interpreted in a very broad sense so the term "security" could cover matters of a, say, contractual or property nature. More particularly the question of right to life, gives rise to, if it is interpreted in a substantive way, gives rise to questions about matters such as capital punishment, abortion and so forth, and if one used the term "due process", and by that language imported some of

[Page 34]

the American jurisprudence under due process, then the result would be what I believe the Committee indicated last week they wanted to avoid, and that was prejudging the law or the question on both those issues. In other words, it might somehow have the effect of limiting the options of Parliament in the future on those subjects.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Robinson.

I see that we are now having a discussion between the mover, and of course, a representative of the Department of Justice in such a way that it is no longer an expression of views of honourable members on the merits of the amendment, but more discussion between two eminent lawyers on the wording and significance of natural justice as opposed to, or as a complement to fundamental justice.

In that respect, the Chair is certainly agreeable to receiving a question, but not to allow such a debate, because we would be taking, I should say, a sideline which might be open in any amendment: in all fairness, those general questions or discussions of principles should have taken place when we were on the general discussion of Clause 1.

I think Mr. Robinson will have an opportunity to conclude his remarks and will have, probably, an opportunity to state his principles.

The Honourable Senator Tremblay.

[Translation]

Senator Tremblay: Before I proceed, Mr. Chairman. I would like some clarification from the mover of this amendment.

Earlier, you drew his attention to the fact that in the French version of their amendment, you should not use the term "naturelle ", but rather "fondamentale".

You presupposed that during the preceding votes, our proposal to replace the term "fondamentale" by the term "naturelle", had been defeated, but my point of clarification bears precisely on his own original version which you have corrected; in the French version he used the term "naturelle".

That means that in his own mind he prefers "naturelle" to "fondamentale"? I feel there is some ambiguity; so I am asking the question, in relation to the discussion which just took place with the Minister' advisers.

The Joint Chairman (Mr. Joyal): Indeed, Mr. Tremblay. I believe the point is quite relevant and I would ask Mr. Robinson to answer in that spirit.

Mr. Robinson.

[Text]

Mr. Robinson: Mr. Chairman, to clarify, I was reading from the printed version of N-10 which made reference to the word "naturelle". This was assuming that your amendment would have been accepted, I would have thought.

[Page 35]

This was printed on Friday before the representations on the provinces and other concerned individuals were heeded.

In the light of those, the concern which was expressed on that amendement, we have gone back to the original version of Clause 7 which deals with «Justice fondamentale». It is that particular phrase which would be modified by the amendment, Mr. Chairman.

The Joint Chairman (Mr. Joyal): Senator Tremblay.

Senator Tremblay: A supplementary question. But on the substance of it do you prefer «naturelle» or «fondamentale»?

Mr. Robinson: Mr. Chairman, the proposed amendment refers to fundamental justice and does not change the concept of fundamental justice.

Frankly, I think the concept of fundamental justice will allow the courts some latitude to interpret provisions, life, liberty, and security of the person, in a way which may be desirable, as the Minister indicated a couple of weeks ago, for example, with respect to the detention of persons who are mentally ill and other persons; that the concept of natural justice is very narrowly defined in Canadian jurisprudence at this point to essentially deal with two points: the right to an unbiased tribunal, and the right to be heard.

There may be other attributes of fundamental justice going beyond that.

Senator Tremblay: Thank you, Mr. Chairman.

[Translation]

The Joint Chairman (Mr. Joyal): Thank you, Senator Tremblay.

[Text]

The honourable John Fraser.

Mr. Fraser: Mr. Chairman, I am mindful of your admonition of a minute or two ago that some of this discussion should probably have taken place at an earlier time.

But, cognizant of the fact that the words we pass are going to govern us, I would just like to enquire a little bit into this.

I direct this enquiry both to the Minister and to his law officers and I would invite my colleague, Mr. Robinson, to Comment if the Chair so permits and if it is appropriate to do.

But this is what is worrying me. The indication that we have from the law officers of the Crown—and the point Mr. Robinson is making—that the words "fundamental justice" have not yet been defined by the courts and, as a consequence, Mr. Robinson's concern is that when they are defined

there may be a definition which is more restrictive, more confining than we would like or we would be intending at the moment.

As a consequence of the well known rule that you cannot look to the intent of the legislation and that the matter has to be perceived from the words which are present on the page, what we intend to do here is of very little help to the court later when the matter is being dealt with or interpreted.

So, what I am saying is this. The first question is, if the words of the Diefenbaker Bill of Rights, relating to principles of due process of law were included, as Mr. Robinson pro-

[Page 36]

poses, is it in the opinion of the law officers of the Crown that the inclusion of those words would in any way derogate from what we are trying to do by using the words "principles of fundamental justice"?

That is my first question.

In other words, would the adding of the words "due process" in any way derogate from whatever rights we were attempting to grant to Canadians as a consequence of using the words "principles of fundamental justice"? May I have a response?

Mr. Strayer: In one sense, the answer is yes; in another sense, it is no.

Due process would certainly include the concept of procedural fairness that we think is covered by Fundamental justice, but we think that "due process" would have the danger of going well beyond procedural fairness and to deal with substantive fairness which raises the possibility of the courts second guessing Parliaments or legislatures on the policy of the law as opposed to the procedure by which rights are to be dealt with. That has been the experience at times in the United States in the interpretation of the term "due process".

Mr. Fraser: Do I take it that what you are telling us is that, in your opinion at least, by adding the words "due process" we could get a narrower interpretation of justice than we might be by just leaving the words "principles of justice"?

These are not easy concepts. They are terribly important right now, because if this Committee, not understanding what is at stake here, let it go on the original wording or accepts the change without understanding the implications, then some day somebody is going to wonder why we were asleep at the switch, and I am worried about it.

Mr. Strayer: Well, as I say, in our view, the use of the term "due process" would certainly also protect or require procedural fairness.

But it would have the other possibility of narrowing, as it were, the range of discretion of Parliament in matters of policy by possibly opening the door to the courts second guessing laws of Parliament on the basis of the policy involved rather than the question of procedural fairness.

In the United States "due process" was used from time to time in combination, for example, with a guarantee over property to provide a basis for courts to determine whether expropriation was justified in the circumstances as a matter of policy, whether the compensation was adequate and so forth.

It has been used to second guess public social measures.

Mr. Robinson: On a point of order, Mr. Chairman.

The Joint Chairman: (Mr. Joyal): A point of order, Mr. Robinson.

Mr. Robinson: I am sorry to interrupt, Mr. Strayer. But in order for the Committee to understand this very clearly, there was an inadvertent, perhaps, inaccuracy which should be clarified.

[Page 37]

Article 14 of the United States Constitution which refers to due process of law, also refers to depriving a person of property without due process of law. That is where the problems have arisen with respect to substantive due process in relation to expropriation and so on.

There is no reference in this proposal to the deprivation of property, at least not as it stands now—to the deprivation of property without due process of law; and I think you will agree, Mr. Strayer, that that would tend to make the remarks which you have made to the Committee with respect to expropriation, for example, somewhat more tenuous.

Mr. Strayer: If I may respond to that, Mr. Chairman, I do not think this is the appropriate time to get into a legal debate.

I was simply using the property cases as an example. I think that is what I said.

But there are other potential problems of a similar nature inherent in Clause 7 if one adds the words "due process"; for example. the term "liberty". "Liberty" at one time in the history of American jurisprudence has been interpreted to cover such things as liberty of contract; and this has been used as the basis for striking down minimum wage laws, because it contravened liberty of contract. That is the kind of potential scope of the term "due process of law" which, in our view should be avoided by using the other term.

The Joint Chairman (Mr. Joyal): The honourable John Fraser.

Mr. Fraser: Thank you, Mr. Chairman.

I realize we cannot go on forever on this.

But I wanted to indicate to Mr. Robinson that I certainly was prepared to look long and hard at his suggestion.

But I think, Mr. Chairman, as a Committee we are almost in a position where we have to be guided by what is really the expert testimony of the law officers of the Crown.

If it turns out that the wording here as proposed is not adequate, then I suppose it has to be something which would go on the agenda for further constitutional discussion. That seems to be the fallback position all the time when we cannot quite resolve something here.

But I am accepting the advice, Mr. Minister, that you and we are receiving as coming down to this; that if we added the words "due process", there is certainly the possibility in the minds of the law officers that we will narrow rather than expand the area of justice available to Canadians under Clause 7.

Now, if that is the case and the considered opinion, then I would not want to support Mr. Robinson's amendment, although I think he has done us a signal service by raising the matter and pointing out the complexities of just what words can mean.

