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Compilation of primary documents to assist in interpreting the meaning of the Remedies Clause in Section 24 of the *Constitution Act, 1982*

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24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

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PART 1:

Enforcement & Remedies Clause in Successive Drafts of Section 24 of the *Constitution Act, 1982*

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

Omitted

(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)[1]

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22 August, 1980: "Discussion Draft"[2]

> 27. Where no other legal recourse or remedy is available, anyone whose rights or freedoms as declared by this Charter have been infringed or denied to his or her detriment has the right to apply to a court of competent jurisdiction to obtain relief or remedy by way of declaration, injunction, damages or penalty, as may be appropriate and just in the circumstances.

(Source: Robin Elliot, "Interpreting the Charter—Use of the Earlier Versions as an Aid", *University of British Columbia Law Review* (1982), Click HERE.)

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2, 5, or 6 October, 1980[3]: Draft Tabled in House of Commons and the Senate

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1 Original not currently available. Discussion draft found in Anne Bayevsky, *Canada's Constitution Act 1982 & amendments: a documentary history* (1989).

2 Elliot calls this the first version of the Charter.

3 Date for this draft is uncertain. Elliot places it as October 5. Parliament was only opened on October 6, 1980 when it was tabled. As for the October 2 date, it refers to "The document entitled 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada' published by the Government on October 2, 1980" which appears as the title of every issue of the Special Joint Committee on the Constitution.

> 26. No provision of this Charter, other than section 13, affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto.

(Source: Canada, Parliament, "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" in Sessional Papers (1980). Sessional Paper 321-7/20. The text is found on p. 8. Click HERE.)

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12 January, 1981: Draft Submitted to Special Joint Committee on the Constitution by Jean Chrétien

> 24. Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(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). The text is found on p. 19. Click HERE.)

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13 February, 1981: Draft Tabled in the House of Commons

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (i), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

(Source: Canada, Parliament, *House of Commons Journals,* 32nd Parl, 1st Sess, 1981. The text is found on p. 1255. Click HERE.)

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23/24 April, 1981: Draft Submitted to Supreme Court for *Constitutional Amendment Reference*

No change.

(Source: Canada, Parliament, *House of Commons Journals*, 32nd Parl, 1st Sess, April 23, 1981. The text is found on p. 1749. Click HERE & Canada, Parliament, *Journals of the Senate*, 32nd Parl, 1st Sess, April 24, 1981. The text is found on p. 1158. Click HERE.)

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November 18/20, 1981[4]: "November Accord Version"[5]

No change.

(Source: Canada, Parliament, *House of Commons Journals,* 32nd Parl, 1st Sess, 1981. The text is found on p. 4013. Click HERE.)

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December 2, 1981: Final Version

No change.

(Source: Canada, Parliament, *House of Commons Journals,* 32nd Parl, 1st Sess, 1981. The text is found on p. 4316. Click HERE.)

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[4] Elliot has the date as November 18. Source is from November 20.

[5] As titled by Robin Elliot, *op cit*.

PART 2:

Debates on an Enforcement & Remedies Clause

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November 18, 1980, Professor Max Cohen (Chairman, Select Committee on the Constitution of Canada of the Canadian Jewish Congress) & Professor Joseph Magnet (Special Advisor, Canadian Jewish Congress), 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. 7, p. 99 (click HERE)

> **Professor Cohen:** […] Finally, we come to two new ideas in the presentation, one is the question of enforcement and the other is the question of the emergency doctrine. I think I will let Professor Magnet speak to the enforcement issue since he made some enquiries based upon our concern that the only way you can enforce this charter now is to wait for a case to come up in the ordinary civil or criminal way, but what happens if somehow there is harm done or on its way to being done and you do not have an ordinary civil or criminal proceeding en route. Perhaps you would just like to speak to that Professor Magnet.
>
> **Professor Joseph Magnet (Special Advisor, Canadian Jewish Congress):** […] We have any numerous examples of this, but to take the two most obvious, the Hogan case in the Supreme Court of Canada, it recognized the violation of legal rights under the Diefenbaker Bill of Rights, the court said: Well, we see no remedies clause here, we cannot grant a remedy.
>
> Similarly, as you know, under Section 23 of the Manitoba Act there is a proscription there that acts be published in English and French. What is the remedy for failure to comply?
>
> Well, we think that to deal with problems like this, as well as the full panoply of rights which will be entrenched in the charter, that an enforcement clause is crucial, that the charter would be hollow without it and we think that this is in
>
> [Page 100]
>
> conformity with our international obligations under the Covenant on Civil and Political Rights, the text of which is set out for you. There is also a right in the Covenant to damages which is set out for you in the brief.
>
> We are concerned that the courts not run wild with enforcing the charter. We do not think that the charter applies fully to the private sphere. We do not think that the charter constitutionalizes tort law, nor do we think it constitutionalizes contract law or property law. We do not think that if a particular person does not receive an invitation to a Scottish home, for example, that he has a right

> of action under the constitution. We restrict our submission in the enforcement clause to public authorities.
>
> Similarly, we note that the enforcement clause we have proposed entitles the court to grant mandatory relief, that it can order the public authority to redress the right to grant a remedy as well as injunctive relief in cases of default, ind our enforcement clause is, on page 14. Everyone entitled in law to the performance by a public authority of an act or omission shall, in cases of actual or threatened default, be entitled to full and effectual relief by mandatory or restraining order of a superior court to compel the performance of the act or omission. Pecuniary compensation shall be awarded in appropriate cases.