The Joint Chairman (Mr. Joyal): Thank you very much.

Mr. Chretien: I would just like to make a suggestion arising out of the discussion, because there might be a compromise here.

[Page 38]

Mr. Robinson is preoccupied because we used a new term "fundamental justice". Earlier, there was an amendment proposed which was rejected a component of it; the word was "natural justice".

If members of the Committee were more comfortable with the words "natural justice" rather than "fundamental justice", we could accept "natural justice" rather than "fundamental justice", because one has been used before—natural justice has been a term used before the courts, and "fundamental justice" is a new phrase.

So if members of the Committee are more comfortable with the words "natural justice" we are willing to accept it.

But the advice I have received is that "fundamental justice" is perhaps more appropriate, but perhaps marginally so, and I am willing to accept "natural justice".

It could cope with some of the preoccupation of the Committee, and it was dropped because the motion in the previous amendment was including the two parts, and the phrase "natural justice" would have been acceptable to us.

We can accept that as part of the earlier rejected amendment and take "natural justice"; and for "due process of law", my legal advisers have said that the scope of it, what it might create, if we were to inscribe it and limit even more the powers of the legislatures and give the power to the court to look at, not the form but the substance of the legislation that would be passed in Parliament, would limit very much the legislative power of the different parliaments in Canada.

The Joint Chairman (Mr. Joyal): The honourable David Crombie.

Mr. Crombie: Mr. Chairman, I had some questions with respect to due process.

My colleague, Mr. Fraser, has perhaps more advantage in this particular instance, in that he has studied the law.

My questions will be a little more pedestrian.

Could either the Minister or any one of the gentlemen present tell me what is the difference between natural justice and fundamental justice?

That is the first question. What is the difference between natural justice and fundamental justice, and how are either or both of those related to the phrase and therefore the concept "due process of law"? What do those mean? I am having trouble.

Mr. Strayer: The term "fundamental justice" appears to us to be essentially the same thing as natural justice.

It is interesting that this question was debated in 1960 when the Canadian Bill of Rights was before Parliament, as to whether to include the term "fundamental justice" or "natural justice". They finally settled on "fundamental justice".

But one of the leading commentators on the Bill of Rights, Professor Tarnopolsky, reviewing that debate at that time and the jurisprudence since has said that it appears to him that the two terms are essentially the same.

Mr. Crombie: What are they?

[Page 39]

Mr. Strayer: Well, fundamental justice or natural justice both involve procedural fairness and that is the content of them.

The requirements of natural justice certainly have been pretty well defined over the years by the courts. The term "fundamental justice" has not been used very much in legislation, although it does appear in the Canadian Bill of Rights. But we have assumed it meant about the same thing. Those two terms can be contrasted to due process.

Mr. Crombie: I am sorry to interrupt, but I want to understand clearly this matter. What I understand so far is that by and large the term "natural justice" and "fundamental justice" I can take as meaning roughly the same thing.

Secondly, that those two phrases relate to procedural fairness; that is what you are saying. What does that mean?

Mr. Strayer: It depends upon the circumstances; but the general concept is that a person has to be notified that his rights are likely to be affected by some action if it is a procedure, if it is a process—what lawyers call a quasi-judicial process involving the determination of rights; then it requires that the person not only should have notice, but should also have an opportunity to be heard and

that he should hear the other side of the case prejudicial to him and that he should have a chance to respond to that.

The content will depend somewhat on the nature of the process.

If it is a purely discretionary power being exercised by a government officer, the procedural requirements may be less than if it is a matter involving rights.

Mr. Crombie: When I say that I or my constituents are entitled to fundamental justice in relation to life, liberty and the security of person, is there an agreed upon number of things that they are now entitled to, and what are they?

My concern is this. I do not want to either bore you or bore the Committee, but I like the sound of natural justice; I like the sound of fundamental justice; and due process sounds terrific. I am just not sure, since there is now some debate, as to whether we want one or two or three or all of them. For example, do I have the right to be heard? Do I have the right to know the nature of the accusation? Do I have the right to hear from my accusers? Do I have the right to have received a notice of a hearing? Do I have the right of an independent tribunal in all of those three concepts? Do those six things happen in natural justice, fundamental justice and in due process or is one or two of them missing in one of those three?

Mr. Strayer: I would say basically, Mr. Crombie, that they are covered by all of those terms.

Mr. Crombie: So whether I am talking natural justice or fundamental justice or due process, I get all of those six things?

Mr. Strayer: Yes.

Mr. Crombie: That clears up a lot of it.

[Page 40]

I have a second area of questioning, if I could, Mr. Chairman. My understanding of due process is as an American contrivance in order to deal with both procedural and substantive justice, that is to say it must be done fairly and I must be treated fairly.

My understanding was that first of all the concept of due process was used to enforce the American bill of rights on the United States, is that correct?

Mr. Strayer: Yes, that is correct.

Mr. Crombie: If I use the word "due process" will that have the same effect here, that it enforces the bill of rights on the provinces?

Mr. Strayer: When I said that due process was used to enforce the bill of rights on the United States, I only meant that there were things in the bill of rights which had effect on the United States; the guarantee of due process has a hearing on various things that the United States does, but that term by itself was not the means by which the bill of rights was applied to the United States.

Certain articles of the bill of rights govern the United States, particularly the fourteenth amendment which is the one which is most commonly used against the United States, and it, by its terms, binds the United States, and in this Charter there are specific sections which bind the provinces. So in both cases the instruments have a specific provision which makes them applicable to the state or province.

Mr. Crombie: Well, let me make sure of my understanding. My understanding was that the "due process" clause in the American constitution was the vehicle by which the bill of rights was enforced as against the United States, is that true or not true?

Mr. Strayer: I think it is not accurate to put it that way, sir.

Mr. Crombie: Let me put it this way. I have before me from the 96th Congress the citizen's guide to individual rights under the constitution of the United States of America, and under due process of law it says this simple. clear, unequivocal sentence, and I would like to ask you to tell me what you understand by it when I read it to you.

Most of the specific provisions of the Bill of Rights have been applied to the States through this clause.

What does that mean, "through this clause"? Does that mean that the due process clause is the vehicle by which the specific provisions of the bill of rights have been applied to the United States?

Mr. Strayer: Yes, I understand in that context what you are saying.

Mr. Crombie: To the extent that that happened in the United States, will this happen in Canada with respect to the provinces?

[Page 41]

Mr. Strayer: I think not in quite the same way, sir, no, because our charter spells out certain things that the American Bill of Rights does not spell out. For example, we have a specific provision with respect to legal rights that is more detailed than the American constitution. We have mobility rights and, of course, we have other things in here such as minority language education rights; so that I think it is fair to say that there will be other sections of our Charter which will tend to have considerable application and you would not look to Clause 7 as being the main section bearing on the provinces. A number of other sections will also bear on them.

Mr. Crombie: You do not have any examples so that I could understand what that means?

Mr. Strayer: For example, in the administration of Justice Sections, the sections which follow Clause 7-8, 9, 10, 11, because the provinces have responsibility for the administration of justice, they are the ones who administer the criminal law form day to day and these sections will obviously have a good deal to say about the way in which they administer justice.

Mr. Crombie: Would not that happen if you did not have the due process clause in it?

Mr. Strayer: Conceivably. If we did not have Clauses 8, 9, 10, 11 . . .

Mr. Crombie: But we have that right now. Do we not have that now?

Mr. Strayer: Not constitutionally guaranteed, no.

Mr. Crombie: I am trying to find out what I gain by having the due process clause in there.

Mr. Chrétien: In simple terms, you are giving more power to the courts over the substance of the legislation that a different legislature will pass in Canada. That is what Mr. Strayer was telling you, and the problem is there.

Mr. Crombie: But I am not sure what that extra power is and maybe that is the nub of my problem because a moment ago the law officers of the Crown advised, Mr. Chairman, that natural justice, fundamental justice and due process meant the same thing at least as it relates to these six events. So far I have stuck in my head that they are meaning the same thing. When the Minister says it gives more power to the courts. What is more power?

Mr. Strayer: Perhaps it is because I did not answer your second question at the outset, Mr. Crombie. I wanted to say that while those procedural requirements which you referred to are embraced in each of these three terms, natural justice, fundamental justice and due process, it must also be said that due process possibly goes beyond that area; it goes farther than the other two in having what has been called a substantive content, and the American courts particularly at one time in the history of their judicial thinking, gave a good deal of substantive content to due process; for example, in interpreting a similar provision in the American Constitution, interpreted liberty to include liberty of contract and they said not only can you not take away that liberty by a fair process, but you

[Page 42]

cannot limit the freedom of contract by a minimum wage law, for example.

Mr. Crombie: Natural justice and fundamental justice do not deal with substantive matters, only procedural fairness, that is the difference between those two and due process?

Mr. Strayer: Yes.

Mr. Crombie: I have one final question.

With respect to due process and the substantive aspects of it, having no regard now for the procedural fairness, my understanding, again from my wee citizen's guide is that by the time the 1930s came along in the United States, the restraints which the court had previously put on legislators were removed and that by and large the substantive aspect of due process was not related to property but indeed became more related to privacy of personal rights, is that correct, in your view, in your understanding?

Mr. Strayer: I think that is a fair comment, sir, yes.

Mr. Crombie: Throughout American jurisprudence, as I understand it, the whole development of the due process clause, both procedurally and substantively, but more particularly substantively, evolved around questions relating to the rights of property and the rights of privacy. Would you say that is true?

Mr. Strayer: That is certainly true of property. I think the privacy question is one of much more recent development.

Mr. Crombie: If our charter of rights does not include either the right to property or the right to privacy, then I suggest to you, and I would like your comment, that the due process clause will not work the same way as it does in the United States because by and large it was the operation of the due process clause on property rights and personal privacy rights, and we are not including those in our charter.

Mr. Strayer: It is true that property will not be included, but liberty and security of the person would be included and I should think that that combined with due process, could get the courts into the business of defining privacy rights, for example.

Mr. Crombie: Let me conclude, if I could then, Mr. Chairman, because I think I understand what you are saying now and I think I have some difficulty with the amendment proposed, unless I hear from Mr. Robinson again, because again in my citizen's guide on page 21 it says "This clause", the "due process" clause, "has a substantive aspect as well," as you point out, sir,

protecting individuals against deprivation of important property and liberty interests. Substantive due process for a significant period of American history was held to preclude government from regulating many forms of economic activity.

We all know the history of that. They finally broke that down to court problems in the 1930s and so on.

[Page 43]

While these restraints were abandoned in the 1930s, the court,

the American Supreme Court,

now accords the protection of substantive due process to certain fundamental personal rights. Foremost among these is the concept of the right to privacy, which to date has been limited largely to matters involving marriage, procreation, and the parental care of children.

And I ask you then finally, what effect will the inclusion of the due process clause have on the question of marriage, procreation, or the parental care of children?

Mr. Strayer: Mr. Chairman, I am sure that anything I could say would be purely in the realm of speculation, but it could be seen to open the door to the courts dealing with the question of abortion, that sort of thing, contraception, which has been dealt with by the American courts. In other words, the courts would be making these policy decisions instead of Parliament.

Mr. Chrétien: The point, Mr. Crombie, that it is important to understand the difference is that we pass legislation here on abortion, criminal code, and we pass legislation on capital punishment; parliament has the authority to do that, and the court at this moment, because we do not have the due process of law written there. cannot go and see whether we made the right decision or the wrong decision in Parliament.

If you write down the words, "due process of law" here, the advice I am receiving is the court could go behind our decision and say that their decision on abortion was not the right one, their decision on capital punishment was not the right one, and it is a danger, according to legal advice I am receiving, that it will very much limit the scope of the power of legislation by the Parliament and we do not want that; and it is why we do not want the words "due process of law". These are the two main examples that we should keep in mind.

You can keep speculating on all the things that have never been touched, but these are two very sensitive areas that we have to cope with as legislators and my view is that Parliament has decided a certain law on abortion and a certain law on capital punishment, and it should prevail and we do not want the courts to say that the judgment of Parliament was wrong in using the constitution.

Mr. Crombie: Thank you very much, and thank you Mr. Chairman. I know I spent some length of time.

Senator Connolly: May I ask a supplementary here?

The Joint Chairman (Mr. Joyal): I will certainly invite honourable Senator Connolly after I have thanked honourable David Crombie.

Honourable Senator Connolly.

Senator Connolly: I have been very interested in what my learned colleague Mr. Crombie has been discussing, and I just wonder whether it does not fortify the position that he has made so clear to us all to look at the world in Clause 7 as amended—no, I guess there is no amendment—it is repro-

[Page 44]

duced. The word "deprived"; it sets out the fact that everyone has the right to life, liberty. security of persons and "not to be deprived thereof except", so you talk about the substance of right in the first place: you talk about the process by introducing the word "deprived" and I think it is restricted to the process in the light of the explanation the Minister and the officials have given. That might help you a bit.

Miss Campbell: Mr. Chairman, just a point of information to Mr. Crombie, if I might.

Perhaps the Canadian public would like to have the address of that nice little citizen's book you are using.

Mr. Crombie: It is the last one that I would be willing to offer the government actually at a reasonable price.

Miss Campbell: Just the address.

Mr. Crombie: It is made in Canada, printed in Cabbagetown actually.

Miss Campbell: You did not give us the title.

Mr. Crombie: Citizen's Guide to Individual Rights Under the Constitution of the United States of America, prepared by the Subcommittee on the Constitution of the Committee of the Judiciary. They are sort of like us. It gives you something to think about.

The Joint Chairman (Mr. Joyal): Thank you very much, Madam Campbell.

Mr. Robinson, to conclude on the proposed amendment.

Mr. Robinson: Yes, Mr. Chairman, I have listened with interest to both the questions of Mr. Crombie and Mr. Fraser and the answers of the Minister's legal advisers and, indeed, of the Minister himself, and I do come back to the position that. as I indicated earlier, this particular proposal, the proposal that we deal with due process of law and not with this totally novel concept of fundamental justice in this context was a proposal which was deemed to be quite proper and quite acceptable to the federal government in February of 1979, in July of 1980, and in August of 1980. I can only wonder, Mr. Chairman, because it was the same advisers, exactly the same advisers in August of 1980 who suggested that Section 6 of that draft should read:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof expect by due process of law,

one can only wonder what bolt of lightening suddenly struck them and suddenly made them realize that there was some substantive concern with respect to due process of law.

We have not yet heard what it was that caused this change between August 22 and September 8, what particular jurisprudence it was that resulted in this change.

Mr. Chairman, I have listened with interest, as I say, to the arguments of my friends. It would be my submission that we should not lose the jurisprudence that has been built up in Canada so far in the question of due process of law and for that reason and because of the arbitrary and undelinable nature of fundamental justice, whatever that may mean, that

[Page 45]

we should maintain the concept of due process of law, recognizing that it does not apply at all to property.

Finally, Mr. Chairman, to deal with the concern of Mr. Fraser. that this might in some way narrow the concept of fundamental justice. I would point only to the fact that we are talking about this as an inclusion to the concept of fundamental justice." It says, "fundamental justice, including the principles of due process of law". So anything that is incorporated within fundamental justice is continued, but we are making very clear that the jurisprudence with respect to due process is carried on in Canadian law.

Thank you, Mr. Chairman.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Robinson.

I would like to call the vote on the proposed motion, that Clause 7 amended by adding thereto immediately after the word "justice" the following:

including the principles of due process of law.

Amendment negatived.

Serge Joyal (Chairman), Sven Robinson, Barry Strayer, Jean Lapierre, James McGrath, John Fraser, Jean Chrétien, Roger Tassé, Coline Campbell, p. 45

The Joint Chairman (Mr. Joyal): […] I would like to call the next amendment. It is the one with the number N-11, Clause 7, page 4, and it is an amendment moved by the NDP party.

I would like to invite Mr. Robinson to make the usual presentation.

Mr. Robinson.

Mr. Robinson: Yes, Mr. Chairman, I will try to be as brief with this one as we were with the last one.

I move that Clause 7 of the proposed constitution act, 1980 be amended by (a) adding immediately after line 27 on page 4 the following:

8. Everyone has the right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations.

Mr. Chairman, I do not know whether you wish to deal with both (a) and (b) together. They cover somewhat different areas. I would suggest that we deal first with the right to a fair hearing in Clause 7(a) and then turn to the right to privacy in Clause (7)(b). but I am in the hands of the Chair on that.

If we could perhaps deal with the right to a fair hearing first, that is Clause 7(a).

En français il est proposé:

Que le projet de loi constitutionnelle de 1980 soit modifié par

a) adjonction, après la ligne 28, page 4, de ce qui suit:
Audition impartiale—«8. Chacun a droit a une audition impartiale de sa cause en conformité avec les principes de justice fondamentale pour la determination de ses droits et obligations.»

[Page 46]

Mr. Chairman, this concept of a right to a fair hearing is one which has been alluded to in questions earlier to the Minister and which has also been raised by many witnesses appearing before this Committee as one of the fundamental rights which must be protected in a free and democratic society.