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November 24, 1980, J.P. Humphrey (President, Canadian Human Rights Foundation), 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. 11, p. 29 (click HERE)

> **Mr. J.P. Humphrey (President, Canadian Human Rights Foundation):** […] We will look very silly indeed as a nation if the great charter of rights that is to be entrenched in the constitution, and which will presumably remain entrenched there for some time, does not even protect those rights which Canada is bound by international law to respect and to ensure, if the proposed charter of human rights does not come up to international standards, which we have recognized and by which we are bound.

Francis Young (Legal Advisor, New Brunswick Human Rights Commission), p. 33

> **Mr. Young:** […] I would now like to turn to the question of violation of the charter. The proposed text is grievously lacking. In some cases, citizens cannot take advantage of guaranteed rights while under other provisions, they cannot exercise their rights efficiently.
>
> Section 25 should state that any law, regulation or order in council that is inconsistent with the provisions of this charter is, to the extent of such inconsistency, inoperative and of no force or effect. This would mean that what could not be done directly by a law, could not be done indirectly through a regulation.
>
> It is also essential that Section 25 outlaw activities which violate the provisions of the charter as most of these sections will probably be infringed upon more often by government activities than by anti-constitutional legislation.
>
> Also, a new section should be added to the charter to provide for efficient recourse, like injunctions, statements, inadmissibility of evidence and damages. This recourse is necessary for the application of sections 8 and 9 and of paragraph 11(d) which, because of their special wording, cannot be implemented at all by section 25. Even if this additional recourse were to be added, there would still be no guarantee that anyone could take advantage of it, at least under the sections of the charter which do not affect particular individuals.

> For example, an individual would not necessarily always be able to go before the courts if the obligation to publish the House of Commons proceedings in both official languages were not respected.
>
> The charter would have to give all individuals the right to take legal action even if the violation did not affect him or her as an individual.
>
> Also, Section 26 should be struck and the court should be given the discretion of admitting evidence based on the specific circumstances.

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November 25, 1980, Jean Lapierre & W. Janzen (Director General, Ottawa Office, Mennonite Central Committee, Canada), 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. 12, p. 53 (click HERE)

> **Mr. Lapierre:** […] Before we go any further, could you tell me what is your position with regard to enshrining basic rights?
>
> You did not make any statement on the principle itself, do you favour enshrining basic rights or not?
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> [Page 54]
>
> **Mr. Janzen:** […] We would like firmer protection; whether it takes the form of enshrinement is best for you as a Committee. to decide. But we would mainly seek firmer protection.
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> **Mr. Lapierre:** I think that entrenchment provides the best way to ensure greater protection.

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November 27, 1980, Guy Lafrance (Legal adviser, Montreal Urban Community Police), 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. 14, p. 7 (click HERE)

> **Mr. Guy Lafrance (Legal adviser, Montreal Urban Community Police):** […] The main reason why we think it should not be enshrined in the Canadian Constitution is that Parliament, and not the courts, are responsible for the definition of citizens' rights. If this charter is included in the Canadian Constitution, we think that Parliament will abdicate this part of its responsibilities in favour of judiciary powers.

Roderick McLeod, Q.C. (Assistant Deputy Attorney General of Ontario), p. 11

Mr. McLeod: […] I think it perhaps would be most helpful if I were to leave those with the Committee as they appear before you in the brief and move through to the end of the brief, at this point, to Section 26, which has been referred to as the evidentiary provision in the Charter. As the members of the Committee I am sure are aware, in earlier drafts of this Charter that were under consideration earlier in this process there was in place of Section 26 a very broad remedies section which in effect gave to any person who thought that his or her rights had been infringed the power to apply to a court for whatever relief that person thought was appropriate and, most importantly, whatever relief the court thought was appropriate.

The current provision is indeed very different from that remedies provision and it is our respectful submission to you that the current provision is far and away better than the earlier drafts and there ought not to be any change to it. Perhaps of more help, I would hope at least, to you, is a factor that may have gone untested or unlocked at in some respects. If we have properly perceived some of the submissions that have been made to you, it has been suggested by some, including the Canadian Civil Liberties Association, that to leave Section 26 as it now is would amount to an enshrining or an entrenching of the admissibility of illegally obtained evidence. It is our respectful submission to you that the wording of Section 26 does nothing of the kind. It no more entrenches or enshrines the admissibility of illegally obtained evidence than it does enshrine or entrench the inadmissibility. What it does is it leaves the law of evidence to the type of evolution that we have been used to in this country, that is a combination of parliament and the courts

It may well be that 10 years from now, or 20 years from now, Parliament would decide in its wisdom that it is appropriate to move to a different law of evidence than we now have in Canada. It may be that judicial interpretation of the existing laws of evidence in Canada will result in a form of evolution that will move towards a different rule, but it is our respectful submission that it really is not right to say that the existing wording amounts to an entrenching of the admissibility of illegally obtained evidence. Those are our comments, Mr. Chairman, and members of the Committee with respect to at least those two of what we perceive to be important points and we will be happy to try and answer any questions that you have.

Donald Munro, Roderick McLeod, & Guy Lafrance, p. 24

Mr. Munro: […] With those two reservations, Mr. Chairman, I would like to again ask the two witnesses, as well as thanking them for appearing and for their evidence, the distinction particularly that Mr. McLeod makes about you cannot be black and white about entrenchment. The Chiefs of Police were quite clear in their statement right at the very beginning by stating that they were of the firm opinion that a Canadian charter of rights and freedoms enshrined in a constitution is neither necessary nor desirable. That is right at the opening of their statement.

[…]

Mr. McLeod: […] Perhaps the best way to look at it is to take an example. If one assumes that there is a charter of rights with a clause in it guaranteeing a freedom of religion and a government official of some kind denies, let us say, a certain organization the status of tax exemption or the right to solemnize marriages or something of that nature, and that citizen feels his rights under the Charter have been infringed, he would take action in the courts and the court would make a ruling. Now, if there is complete and full entrenchment with Parliament having no

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right to clarify and define, then it would be the court and only the court that would define what freedom of religion means.

If, on the other hand, Parliament shared that role with the courts in the fact situation that I have given, let us assume that the court ruled in the man's favour and overturns the action of the government against this man. After having done that, the legislature of the province in question would be free to legislate so as to define or clarify what was meant by freedom of religion. If that were to take away some of this man's rights, if he thought it did, he could go back to the court and ask the court to overturn what the government had just recently done. The court on that second occasion would then decide whether the provincial legislation was legislation which defined or clarified freedom of religion or whether it was legislation that abrogated the right to freedom of religion. If it was the latter, the court would have the power to strike down the legislation; if it was the former, the court would not because Parliament would have played its role of clarifying or defining that right. That is the type of distinction we seek to make with respect to Section 1.

With respect to the balder question of entrenchment, we as an association do not take the position on the simple question: shall you entrench or shall you not? We have tried to explain to you that we do not take a position on that because, in our respectful view, you cannot take a position on that. You have to know with more precision what you are talking about and that is why we tried to direct our submissions to the wording.

[…]

Mr. Lafrance: Mr. Chairman, as far as we are concerned, I think our submission means that a Charter of Rights and Freedoms should not be entrenched in the Constitution. That power rests fully with Parliament and the legislatures, and they are the ones to decide what are the rights of all citizens.

There is however, a daily, very practical issue. If the Charter were included in the Canadian Constitution, it will be extremely long before any amendments, brought about by some events which could be detrimental to the whole society, can be made, while the Parliament of Canada being elected must know the needs of the population, the rights which should be respected, and which rights and freedoms should be defined in certain circumstances and conditions.

This power rests with Parliament and not with the courts. That is our view.

Angus MacLean (Premier, Government of Prince Edward Island), p. 82

Mr. MacLean: […] One argument against entrenchment is that in the course of deciding what is meant by a broad phrase such as freedom of religion, judges will be asked to make decisions which shape the character of our community. I maintain these decisions should be made by the elected representatives of the people. I recognize that this is an arguable point, there are good arguments on both sides of the issue, and that neither one is perfect; but inflexibility or rigidity is not the problem of my government, I perceive it as a problem on a different level.

George Henderson, p. 94

> **Mr. Henderson:** […] (4) We believe that the rights of all Canadians should be protected through a constitutionally guaranteed charter of human, democratic and political rights. Even with our historic traditions, it is a mistake for Canadians to take these rights for granted. Such a charter would protect all of us, individually and collectively, from any government encroaching upon or denying civil liberties. Ontario Progressive Conservatives have always believed that equality before the law, protection from unlawful arrest, freedom of speech, freedom of assembly, freedom of thought, freedom of religion, are basic to a tolerant and free society of which we in Ontario have every right to be so proud. The way to ensure that society is "to enshrine" basic rights within the constitution where it cannot be readily changed by a given parliament or legislature.

Angus MacLean, p. 102

> **Mr. MacLean:** […] [T]he constitution of this country includes not only the British North America Act, but also conventions, practices and understandings which have become universally accepted, and that just because something is not specifically covered in the law, for example, is not a reason to say that it does not exist.
>
> If I might digress for a moment, this is one of the dangers in trying to enshrine everything that comes to mind in a constitution because it is almost impossible to anticipate and to make provision for all the possibilities which may occur in the future; and if the interpretation of what is meant is left
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> [Page 103]
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> entirely to the courts, you may have a situation where something may be legal according to the constitution, but not reasonable

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November 28, 1980, A. William Cox, Q.C. (President, Canadian Bar Association), 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. 15, p. 5 (click HERE)

> **Mr. A. William Cox, Q.C. (President, Canadian Bar Association): […]** The Canadian Bar Association welcomes this opportunity to appear before the Joint Parliamentary Committee to discuss matters that are of particular concern to our association. We are already on record that the patriation of our constitution and the enshrinement of a Charter of Rights therein are long overdue, but we must register a caution. The drafting of a constitution and the enshrinement of rights in that constitution must be done with great precision and care. We must not, in seeking to preserve our freedom, curtail it through the use of obscure and ambiguous language.

J.P. Nelligan (Chairman, Special Committee on the Constitution of Canada, Canadian Bar Association), p. 9

> **Mr. J.P. Nelligan (Chairman, Special Committee on the Constitution of Canada, Canadian Bar Association):** […] Now, in addition there are some rights which we feel are missing. The right to enjoy property and not to be deprived of it except by due process is now in our Bill of Rights but does not appear in the new charter. We also note the absence of the twin rights of privacy and information. We had recommended that the constitution protect the privacy of the individual against unreasonable interference and ensure reasonable access to all public information in the possession of governments.
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> Now, while the right of privacy may be afforded protection under Section 24, which retains other existing rights, we would have preferred an express provision.
>
> Now, on the question of enforcement, we are very concerned that there is no actual mention in the proposed charter of the status of the courts. in our view we must have independent courts to enforce a bill of rights. We recommended in particular that the existence and independence of the Supreme Court of Canada should be enshrined. We also feel that the right of access to the courts to enforce the charter and the independence of the courts should be guaranteed. If this were not the case, the whole purpose of entrenchment would be destroyed.