It is a concept which is contained once again within the Canadian Bill of Rights, at Clause 2(e), Mr. Chairman. and I would like to just make brief reference to that.

Clause 2(e) refers to the right not to be deprived of the right of a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations. In addition, Mr. Chairman, each of the successive federal proposals before the provinces and, indeed, the Committees which have considered this matter, have felt that this right to a fair hearing was fundamental.

The 1972 Molgat-MacGuigan Committee Bill C-60, made an explicit reference to the right to a fair hearing which would apply both at provincial and federal levels. This was supported by Senator Lamontagne and Mr. MacGuigan in their report on Bill C-60.

The February 1979 proposal before the First Ministers also included the right to a fair hearing, and finally, in July of 1980. Mr. Chairman, the Minister himself stated that this particular right was an essential right.

I do not know, Mr. Chairman, if the Minister is going to be returning.

Mr. Strayer: Yes.

Mr. Robinson: I see. I will not explicitly refer to the Minister's statement until he has returned, to give him an opportunity to deal with that, but Mr. Chairman, I think in suggesting why it is so important that this right to a fair hearing be included within a constitution of Canada, I can do no better than to quote from a brief of the British Columbia Civil Liberties Association at page 10, and I will just quote from their section on the right to a fair hearing:

In his 1969 proposals regarding a Charter of Rights, Mr. Trudeau suggested that the Charter should guarantee the right of a person to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. Such a provision is included in the 1960 Statutory Canadian Bill of Rights, but no such provision is included in the present government proposals.

The British Columbia Civil Liberties Association believes that such a provision should be included and that its language should be changed so that statutory tribunals and administrative agencies are clearly covered by its wording, and this is the important point:

It is not only in criminal proceedings that individual rights need clarification and protection; citizens today face an array of government agencies which may reach into every aspect of their lives.

[Page 47]

Mr. Chairman, all we are suggesting in this proposed amendment is that when there are fundamental decisions which are being made, not just about criminal law, but which many directly affect the lives of the people of Canada, that they have the right to the principles of fundamental justice as they have assumed that they have had for some considerable length of time.

In many instances administrative decisions are made which affect a citizen drastically and directly and which may appear to be arbitrary. unfounded and wrong, and the citizen may have great difficulty in even determining what the reasons were for a particular decision. The reasons may not be published, they may only be available to agency personnel.

They conclude by saying that because of this proliferation of administrative and statutory tribunals and their effect, and it is a serious effect, on the lives of Canadian citizens, we believe that this right to a fair hearing must be included in the new constitutional Charter of Rights and Fundamental Freedoms.

The concept of this fair hearing would explicitly include all instances of decision-making where a person's rights and obligations are to be determined, and they say only in this way will today's citizens find the traditional right to a fair hearing relevant to his circumstances and a proper safeguard to his rights.

Mr. Chairman, that is the purpose of this proposed amendment. I would invite honourable members to support the amendment, to recognize how important this is in Canadian society today, and I would like to conclude by quoting from the Minister himself. Mr. Chretien, in a statement which he made to the Continuing Committee of Ministers on the Constitution in July of last year, and I am quoting now directly from the Minister:

In deciding which rights should be included in this Charter, we have selected only those which we feel reflect the central values of our society. Each of the rights we have listed is an essential ingredient for the Charter and all our rights which all Canadians should have, regardless of where they live in our country.

Mr. Chairman, one of the fundamental rights which the Minister was referring to in that statement was the right to a fair hearing for the determination of a citizen's freedoms and obligations. If that right was fundamental, if that right was central and essential in July of 1980, I can only assume that that right is still fundamental and essential today.

Thank you. Mr. Chairman.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Robinson.

I would like to invite Mr. Jean Lapierre.

Monsieur Jean Lapierre.

[Page 48]

[Translation]

Mr. Lapierre: Thank you, Mr. Chairman.

I am going to take part in this debate, and this time, I will take the Minister of Justice to witness.

The amendment suggested by my friend Mr. Robinson in the name of no direct interference with the provinces, a thesis which be debated so well concerning property rights, I think his logic should apply to this clause which could have many implications with the provinces if, for example, we think about the issuing of drivers' licences or the issuing of all kinds of other permits that provinces issue on a regular basis.

I think that the provincial governments. if they had another weekend to consult, would object very strongly to that and that is why we believe it is not necessary at this point and that it would be going a bit too far in the administration of provincial governmental and paragovernmental agencies.

As he said, this section is included in the Canadian Charter for the Federal Government and we have accepted to be bound by it but at the provincial level it would be going a little too far and I would ask him to think a bit more about the direct intervention we would then be making especially in the area of permits. That is why we think this amendment is not proper.

The Joint Chairman (Mr. Joyal): Thank you, Mr. Lapierre.

[Text]

The honourable James McGrath.

Mr. McGrath: Can I ask Mr. Lapierre a question? Mr. Lapierre, are you speaking on behalf of the government on this particular amendment? I would just like to get that straight.

Mr. Lapierre: That is why I said that the Minister of Justice was witnessing this time.

Mr. McGrath: But you were speaking on behalf of the government?

Mr. Lapierre: That is our position, as a member that is my position. I cannot speak on behalf of the government, for now at least.

Mr. McGrath: I just wanted to know when you are speaking on your own behalf and when you are speaking on behalf of the government.

Mr. Lapierre: I would never speak on behalf of the government before I am in Cabinet.

Mr. McGrath: Again, you learned your lesson last week.

Mr. Lapierre: Yes, I did.

[Translation]

The Joint Chairman (Mr. Joyal): Thank you, Mr. Lapierre.

[Text]

So the Chair sees no other speakers on the proposed motion, I would like then to call the vote, but before calling the vote, ask for Mr. Robinson to conclude on the proposed motion.

Mr. Fraser: Just a minute, Mr. Chairman.

The Joint Chairman (Mr. Joyal): Honourable John Fraser.

[Page 49]

Mr. Fraser: I wanted to ask a couple of questions.

We have listened to Mr. Lapierre, through you, Mr. Chairman, to the Minister, and I would like to hear from the law officers of the Crown as to whether or not they think that this particular clause is going to so impinge on the provinces that they cannot issue a driver's licence or anything else. I would just like to know what substance there is in that statement?

It is an easy statement to make, but I look at that clause and I do not, frankly, see how that is going to interfere with the administration of the Motor Vehicles Branch in the province of British Columbia, but if somebody can convince me that it will, I am certainly prepared to listen.

Mr. Chretien: I will ask Mr. Tassé to reply to that question, he was involved in the discussions with the provinces on the matter.

Mr. Roger Tassé, Q.C. (Deputy Minister Department of Justice): Last week, I think it was, Mr. Fraser, I indicated that there have been recent decisions of the Supreme Court of Canada that have, in effect, decided that the concept of fairness should apply to administrative proceedings.

When we look at that section of the Bill of Rights right now, that requires that in effect the right to a fair hearing be extended in accordance with the principles of fundamental justice, when the rights and obligations of a person are being determined; we had always thought that in effect that right to a fair hearing would apply in civil or administrative proceedings that were of a judicial or quasi-judicial character, and that this principle did not extend to administrative proceedings like the granting of licences, and so on, so forth.

However, this recent decision of the Supreme Court, Martineau and Nicholson, has in effect extended possibly the principle of natural justice which is included in that principle of a fair hearing to this other level of administrative activity that both the federal and provincial governments are involved in. Until we know further from the courts as to what is the exact scope of the right to a fair hearing, where there is some uncertainty as to exactly what this meant, and if we were at this time to constitutionalize and entrench the principles of fundamental justice and the right to a hearing in accordance with the principles of fundamental justice, in effect we could be saying that not only should this right apply in terms of decisions that are required to be made judicially, but also we may be saying that this right should apply in terms of the administrative activities that governments get involved in and it would not be possible, because it would have

been entrenched, for the legislature to provide for special procedures that we feel, at the administrative level anyway, in licencing, for example, activities, municipal licencing at the local level requires that, in effect, there be some exceptions to the rules that apply in decisions that are required to be made in accordance with the principles of natural justice as is set out in Clause 2(e), and as the courts have over the years decided in matters in the provincial area.

In effect we would be taking away from the provinces the possibility, possibly, of designing their administrative decision making at the provincial or municipal level in such a way as

[Page 50]

these things can be done fairly, not necessarily in accordance with the more extensive and the more sophisticated procedures and principles that apply where a decision needs to be made judicially or quasijudicially.