Svend Robinson, Victor Paisley (Chairman, Civil Liberties Section, Canadian Bar Association), & L. Yves Fortier (National Treasurer, Canadian Bar Association), p. 20

> **Mr. Robinson:** […] My final question relates to a matter which is touched upon somewhat peripherally in your brief and that is the question of remedies.
>
> Would you agree that in light of both the 1978 report and also your brief that the proposed Charter as drafted now simply does not contain adequate provision for recourse by citizens whose rights have been violated, to the courts, and that they may be able to obtain adequate remedies; that there should indeed be some much clearer formulation of the right of access to citizens to the courts to obtain remedies for violation of these rights rather than simply stating that the law is inoperable.
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> […]
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> **Mr. Paisley:** Yes, I think that that is a very key issue. Our report considers it at page 9 and in the same breath that we
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> *[Page 21]*
>
> refer to the recommendation that the constitution should guarantee access to enforce the Bill of Rights we point out in the very next sentence that this was also why among other reasons our report recommended that the existence and independence of the courts, and in particular the Supreme Court of Canada, should be enshrined.
>
> I think it is safe to say that when you are drafting a constitution you should take the long view, and an examination of the history of the United States Supreme Court and the efforts of an early

administration to pack that court in order to get its way might give rise to the determination that our courts should be entrenched in a manner that will not permit any tampering with it. That is point number 1.

Point number 2, access is in fact denied where civil rights to a fair hearing are excluded under the existing Bill of Rights. The provision contained in Section 2 of the Canadian Bill of Rights provides that every law of Canada shall be construed and applied to guarantee the right of a person to a fair hearing in accordance with the principles of fundamental justice.

Under the present proposed Charter it is only in a criminal trial that the right to a fair hearing is guaranteed, so a person may be deprived of his property or civil rights without any guaranteed access or remedy to the courts.

Thirdly, we should point out that one of the remedies that the court might otherwise have available to it is to exclude evidence unlawfully or improperly obtained, and there is precedent under our existing law for the state to deprive a person of a guaranteed right and for the evidence thereby obtained to be admitted. That is clear law as it now exists. This provision that is going to be entrenched in Section 26, forbids the court from enacting or interpreting the law in a way that would deprive the state of the fruit of the poison tree, as it were.

So, for those three reasons, we have pointed out grave deficiencies with respect to access and remedies.

[Translation]

Mr. L. Yves Fortier (National Treasurer, Canadian Bar Association): Mr. Chairman, I would like to add a few comments to Mr. Paisley's, though I agree with him. We should be remindful of the fact that section 25 provides for the inoperability of provisions inconsistent with any other rule of law. It seems to us that if any piece of legislation was contrary with any provision of the charter, such inconsistency should give right to remedy for damages before the courts. I would like to point out some contradiction in the French version and the English version of section 25.

In English, section 25 provides that "any law that is inconsistent with" which has been translated into or from French by [Text]"it is a law"? [Translation] We have tried to figure out whether a law or a rule of law was the same thing.

L. Yves Fortier, p. 23

Mr. Fortier: […] [W]e recommend the enshrining of certain fundamental rights.

Jacques Viau (Chairman, Special Committee on the Constitution of Canada, Canadian Bar Association) & James McGrath, p. 28

Mr. Viau : […] The Constitution should guarantee access to the courts to enforce the Bill of Rights.

[…]

Mr. McGrath: In order to give the courts that power, and if you were to enshrine the independence of the courts in the constitution, then I would expect that you would advocate a change in the appointment process?

[Translation]

Mr. Viau: Mr. Chairman, that is what I have stated. I realize that there has been some discussion and that the constitutional meeting last year apparently stalled on that very question of appointments. A variety of proposals have been made. In our report, there is even an entire chapter devoted to the Supreme Court, There, we make reference to the American system and suggest that a reformed Upper Chamber could be the body responsible for choosing and accepting judges appointed to the Supreme Court. That may be the most equitable way to proceed because there would probably be some difficulty in reaching unanimous agreement among the provinces on the choice of appointments to the Supreme Court.

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December 4, 1980, Phillip Hammel (President, Canadian Catholic School Trustees Association), 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. 19, p. 7 (click HERE)

Mr. Phillip Hammel (President, Canadian Catholic School Trustees Association): […] We are particularly fearful because we recognize that the courts will, in the final analysis, determine the specific applications of these sections, and we are not unaware of developments in the United States where a similar dependence on the courts has ultimately reached the point where prayer is banned from an educational system originally founded in a Christian religious context. We are fearful that emphasis upon individual rights by the courts would erode group rights—such as rights in regard to: staffing policies and practices, enrolment criteria, prayer and religious practices in schools, extension of Catholic schools where some are now limited to specific grade levels, and indeed, participation in public funding to such an extent that Catholic denominational schools would remain Catholic in name only.

[…]

Finally, although Section 24 indicates that the Charter is not intended to affect any rights now existing in Canada, we are fearful that the primacy of the Charter, coupled with interpretations and reinterpretations made by courts in the

[Page 8]

future, poses a serious threat to the meaningful existence of Catholic Schools.

James McGrath & Phillip Hammel, p. 9

Mr. McGrath: […] I would like to ask you, Mr. Hammel, or one of your colleagues, how you feel about the principle of entrenchment in terms of addressing your concerns with regard to individual rights having paramountcy before the courts with respect to group rights, and, of course, we refer specifically, as you do, to Section 2 of the Charter dealing with freedom of conscious and religion.

[…]

Mr. Hammel: I am not sure whether I can answer your question directly. I think our major concern is that the group rights are, indeed, provided for. We have not addressed the question whether or not there should be a Charter of Rights.

The important thing is if there is a charter, then, indeed, the group rights, the minority rights, must be entrenched; for, as I say, I think the majority will always look after itself.

But whatever the case may be, our minority rights, we believe, are important.

Mr. McGrath: Then how do we avoid getting into the kind of situation which has developed in the United States where, for example, in certain instances, the Lord's Prayer recited in the classroom has been ruled by the courts to be unconstitutional?

[…]

The question is: if we are to entrench a Charter of Human Rights in the constitution, how do we avoid the situation whereby the courts of this country will, in fact, be almost in a position of a parallel legislature in terms of defining new laws by the constitution; for example. you could be restricted as to your hiring practices; as to your conduct in the classroom. I have cited the instance in the United States where the recitation of the Lord's Prayer has, in certain circumstances, been declared unconstitutional.

That is a dilemma I find myself in I am very much in favour of fundamental human rights being protected by law, but I have this dilemma.

Mr. Hammel: I think whatever approach is taken, whether the statute approach or the Charter of Rights and Freedoms one, I think we simply have to recognize that there are individual rights, and then there are, in our case, organized group rights. In this case, we are dealing with denominational group rights, although, for example, as a Roman Catholic I do not in any way tend to judge anyone's right to freedom of conscience, I do feel that when he does not abide by what the Roman Catholic religion teaches, then he is no longer a Roman Catholic, and, therefore, does not have the rights of the group.

So I think we have to approach it from that particular point of view, that there are certain group rights which are at least equal to, or, perhaps, supreme over some individual rights.
I do not think we can simply make it sound as if the individual rights are total.

Lorne Nystrom, p. 13

> **Mr. Nystrom:** […] I am very happy to see that in there because last spring or summer I asked the Prime Minister a question in the House about enshrining collective rights in our constitution. He threw back the question at me, well, what are collective rights, how do you define collective rights?
>
> So, I think this morning, you have given us another definition of collective rights. We have had before, as Mr. Chairman knows, a number of groups before our Committee arguing that We have collective rights in terms of language legislation in the Official Languages Act. the French language and the English language. We have also had a number of aboriginal groups before this Committee the last few days talking about the need for their collective rights being enshrined in the constitution.

Jake Epp, p. 19

> **Mr. Epp:** […] [A] problem could arise if an atheist were denied employment with a denominational schoolboard because of his beliefs, and it is now impossible to predict how the courts would rule on this matter.

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December 8, 1980, Chris Speyer, Norman Whalen (Vice-Chairman, Canadian Federation of Civil Liberties and Human Rights Associations) & Edwin Webking (Chairman, Canadian Federation of Civil Liberties and Human Rights Associations), 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. 21, p. 20 (click HERE)

> **Mr. Speyer:** […] Gentlemen, I agree with you that if you believe in the value of entrenchment in the Charter of Rights, that this particular document is very badly drafted.
>
> I would like to direct a comment to you. Mr. Tarnopolsky in his writing has said that one of the failures of the Diefenbaker Bill of Rights was that we, as legislators, did not give a sense of direction to the courts as to what we wanted the courts to do in the event that there was a violation of those rights.
>
> Do you accept the criticism that if we are going to have a Charter of Rights that we should have included some type of remedies when there is a breach of those rights?
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> **Mr. Whalen:** I do not necessarily think that follows. It may give some assistance, but I do not think it is normal in constitutions to find this type of penalty clause, although it is normal in legislation. I think the greatest failing of the Diefenbaker Bill of Rights was the very fact that it was only an act of the Parliament of Canada, and was not part of the constitution. It was not entrenched.
>
> **Mr. Speyer:** Surely, the freedom of speech and the freedom of assembly, which are included in the Diefenbaker Bill of Rights, have the same rational impact as that which is in the Charter of

Rights, and the difference is what interpretation the courts are going to place and what remedies the courts are going to give for a violation of those rights.

Mr. Whalen: I agree with you up to a point. Are you suggesting that there should be a penalty clause in the constitution so that if you breached clause one you will have a fine of fifty dollars?

Mr. Speyer: No, no. I was just wondering whether you had given any thought to the provision of remedies.

Mr. Whalen: No, we have not given any thought to that matter.

Mr. Webking: My only reaction to that would be that the act of entrenchment is itself such a process in constitutional law that it would not be necessary to provide remedies or penalties, for that matter, because the direction that you noted as criticism relative to the Diefenbaker Bill would be eliminated or done away with simply by making that particular a piece of legislation the supreme law or part of the supreme law of the country. Then, anybody who felt that they were being denied whatever that piece of legislation guaranteed them, could take action to pursue a remedy through the courts, if that were the way they were advised to go.

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December 9, 1980, David Copp (Vice-President, British Columbia Civil Liberties Association), 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. 22, p. 107 (click HERE)

Mr. Copp: […] The third main issue which I wish to raise is that the proposed Charter provides inadequate remedies to persons whose rights are infringed by official action. A charter with the remedies of this Charter will turn out to be a hoax for many persons in many circumstances. I refer now to Sections 25 and 26.