So in effect I suppose I am saying, in a nut shell, because of these recent decisions of the Supreme Court, the right to a fair hearing and the scope of its application is in a state of uncertainty at this time and that it would be unwise to constitutionalize and entrench the right to a fair hearing in accordance with the principles of fundamental justice because we might unwittingly be extending that right beyond those areas where the decisions need to be made judicially or quasi-judicially to the area of the administrative decision making process where these principles do not apply now.

Mr. Fraser: Well, Mr. Chairman, I have got to say that I am concerned about this because my own experience in practicing law has been that fairness in purely administrative decisions is a very hard thing to achieve and it is well known to lawyers that it is often difficult to upgrade an administrative decision into a quasi or judicial decision where the principles of natural justice would apply.

I find it awfully difficult to accept that whether it is an administrative decision or a quasi-judicial decision made by bureaucrats. that a Canadian citizen ought not to get a fair hearing.

Senator Connolly interjects, and he is absolutely right, the prerogative writs have been a remedy but the difficulty is that you then have to establish a qualis-judicial or a judicial nature in the proceedings and almost every lawyer who has acted for citizens against the massive complexity of the modern bureaucracy has wondered somehow why we have this quite unfair distinction between the right to do anything you want on an arbitrary basis with respect to the citizen as long as it is called administrative, but the minute it is called judicial, in the sense of determining their rights in a more profound way. then and only then do the principles of natural justice apply.

If the Supreme Court of Canada is now saying, in its wisdom. the principles of natural justice ought to be extended farther than they have been extended during the 50 or 60 or 70 years of Canadian administrative law that took an extremely narrow view on these things, then I can only say that the Supreme Court of Canada is leading instead of following and is starting to learn as do common law lawyers that the pride of the common law was that our freedoms and liberties broadened down from precedent to precedent instead of narrowed down from one restrictive case to another.

I must say that personally I am just not persuaded that this amendment would cause the mischieve that Mr. Lapierre thinks or that Mr. Tassé, whose legal opinion I certainly respect, believes it would cause.

I find it extraordinarily difficult to accept the strictures that are being imposed on us by those that argue against this. I also have to add that if the government is concerned, if they have suddenly become concerned about an imposition on the prov-

[Page 51]

inces, that concern does not extend to the profound problems of the amending formula and other things, all I can do is invite the government to follow our procedure and put this, if this is what we believe then put this in front of the provinces for further discussion. If a case can be made whereby it would make it impossible to administer, the government of the provinces or the Government of Canada, because that must be part of the concern, the only bureaucracy in the country is not the provinces', there is a huge bureaucracy in the federal government, the case can be made where there are instances where this would confound the ordinary and effective administration from day to day and exceptions can be found to it at that time.

However, I must say that I am deeply concerned when, in the Charter which is trying to establish the rights of Canadians, especially the rights of Canadians vis-à-vis the massive and impersonal kind of bureaucracy with which the Canadian citizen has to deal, that the government would be seriously arguing against this amendment.

Mr. Chrétien: M. Fraser, I would like to point out to you that in relation to the federal level this aspect of the problem is covered in the Bill of Rights and would still be applicable, and through the Bill of Rights it covers the federal administration and the clause is Clause 2(e), which speaks of the right of the private person to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

Mr. Fraser: Well, I recognize that.

Mr. Chrétien: And if you enshrine it in the constitution we are bound by it but we will be binding the provincial governments on that issue. We are covered federally because you have referred to the federal bureaucracy, we are covered here by the Bill of Rights, but if we were to enshrine it in the constitution you will impose it on the provinces and we say that they have their provincial Bills of Rights, there is legislation that can be passed to protect the citizen against abuse of administration provincially and it is not for us to impose our standards on them.

Mr. Fraser: Just one response, Mr. Chairman . . .

The Joint Chairman (Mr. Joyal): It will be your final question, Mr. Fraser.

Mr. Fraser: I have got great respect for the Minister but the Ministers answer just once more has illustrated just how bizarre this whole exercise is. When the Minister does not want an amendment he says it is because it is encroaching on the provinces, but when he wants to encroach on the provinces he says it is in the absolute interest, the public interest and the rights and freedoms of Canadians that the provinces be encroached upon. There is absolutely no consistency. What is

happening, this Charter has picked up chunks of the Canadian of Rights and decided that you are going to put it in? Why?

[Page 52]

You are going to put it in because you think those rights ought to be entrenched, but in the case of other things you play both sides against the middle.

Mr. Chretien: You do not want to entrench, and you want me to entrench. Make up your mind!

Mr. McGrath: Mr. Chairman, on a point of order.

The Joint Chairman (Mr. Joyal): A point of order, Mr. McGrath.

Mr. McGrath: Surely, Mr. Chairman. the hon. member should be entitled to finish his intervention without this kind of interruption by the Minister of Justice.

The Joint Chairman (Mr. Joyal): Mr. Fraser, I will invite you to proceed with your intervention.

Mr. Fraser: Thank you very much, Mr. Chairman.

The Minister forgets—and I am sure he would want me to respond very calmly to his interventions; but he forgets that the Conservative position is that we, here, as a federal House of Commons, are told to bring forward what we think would be a good set of rights and a good amending formula, and then report that proposition to the provinces and sit down and talk with them a little further to see whether we can get as much agreement as we can on that.

You see, we are not unilaterally imposing; and I am sure the Minister does not intend to mislead the public who are watching us. We are not unilaterally imposing.

What I am saying is that if we are to sit here and take this exercise seriously and talk about the question of rights and get into the whole field of what rights does a citizen have in dealing with a massive bureaucracy and the bureaucracies we have in the country, why should that not go forward just as legitimately as the other propositions that the Minister wants to go forward? That is my only point. I do not think I need press it further.

I think I have made the point that I see nothing to be afraid of in that clause, and I do not think it would bring the ordinary administration of the provinces or any other body of government to a halt, and if the Minister is as serious as he says, and as is set out in the Bill of Rights—exactly the same clause is binding and applicable on the federal bureaucracy then, surely, you could not really have fear that it would bring provincial administrative bureaucracies to a halt; because if it would bring their bureaucraies to a halt, then why would it not bring the federal bureaucracy to a halt?

Mr. Chrétien: I have just said that we are bound federally with the federal administration, and if the provincial administrations want to bind themselves with the same privileges and rights they can do so. That is the only point I am making.

And what you are proposing—and you are objecting to the process: but because I know it would be in the Charter of Rights and inscribed in the Canadian constitution, if we were

[Page 53]

to accept it it would be binding on the provinces and we do not want to bind the provinces.

You may say that you would discuss that further. If the provinces want to discuss the matter further and if we think that the provinces should have the same obligation, we will discuss that and if the provinces want, in the second round of the constitutional debate, to have it enshrined in the constitution, we will not object, because already we have that protection for the citizen in relation to the federal bureaucracy.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Fraser.

Madam Campbell.

Miss Campbell: Mr. Chairman, I have one question for the Minister or his officials.

It seems to me that this proposed amendment is taken care of in the larger Clause 24. Anyone who has the rights and freedoms under that clause can apply to a court.

So you are going to get a fair hearing, I would assume, if you think your rights and freedoms have been infringed upon.

If you are relating it strictly to administrative tribunals, I would agree with the Minister that the provinces have their own sources.

But think procedural fairness under administrative tribunals is the key thing there.

I would hope that the new clause we would be proposing in Clause 24 would take care of that.

Mr. Chretien: I am sorry, but I cannot agree with you.

Miss Campbell: I would use it.

Mr. Chretien: You can try; but it is not the interpretation I would give at this time. But I think it would not apply to that in provincial jurisdictions. It would apply to federal jurisdiction, but not on provincial jurisdictions.

Miss Campbell: They would apply to rights and freedoms under this Act.

Mr. Chretien: Yes, under this Act; but we are not covering the provincial problems.

What Mr. Robinson would like to have—he would like an amendment that will entrench what we have in the Bill of Rights for federal administration and to apply to the provinces, too.

If it were to be entrenched, Clause 24 would apply as a remedy; but it is not entrenched in the constitution; but for the federal side of the problem, it is covered in the Bill of Rights.

Because of the Bill of Rights, I guess one could use Clause 24 to get a remedy in relation to the Bill of Rights.

Miss Campbell: In relation to this act.

Mr. Chrétien: Yes, but it is in relation to the provincial aspects.

Miss Campbell: It is related to any rights or obligations…

[Page 54]

Mr. Chrétien: But this right will not be in the Charter.

The Joint Chairman (Mr. Joyal): Thank you very much, Miss Campbell.

Mr. Robinson, to conclude on the proposed amendment.

Mr. Robinson: Mr. Chairman, I would like to respond to some of the points which have been made, in particular by Mr. Lapierre; because if ever there was an example of a red herring being thrown into a debate, it was the reference to a driver's licence somehow being affected by this proposal.