First. Section 25 reasonably provides that laws that are inconsistent with the Charter are, to the extent of their inconsistency, inoperative. This does not go far enough, because many official standards which are not laws may be objectionable. For instance, a rule within a penitentiary could authorize a cruel punishment. In this case, a court asked to protect inmates in light of Section 12 of the Charter should have the power to strike down the offending tule without having to interfere with any statutes.

Accordingly, we suggest that Section 25 be amended to follow Section 26 of the discussion draft of August 22, which reads "that any law, order, regulation or rule that authorizes, forbids or regulates any activity" in a manner inconsistent with the Charter may be declared inoperative.

The existing Charter provides no remedy for any violation of the Charter other than the striking down of legislation. Section 26 even eliminates the possibility that the courts might rule that evidence obtained in a way that violates the Charter is inadmissible in a legal proceeding. The result is that rights in the Charter are explicitly protected only from legislative infringements.

It is obvious, however, that many official actions not explicitly authorized by legislation can be in violation of the Charter. For instance, administrative officials and public agencies could violate the Charter by their actions and there may be no remedy available to aggrieved persons.

Consider Section 8, which sets out one of the legal rights. It prohibits unlawful search and seizure.

Leaving aside for the moment our objections to the wording of that section, it is clear that it means nothing at all unless someone who has been subjected to an unlawful search has some recourse. Testimony before the MacDonald Commission has revealed that between 1972 and 1976 many premises in British Columbia were searched by police without any legal authorization, and I should add that in most cases the searches did not lead to the conviction of anyone for any offence.

Again, consider Section 10(b) which requires that someone who is arrested has the right to retain and instruct counsel without delay. The existing Bill of Rights contains a similar guarantee, but in a 1975 case, *Hagan versus the Queen*, it was found that a person has no remedy if that right is violated.

Surely we need not argue that remedies are required and that it would be valuable to list them. Accordingly we recommend the wording in Section 27 of the discussion draft which

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allows a person to apply to the courts to obtain relief or remedy by way of declaration, injunction, damages or penalty.

Now, in many cases the Charter could be violated in the course of obtaining evidence that someone has committed an offence. In many such circumstances the only effective remedy would be for the court to refuse to admit such illegally obtained evidence. Section 26 would prevent the courts from providing this remedy even in the most extreme circumstances.

Accordingly, in order to give full effect to the legal rights, we believe that at the very least Section 26 should be deleted so that the courts may exclude evidence gained by means of violation of the Charter if they think it is appropriate.

Ideally we think Section 26 should be amended to provide that evidence obtained by means which infringe upon or violate the rights listed in the Charter shall not be admissible in judicial and quasi judicial proceedings. This, the exclusionary rule, is necessary because the use of illegally obtained evidence in obtaining convictions discredits the judicial process and the law enforcement system and would undermine respect for the Charter of Rights.

Convictions for illegal acts should not rest on grounds themselves tainted by illegality.

Let me conclude with the remark that far from democracy being inconsistent with an entrenched Charter of Rights, the substance of democracy in a pluralistic society depends on the security of the rights we all wish to see entrenched. The real choice is between principle and power.

Svend Robinson & William Black (Member of Executive Committee, British Columbia Civil Liberties Association), p. 116

> **Mr. Robinson:** […] Now, on that question there some who suggest, including the Canadian Association of Chiefs of Police, that you do not need a remedies section, because there is already provision, for example, for the laying of criminal charges against police officers who violate the law or the provisions of the proposed charter.
>
> What would be your comment on the suggestion that we do not need a remedies section, and that it is sufficient to have laws rendered inoperative which violate the proposed Charter?
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> **Mr. Black:** Our answer to that, I guess, would be that the whole concept of a charter of rights is based on the assumption that we cannot assume that all the rights which would be available to us at this moment would be available to us forever.
>
> The whole principle of entrenchment is that at some future date, for some unforseen reason, the rights which now exist, or even the common law remedies which now exist, may be restricted by an act of parliament or a provincial legislature or by some other means.
>
> And that is why we need an entrenched charter of rights.
>
> So, of course there are other means to protect rights in Canada. Canada has rights now. The danger is that those rights can be taken away so easily. We are in favour of an entrenched bill of rights in many cases, not to create new rights or extend them, although in some cases we have made recommendations along those lines; but to ensure that the rights we now have will also be available in the future.
>
> **Mr. Robinson:** Presumably, though, you would agree that, without a remedies section, many of the rights which Canadians might think they would have, would, in practice, be nonexistent.
>
> **Mr. Black:** As Professor Copp has pointed out, many of the sections refer, not to law, but to the acts of public officials, that a person arrested should be informed of the reason for his arrest and so on. It is public officials, rather than law which would take away those rights.
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> Yet, the only remedy is Section 25 which refers to discriminatory laws, without giving any remedy with regard to discriminatory acts by public officials.

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December 11, 1980, Jean Lapierre & Peter Maloney (Member of the Executive Committee, Canadian Association of Lesbians and Gay Men), 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. 24, p. 36 (click HERE)

> **Mr. Lapierre:** […] The only thing that bothers me a bit is that you have recommended that an independent commissioner be appointed. I thought that the legal interpretation and enforcement

of the charter was to be left up to the court. I am not convinced that it would be constitutionally appropriate to appoint an independent commissioner.

I do not know whether you have really thought about this or whether you are just paying lip service.

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Mr. Maloney: Yes. We have some difficulty with leaving it to the courts. Our experience with the courts is that litigation is an extraordinarily expensive and time-consuming thing.

Individual cases can surely be brought, but it has been our experience that most of the discrimination in this country is in fact structured and built in, as it were. One needs a more active intervention to seek out instances of discrimination and to seek redress.

Mr. Lapierre: Fine.

That is why I think we should have a redress clause which would provide for special remedy without creating another judicial or quasijudicial body, since we do have a legal system that must be respected.

Svend Robinson & Professor Fred Sussman (Chairman of the Committee on Legislation, Canadian Association for the Prevention of Crime), p. 50

Mr. Robinson: I would refer to Section 26, the comments which have been made on that Section, and the suggestion has been made that that Section should, in fact, be removed from the proposed Charter and that that would leave the courts a discretion, and I understand you to be saying, to exclude evidence which brings the administration of justice into disrepute.

How would you square that suggestion with your suggestion that there should be a remedies section—a suggestion, by the way which I think makes eminent sense—if there is to be a remedy section for breaches of the proposed legal rights section of the Charter, surely that remedies section would confer upon the courts some discretion to exclude evidence which has been obtained in a manner which violates specifically the proposed legal rights contained in the Charter. That is my understanding of the purpose of a remedies Section.

Professor Sussman: The remedies Section, as I recall the terms in which I phrased it in suggesting it, would be a remedies section which would provide, in effect, for a court proceeding which would seek as a remedy mandatory or an injunctive order of the court, or in particular cases, would make provision for damages.

That, I think. you can see is an entirely different matter from the exclusion of evidence, for example, which may be described as the fruit of the poisoned tree.

Mr. Robinson: In view of that, I would say that there are those who believe—and I do not believe there has been any suggestion to date that a remedies section should not provide remedies for breaches of the proposed legal rights contained in the Charter.

Would you agree, then, that by merely deleting Section 26, unless the Supreme Court of Canada reversed its position, a course of action which they do not take lightly, that the situation in Canada would remain, to the best of your knowledge, speaking now on behalf of the Association, that evidence obtained would be admissible if relevant, even if that evidence tended to bring the administration of justice into disrepute?

Professor Sussman: No; because it is open to the relevant legislatures and in criminal legislation, assuming that the constitutional division of powers remain the same in that respect, it will be the Parliament of Canada—your question was on what assumption? Was it on the assumption that the Section were deleted?

Mr. Robinson: The law will remain the same. Assuming that the Section were deleted and there is no indication that Parliament intends to move on this, the state of the law would then be that the evidence would be admissible as long as it is relevant, would it not?

Professor Sussman: In the immediate moment, yes. The Charter speaks for a stretch of time reaching into the indefinable future. The point is that one can anticipate the future. One believes that Parliaments may develop differences of opinion from their present position, and courts may, too.

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Personally, I am one who believes that courts particularly tend to rise to the height of the document that they are called upon to interpret.

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December 15, 1980, Frank Oberle & Arthur Grenke (Historian, German-Canadian Committee on the Constitution), 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. 26, p. 44 (click HERE)

Mr. Oberle: Your brief, Herr Kiesewalter, is not too specific as to where you stand on the entrenchment of the Charter of Rights. Mr. Grenke, I would take from your comments that you would be against the entrenching of a Charter of Rights. I have very strong feelings about that myself, and particularly I feel strongly about it because I do not believe that an entrenched Charter of Rights is workable in the British judicial

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process, in the British advisory judicial process as we have adapted it from Great Britain and I draw from the understanding that I have from the system in Germany and to some extent in the United States. You have a constitutional court in Germany that does nothing else but deal with constitutional questions and the individual has free access to these courts. There is no adversarial nature to that process, and half of that particular court is elected by the members of the Lower

House and the other half by the members of the Upper House so there is accountability back to the people.

In the American system, of course, the appointment to the Supreme Court is ratified by the Congress and the Lower Courts are elected by the people; again accountability. I cannot believe that you can have one without the other and I feel very, very strongly about that, but as I say your brief is somewhat vague in this regard. Do you share with me the same fear that if we entrench the Charter of Rights in the context of the British judicial process that we have here, that you would have a situation where the courts would not only make the laws but they would also interpret them. Do you share that fear with me?

Mr. Grenke: To some extent, yes, but I am sure that the people who are drafting this particular bill are aware of this to some extent and all I am trying to say is that they be aware of what they are doing, that they be aware of the limitations and the advantages derived, that this be done intelligently and that they take cognizance in particular of the problems which a bill may involve us in the future.

Mr. Oberle: In the way I look at the situation there are two crucial questions that have to be answered by the guardian of the rights that we are about to entrench. The first question is, of course, what is the extent to which each individual in a society, in any organized society, has to surrender a portion of his freedom and his independence and his right to accommodate the community, the common good to the collective will, and having asked that question, then the question arises, what is the common good, the collective will, and if the Supreme Court of Canada were to define both these questions, in my opinion that would be exceedingly dangerous and would be a practice that is not consistent with western democracy but would be a practice, rather, that is consistent with so-called democracies behind the iron curtain.

Mr. Grenke: I would not go so far as to say that.

Dietrich Kiesewalter (Co-ordinating Chairman, German-Canadian Committee on the Constitution), Bryce Mackasey, & Arthur Grenke, p. 50

Mr. Kiesewalter: Mr. Mackasey, how would you deal with the court cases? Which courts? We are not familiar with any provisions being made for dealing with the problems that may arise. Who is going to apply the law of the land?