First of all, the question of drivers' licences. It is dubious, to say the least, that a court might consider that there is any right or obligation on the part of the provincial government to grant a driver's licence.

A driver's licence is a privilege. It is not something which is considered to be a right or obligation. In determining this question of rights and obligations that is precisely what we are talking about—rights and obligations: not privileges which might exist from time to time.

To talk about drivers' licences, which are purely discretionary on the part of provincial governments, as I say, has no application whatsoever to this particular proposal.

The Deputy Minister of Justice, Mr. Tassé, has referred to certain concerns about the evolution of jurisprudence in the Supreme Court of Canada and referred to the *Martineau* case and the *Nicholson* case.

The Deputy Minister will know very well that while these have been classed as administrative decisions by the Supreme Court of Canada, in both cases they involved prisoners and we were dealing with very fundamental questions of punishment and deprivation of liberty.

The Minister will be aware that that is a far cry from a denial of a drivers licence for whatever ground a provincial government may choose to deny it upon.

The Supreme Court of Canada said that there were certain obligations of fairness; and when you are denying these fundamental rights and liberties, and when you are punishing somebody, that

Canadians were entitled to fair treatment, and that Canadians were entitled to fair treatment when their rights and obligations are being determined.

Mr. Chairman, the Minister has suggested that we do not want to impose this on the provinces.

Well, Mr. Fraser has indicated that if this is a fundamental value, if indeed the Minister felt and continues to feel, as he felt in July—and I have quoted from his statement—that this is a right which was a central value, that it was one of the essential rights which was so basic in our society that it could not be disregarded, well, if it is that basic, then surely it should be included in this package of rights.

Mr. Chairman, I would hope that the independent members on the Committee, having listened carefully to the arguments, and having all of the members of this Committee, having listened to the arguments very carefully, Mr. Lapierre, recognizing the error of his ways in referring to drivers' licences,

[Page 55]

might now come to see the light and support this very fair and reasonable proposal.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Robinson.

It is now clear that members are ready for the vote.

Mr. Robinson: Mr. Chairman, may we have a recorded vote, please?

The Joint Chairman (Mr. Joyal): Yes, that will be done. I will first read the proposed amendment.

The proposed amendment is:

That Clause 7 of the proposed Constitution act, 1980 be amended by

(a) adding immediately after line 27 on page 4 the following:

Fair Hearing

8. Everyone has the right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations.

Amendment negatived: Yeas, 10; Nays 14.

The Joint Chairman (Mr. Joyal): The motion is defeated by a vote of 10 to 14.

Some hon. Members: Shame!

Serge Joyal (Chairman), Sven Robinson, Jean Lapierre, Jean Chrétien, David Crombie, Jake Epp, John Fraser, Senator Asselin, p. 62

The Joint Chairman (Mr. Joyal): Agreed. Very well. *[Text]* So I would like to invite the honourable members, then, to come back on Clause 7, the amendment numbered N-1 1, Clause 7, page 4 and it is on an amendment moved by the NDP that has been divided this morning and I would like to invite Mr. Robinson to introduce the amendment.

On Clause 7—*Life, liberty and security of person.*

Mr. Robinson: Thank you, Mr. Chairman. I will bear in mind the newly imposed time restraints in introducing the amendment.

An hon. Member: Time is up.

Mr. Robinson: I move, further, that Clause 7 of the proposed constitution act 1980 be amended by paragraph (b), adding immediately after the proposed new Clause 8 the following. Now, presumably that wording would be changed because the proposed new Clause 8 was defeated, privacy, and this would be new Clause 8 instead of new Clause 9:

Everyone has the right to protection against arbitrary or unreasonable interference with privacy.
And renumbering all subsequent clauses accordingly.

En français, Il est proposé

Que le projet de Loi constitutionnelle de 1980 soit modifié par

b) adjonction, après le projet du nouvel article 7 de ce qui suit:

«8. Chacun a droit à la protection contre toute intervention abusive ou arbitraire dans sa vie privée.»

Mr. Chairman, there has been some discussion of a similar amendment earlier which was proposed in more comprehensive terms by the Conservative party, which was defeated. I would hope that this particular amendment in its terms as proposed by the New Democratic Party would be accepted, Mr. Chairman.

I would point to the fact that the Canadian Bar Association in their report *Towards A New Canada* specifically recommended that the Bill of Rights should provide that individual privacy not be sujected to unreasonable interference. In addition they stated, and if I might just quote briefly from their report to elaborate on what we mean by privacy:

Though never expressly recognized by the common law, the right to personal privacy is increasingly being given recognition. In the United States it receives constitutional protection. Of particular concern is the amount of information regarding the individual collected and stored by government. In large measure this can be dealt with by proper administrative procedures, particularly by an information commissioner or ombudsman, but a useful role can be played by the courts.

[Page 63]

The privacy of the individual against the state is indeed so fundamental and the dangers of governmental interference with individual privacy so great in modern society, that there must be constitutional protection.

That, Mr. Chairman, in short, is the purpose of this amendment. The right to privacy has been recognized by the community of nations as early as 1948, in the United Nations Declaration of Human Rights at Article 12 which states that no one shall be subjected to arbitrary interference with his privacy and so on. That right was recognized, as I say, by the community of nations.

That was repeated in the United Nations Covenant on Civil and Political Rights in Article 17(1), which I remind members of this Committee is binding at both the federal and provincial level.

Finally, Mr. Chairman, this particular right, this fundamenatal right to the protection from unreasonable interference with privacy was recommended by the federal government itself to the first ministers in February of 1979, at Chapter 2 of their proposals.

Once again it was recommended in July, 1980, by the federal government and I remind members of the Committee that this right to privacy and the right to protection from unreasonable interference with privacy was one of those rights that the Minister of Justice, Jean Chretien, in July of 1980 said was an essential right and formed one of the minimum rights of all Canadians which must be included in a charter of rights.

Once again, one can only ask the question what has happened to this right which was so fundamental in July of 1980 that it has now been completely disregarded in the government's new proposals. It was contained also in the August, 1980 proposals.

Finally, Mr. Chairman, if I might just conclude on this important right by referring again to the report of the Canadian Bar Association when their recommendation that the right to privacy be included, they stated:

The right to privacy is a prerequisite to freedom of speech, expression, thought, conscience, opinion, assembly and association. It is inconsistent to guarantee these rights directly when a person's knowledge that his privacy may be violated will indirectly inhibit the exercise of the guaranteed rights. All of these rights are prerequisites to the proper exercise of democracy, which in turn is the prerequisite to the proper operation of the principle of supremacy of Parliament.

Mr. Chairman, I conclude by saying that this right, this fundamental right which has been referred to by Mr. Justice Brandeis of the United States Supreme Court as the right to be let alone. the right most valued by civilized men and women, must be entrenched in any Charter of Rights which is to rellect those rights and freedoms which all Canadians take for granted.

Thank you, Mr. Chairman.

[Page 64]

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Robinson.

[Translation]

Mr. Lapierre.

Mr. Lapierre: I believe, Mr. Chairman, that the argument against including the right to privacy have already been set out. Mr. Robinson referred to these arguments earlier and they have not changed.

I know that Mr. Robinson has done a great deal of reading on the notion of privacy and I do not know whether he has found jurisprudence which defines the right to privacy. In our opinion, however, the notion is too vague and has not yet been clearly defined. It is not quite matured and we will have to wait a few years for legislatures and Parliament to work and legislate on this right, since it is a new legal concept. This is why we feel it would be premature to include it in the constitution.

We would instead ask members of the Committee to think about it and wait to see what happens. in a few years, we will certainly be in a position to come back with a more clearly defined concept. In this way we would not be taking any chances.

Mr. Chrétien: One more point should be added. There is now legislation before Parliament which was tabled this afternoon for second reading with the Freedom of Information legislation. So the problem of making new law is before the Canadian Parliament and will be debated in the House this week.

[Text]

The Joint Chairman (Mr. Joyal): Honourable David Crombie.

Mr. Crombie: Thank you very much, Mr. Chairman.

Mr. Chairman, I would like to move. i suppose it would be an amendment, to Mr. Robinson's amendment, and that is that after the word "privacy", we add "family, home, correspondence".

That, you may recall, Mr. Chairman, was originally in our proposal in Clause 2, but you may recall that that was dealt with under Clause 2 and has not been dealt with under Clause 7. I take it that as you have aaccepted the amendment from Mr. Robinson, even though we have dealt with the matter in Clause 2, you see it as a new motion because it is in Clause 7.

Consequently, I take it that putting in the words "family, home, correspondence" is in order.

The Joint Chairman (Mr. Joyal): There are two ways to accept such a request that you are proposing to the Chair; either by requesting the consent of the main proposer to include those three words in the main motion with the consent of all the honourable members or I invite you to keep it as a subamendment when we will have dealt with the main motion, because now we are in a motion and yours is a subamendment and we cannot deal with the subamendment and a motion at the same time.

The only way to do it is to request the unanimous consent and, of course, the consent of the mover to include those three words in the main motion.

[Page 65]

Mr. Epp: Mr. Chairman, is the subamendment not dealt with first?

The Joint Chairman (Mr. Joyal): Yes, but it is a subamendment that is attached to an amendment.

Mr. Epp: That is right. That is why we deal with the subamendment first.

Mr. Crombie: Mr. Chairman, as I understand it, the first option you offer is for me to ask the mover if he would take my wording as part of his motion.

The Joint Chairman (Mr. Joyal): Yes.

Mr. Crombie: Failing that, I could ask for consent so that I could move it as a subamendment. If that is the form of proceedings that is adopted, would we then vote on my wording prior to Mr. Robinson's motion?

The Joint Chairman (Mr. Joyal): Yes, of course.

Mr. Crombie: I wonder if i could then, through you, Mr. Chairman, ask Mr. Robinson if he would consider adding "family, home and correspondence" so that the clause would read:

freedom from unreasonable interference with privacy, family, home and correspondence

The Joint Chairman (Mr. Joyal): Mr. Robinson.

Mr. Robinson: Mr. Chairman, we supported the earlier amendment as very strong defenders of the family, the home, and the integrity of correspondence. Certainly, I would be prepared to accept that particular amendment.

Mr. Crombie: Mr. Chairman, I would like to put it in that form then, and therefore, have the whole of the motion before the Committee.

I think I probably have about one minute left in support of the proposition. I made some remarks in connection with it before, Mr. Chairman, when we were dealing with Clause 2.

It was part of the ill-fated commitment given by the Solicitor General, you may recall. At that time, we split off the enjoyment of property, the new celebrated clause, and we voted on privacy, family, home and correspondence. That, at that time, was not supported by the Liberal party, but I think it was probably due, Mr. Chairman, to the privailing winds of change that occurred between the Thursday and the Monday.

Now, I do not have the power of a phone call at this point. Oh, that I did. Then I would ask the Prime Minister if he would so instruct his supporters on this Committee that they would see the

wisdom of this particular wording, because it is the wording taken exactly from the United Nations Declaration of Human Rights.

It also appears, the same wording, in the international Covenant on Civil and Political Rights. Members, Mr. Chairman, will also find it in many, many constitutions in the Western World and throughout Asia and Africa. It is beyond me how it could be opposed.

I would hope that at least. as even some small gesture for building bridges back to some reasonable dialogue, members opposite would give consideration to including in the protection of privacy, family, home and correspondence.

[Page 66]

The Joint Chairman (Mr. Joyal): Thank you very much. honourable David Crombie.

Mr. Crombie: Thank you, Mr. Chairman.

Mr. Epp: Mr. Chairman, if there is no one else who wants to speak to the subamendment, I want to support what Mr. Crombie has said.

It has been vital, we believe, not only to our party, but more importantly, to the Canadian people that government must be restricted in their interference with the daily lives of Canadians. So often we hear the charge made that government has become too large and that they want government off their backs, and I think this would go quite some distance to guarantee to Canadians that it is they who hold rights. rather than governments who can give or grant or take away rights.

The Joint Chairman (Mr. Joyal): Mr. Robinson, to conclude.

Mr. Robinson: Mr. Chairman, might I just ask a question for clarification on the proposed subamendment, if I may.
The proposed subamendment refers to arbitrary or unreasonable interference with, among other things, correspondence. Can I assume from this that this would encompass also the right to protection from opening of the mail by the RCMP.

Perhaps Mr. Fraser or another member might like to comment on that.

The Joint Chairman (Mr. Joyal): Honourable David Crombie.

Mr. Crombie: I gather that we are keeping in unreasonable interference as the qualifying phrase. is that correct?

Mr. Robinson: I am wondering if it is the intention of the movers of the motion that they would construe the words "unreasonable or arbitrary interference" to preclude a mail opening by the RCMP.

Mr. Fraser: I would like to make a comment on that, as former Postmaster General.

The Joint Chairman (Mr. Joyal): Honourable John Fraser.

Mr. Fraser: Mr. Chairman, I will be very brief. and I am very pleased Mr. Robinson has raised that because as Postmaster General I made it very clear that I would be opposed to any unreasonable opening of the mail. and "unreasonable" is a very wide reaching word.

I think I would have to say in frankness to Mr. Robinson that there may be extremely limited occasions and only, in my view, related to an imminent question of national security in which mail opening might be necessary in the national interest under an emergency situation, but I think that it" that is to come, that has to be the subject of a special arrangement, special legislation which takes into account the concept of national security.

So I would say, in answer to Mr. Robinson, that I certainly would interpret the use of the word "correspondence" to strengthen the privacy of the mails in Canada against unreasonable and unwarranted interference.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Fraser.

[Translation]

The honourable Senator Asselin.

[Page 67]

Senator Asselin: Thank you, Mr. Chairman.

Mr. Lapierre has said it is premature to recognize this right. Does this mean that the courts have not handed down any judgments on these issues and, that, because it is new law, we cannot include it in the charter of rights, especially since the Minister has said that there is a bill before the House of Commons that is related to the resolution that we are presenting?

Is that what you meant?

Mr. Lapierre: With your permission, Mr. Chairman . . .

Senator Asselin: I have for this clarification because it seems to me that the arguments you have given do not warrant rejecting the proposal without giving it proper consideration.

Mr. Lapierre: I am not asking you to reject without giving it proper consideration, it is just that the notion of privacy is a new concept in law . . .

Senator Asselin: What is the basic objection to putting new rights in the charter?

Mr. Lapierre: We may well do so, and if you have a clear definition and are ready to take the chance, it will show up in the results of the vote. But we would prefer to let this right mature and include it afterwards.

Senator Asselin: We could discuss the maturity of a right at some length. Does the maturity of a right mean that we cannot legislate until the courts have established solid jurisprudence or should we pass legislation first and then ask the courts to test it?

Mr. Lapierre: You are doing more here than legislating.

Mr. Chrétien: Mr. Chairman, I have a brief comment to make on this.

This was discussed last week and Mr. Robinson referred to that time to Section 17 of the International Human Rights Act. In our charter, we attack this problem by referring to unreasonable search and seizure. To protect the privacy of citizens, we have included provisions in our charter that are not found in the international charter.

Insofar as the implementation of this right is concerned, there is legislation before the House of Commons at this time. I have already described what we are doing to protect privacy, but it is not necessary to include that particular right at this time. It is being considered by the House and is posing a number of problems.

The former Postmaster General has admitted that he too had a problem with this. The government has not yet decided to what extent we can examine letters and parcels entering Canada.

[Page 68]

There are problems of this sort that have not yet been solved. To protect privacy. we have included provisions dealing with seizures, arrests, etcctera. carried out by the police. So privacy will be protected from that angle.

There is just no need to include the vague term proposed by Mr. Robinson.

Later, when the legislation has matured, it will always be possible to include it in the charter.

To make things clearer and simpler, we are opposed to it at this time.

The Joint Chairman (Mr. Joyal): Thank you, Mr. Minister.

[Text]

Do I see that honourable members are ready for the vote? Mr. Fraser, before I call Mr. Robinson.

Mr. Fraser: Before I break the rules, am I allowed another intervention?

The Joint Chairman (Mr. Joyal): I see that you are certainly allowed another intervention, Mr. Fraser.

Mr. Fraser: Thank you, Mr. Chairman. I will make it short.

One of the things that I find difficult about Mr. Lapierre's assertion that this is a new notion is that it just is not a new notion. You can go back to the ancient statement that an Englishman's home is

his castle, which is all wound up in the concept that unless under law and unless under reasonable conditions, the privacy of a person in their own home has got to be respected. It is not a new notion when it has appeared in the United Nations Declaration of Human Rights and the International Covenant on Civil and Political Rights, to which we are parties in this country. The concept of privacy is not new. It is an old and longstanding concept. The whole law of trespass is based fundamentally on the concept of privacy, the right to not have the private use and enjoyment of your own property interferted with.

It is only new in the sense that it is now being put into a charter here in Canada at this particular Committee, but there is nothing new about the notion. The fact that we should assert it as a fundamental right is not something which is going to run against the conscience or the good sense of the vast majority of people.

The honourable Minister of Justice said that there are things that we have not yet resolved about mail opening. Perhaps the government he represents has not got it resolved in its own mind so far as mail opening is concerned. but the vast majority of Canadians do not want unreasonable and arbitrary interference with their correspondence, and I say "correspondence"; I am not talking about packages and other things that come in, and certainly things that cross the border, packages, goods those things are subject to investigation and examination by the customs officials, but correspondence is the transfer of thoughts from one free person to another.

[Page 69]

The notion that that is sacrosanct is a longstanding notion in Canada and just because some political science professors and law professors have gone back into old English history and said that it was not always honoured in ancient times is no reason to think that it has not been the tradition in this country. because it most clearly has been and the statutes from time to time, as amended. that have regulated the distribution of correspondence in this country, abided by by the Canadian Post Office, make it quite clear what we have had is an erosion of the principle by acts which. as far as I am concerned, were unwarranted, unreasonable and even worse, illegal.

The fact that this may also be treated in other ways in peripheral fashion is really no argument to not include it as a fundamental right.

Thank you, Mr. Chairman.

The Joint Chairman (Mr. Joyal): Thank you, Mr. Fraser.

Mr. Robinson, to conclude.

Mr. Robinson: Mr. Chairman, before concluding, I would just like to ask one supplementary question. if I may, of the Minister, and that relates to the point that I made earlier.

I would like to ask him to answer the following question with respect to his July 9, 1980 statement, Mr. Chairman.

I am referring directly now to the statement. The Minister stated:

In deciding which rights should be included in this Charter, we have selected only those which we feel reflect the central values of our society. Each of the rights we have listed is an essential ingredient for the Charter and all are rights which all Canadians should have, regardless of where they live in our country.

Mr. Minister, in the July 9, 1980 document, you included as one of those essential ingredients the right to privacy. What has changed your mind now on the importance of that as an essential ingredient and one of those which reflects the central values of our society?

Mr. Chrétien: The mechanism dealing with it will be found in the next clause dealing with unreasonable search and seizure. That is the way we found to be most logical.

Mr. Robinson: In the July document?

Mr. Chrétien: Yes; but we think it is sufficient to cope with the problem at this time. In the next clause you will find a satisfactory answer to the problem you have raised.

Mr. Robinson: To conclude, Mr. Chairman, with respect to the amendment, we would just like to deal with the concerns expressed by Mr. Lapierre who stated that because there was a lack of jurisprudence in this area of privacy and that it was not clearly defined and was not mature, I think he said, that we should not include it.

[Page 70]

Well, by that logic, Mr. Lapierre, through you, Mr. Chairman, why are we including the concept of fundamental justice. a concept around which there is no jurisprudence and which has not been legally defined and which has certainly not matured?

If that is your criterion, you voted to include that, Mr. Lapierre: so did I. I think it was sensible. So, those particular arguments, surely, would have applied. You say it is premature to include it in the constitution. This concept is one which was recognized before by the community of nations in 1948 in the United Nations Declaration on Human Rights. Canada became bound to accept the recognition of the principle of the protection from unreasonable interference with privacy in 1976 and in the document which Canada has tabled before the United Nations Human Rights Committee, in our commentary on Article 17, it is stated that we recognize the individual's right to his privacy and reputation.

Well, if you do not know what it is, then how can you make a statement in your report to the United Nations Human Rights Committee that you recognize it, if your statement that you do not even know what it is has any substance whatsoever?

This is a fundamental right of all Canadians. As the Minister said in July, it is an essential right which should be recognized in a statement of fundamental rights and freedoms.

In dealing with the question of correspondence, certainly we believe that first class mail should be inviolate. Mr. Fraser has defended that right in his tenure as Postmaster General defended it, I say quite frankly, from the more aggressive moods of his colleagues at the time.

> Mr. Chairman, this right is one which Canadians are entitled to, and I would hope that members opposite would recognize that—recognize the jurisprudence and vote for this amendment.
>
> **The Joint Chairman (Mr. Joyal):** Thank you very much, Mr. Robinson.
>
> **An hon. Member:** Mr. Chairman, could we have a recorded vote?
>
> **The Joint Chairman (Mr. Joyal):** Yes.
>
> Amendment negatived: Yeas, 9; Nays, 14.
>
> **The Joint Chairman (Mr. Joyal):** I would like to call the vote on Clause 7 as amended.
>
> Mr. Robinson.
>
> **Mr. Robinson:** Mr. Chairman, just one question on Clause 7 as a whole and that relates to a concern which was expressed to us by the Canadian Advisory Council on the Status of Women and a number of other national women's groups in this country.
>
> Will you confirm, Mr. Minister, that, even though the change in the words from "everyone" to "every person" was not made, that it is your intent that in no way should this
>
> *[Page 71]*
>
> particular clause in any way affect the right of women to obtain an abortion?
>
> **Mr. Chrétien:** This does not affect that situation. There are laws in the land about abortion.
>
> **Mr. Robinson:** And this clause would not affect that in any way?
>
> **Mr. Chrétien:** in our view, it would not.
>
> Clause 7 as amended agreed to.

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February 20, 1981: Walter McLean, Debate in the House of Commons, p. 7525 (click HERE)

> **Mr. McLean:** […] They go on in another thoughtful recommendation, which is before the government, to suggest that Clause 7 be amended to include the right to equality of economic opportunity.

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March 5, 1981: Tom Siddon, Debate in the House of Commons, p. 7952 (click HERE)

Mr. Siddon: These people are being led to believe they can move back and forth between provinces and seek employment. But if you read the Subsections of that clause, people will be denied that right, if there are laws or practices in general force which would deny that right. So it is a sham.

Similarly in Clause 7, which reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

—we are qualifying everything. We are pretending we are granting people something which, under our system of common law, they have enjoyed in this country for decades.

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March 12, 1981: Girve Fretz, Debate in the House of Commons, p. 8160 (click HERE)

Mr. Girve Fretz (Erie): Madam Speaker, I rise to move a motion under the provisions of Standing Order 43. Recognizing that Clause 7 of the proposed charter of rights purports to guarantee "everyone the right to life" but that in the recent case of Dehler v. Ottawa Civic Hospital, on which leave to appeal to the Supreme Court of Canada has now been denied by that court, our courts have indicated that unborn persons are not recognized as protectable persons, and fearing that the entrenchment of the proposed wording would render it unconstitutional for the Parliament of Canada to enact legislation to protect unborn Canadians, I move, seconded by the hon. member for Grey-Simcoe (Mr. Mitges):

That Clause 7 be amended to read as follows: Everyone, including unborn human beings, has the right to life. Everyone has the right to liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[Page 8161]

Madam Speaker: Is there unanimous consent for this motion?

Some hon. Members: Agreed.

Some hon. Members: No.

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March 19, 1981: Sinclair Stevens, Debate in the House of Commons, p. 8423 (click HERE)

Mr. Stevens: There are other changes, though. The proposed charter provides that everyone has the right to life. The effect of Clause 7 will be to strengthen the hand of the pro-abortionist faction. Let me explain. To date the Canadian courts have determined that the words "person" and "human being" do not include the unborn child, with the result that a child must be born before it can assert rights. The proposed charter reaffirms this interpretation by not explicitly providing for the right

to life of the unborn child. Because of this omission, the right to an abortion will be virtually entrenched in our Constitution.

Girve Fretz, p. 8438

Mr. Fretz: The proposed charter provides that "everyone has the right to life." The effect of this clause will be to strengthen the hand of the pro-abortionist faction. Let me explain. To date the Canadian courts have determined that the words "person" and "human being" do not include the unborn child, with the result that a child must be born before it can assert rights. The proposed charter reaffirms this interpretation by not explicitly providing for the right to life of the unborn child. Because of this omission, the right to an abortion will virtually be entrenched in our Constitution. Once the charter is in place, Canadians will be locked into rights and relationships permanently, far beyond what may be fully understood today. In light of this, it is better the charter be amended specifically to deal with the rights of the unborn and the assertion of those rights prior to birth, rather than leave it to the courts only to find later that a constitutional amendment is required. Therefore, clause 7 might be amended to read as follows: Everyone, including the unborn, has the right to life, which life begins at conception and which right is assertable from conception. Everyone has the right to liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.

In light of this, it is better the charter be amended specifically to deal with the rights of the unborn and the assertion of those rights prior to birth, rather than leave it to the courts only to find later that a constitutional amendment is required. Therefore, clause 7 might be amended to read as follows:

Everyone, including the unborn, has the right to life, which life begins at conception and which right is assertable from conception. Everyone has the right to liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.

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