Mr. Mackasey: Well, eventually, people who feel that their constitutional rights which are enshrined are being infringed upon by some authority, can go all the way to the Supreme Court, and the Supreme Court will be dealing not with a Bill of Right which is not enshrined, such as Mr. Diefenbaker's laudable piece of legislation, but with rights which are funda mentally enshrined in the constitution. It will then be for the courts to determine whether the case comes within the defini tion or intent of the constitution.

If you are asking me who would enforce it, then it would be the Supreme Court.

Mr. Kiesewalter: As it is now, not enlarged or anything of that sort.

Mr. Mackasey: Well, as you know one of the weaknesses of the present Bill of Rights of Mr. Diefenbaker is that the Supreme Court can, and has, ruled that it does not supersede any other piece of legislation, with one exception—one ruling.

Surely, once something is enshrined or spelled out in the constitution as your individual rights, as opposed to the common law system—and, if I may say so, I am a little concerned and perturbed, because I respect your group when you realize, that representing the riding of Lincoln I have had a chance, as you know, to discuss this matter for many, many months. It has been fascinating to get the multicultural views of that community which I was not always exposed to previously when I was in Quebec.

But it seems to me that, with Canadians of German origin who have been subject to the type of discrimination which you have touched upon in your brief, the atrocities which were committed against Canadians of German, Ukrainian, Japanese background well before World War I it would seem to me that you, more than any other group, would want to see your individual rights enshrined in the constitution. I am a little

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perplexed by your reservation. Is it because of the drafting or its limitations?

Surely, philosophically, you cannot be opposed to it.

Mr. Kiesewalter: The atrocities which have been committed against our groups were in countries which had entrenched rights.

Mr. Mackasey: I do not want to leave you with the impression that the entrenching of rights will eliminate these atrocities, anymore than it could eliminate discrimination. But all things being equal, if you had the case to pursue, after you felt you had been discriminated against individually or collectively, surely you would want to go to the Supreme Court armed with entrenchment in the constitution rather than relying on the common law?

Mr. Grenke: The example which I gave you, they appealed to the President; and because the society was intolerant the Supreme Court did not help them at all.

Let me give you another case. In April 1918, a mob lynched R. H. Praeger for supposedly making disloyal remarks during an address. He was dragged out of court where he had been brought and eventually lynched.

Now, let me give you another case. A man by the name of Arnold T. Drumheller was acquitted by a court after shooting Tim Blair, one of twenty who broke and attacked his farm and harassed him. In this case the man was better protected by common law than the man who was in the American situation.

So it is society—the right atmosphere—which creates human freedoms, not law.

The Russians possibly have one of the most liberal of constitutions, but they are really one of the most enslaved societies.

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December 16, 1980, Senator Goldenberg, 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. 27, p. 27 (click HERE)

> **Senator Goldenberg:** Well, as a constitutional lawyer, Mr. Richardson, I can tell you that you have defined a constitution very properly in what you said about the BNA Act. The BNA Act is our constitution; it is not the only part of our constitution. You said that you object to a written constitution because it leaves to the courts the interpretation, that the courts lock us up in language used in 1867.
>
> If you are familiar with the judgments of the Supreme Court on the BNA Act, you will find that we have by no means been locked up. I will just refer to the aeronautics case—there was no such thing as an airplane in 1867, the radio case and any other number of cases. The court, as the United States Supreme Court, has adapted itself to what you refer to as the political and social reality of the times in which the judgment is being made. There is that mistaken impression, we heard it last night, that the courts are inflexible; that the courts do not change with the times; that they try to interpret language as it meant at the time the law was enacted and I think it is well to realize that we have lived very well with the BNA Act to date. It has adapted itself and to say, I repeat, that we do not have a written constitution, I think we have lived under a written constitution ever since 1867.

Senator Goldenberg & Maureen Mahoney (Public Affairs Manager, Alberta Chamber of Commerce), p. 63

> **Senator Goldenberg:** As I see the Charter of Rights, which is what they are referring to, it removes powers from both orders of government and does not add power.
>
> My question to you is this: if you feel that it will lead to a more centralized state, what additional powers are being conferred on the Parliament of Canada by the proposed Charter?
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> **Miss Mahoney:** I think when you entrench a charter of rights, you are giving in effect, more powers to the court. You are giving the Supreme Court positive legislative functions which will, in effect, detract from the rote of the elected representatives. There is the possibility for legislating in those areas.
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> **Senator Goldenberg:** Well, are you suggesting that by asking the courts to interpret the law that you are taking powers away from the legislature? Who else interpret the law?
>
> **Miss Mahoney:** No, not taking away powers; but the responsibility that the people give to their elected representatives to make laws for them, reflecting the rights that they want and to have included, and at whatever point in time.

> **Senator Goldenberg:** But all this point about the courts making laws: the courts do not make laws. The case has come to the courts because it is alleged that laws are violated. That is when they come to the courts. The courts are intended to correct the situation.
>
> **Miss Mahoney:** But I would like to say something about why I see it as becoming more centralized. I think if you are going to entrench a charter of rights, you should also be changing the rules for the appointment of judges to the Supreme Court because you are in fact giving that power to a very select group of people who are appointed and who have tenure, and that is not the same situation which we have right now. Previously, when Prime Minister Trudeau, in the last Bill C-60, made proposals concerning entrenchment of the Charter of Rights, there were also proposals to change the Supreme Court and to give the provinces more say in the appointment of judges.
>
> **Senator Goldenberg:** But, surely, if you want the judiciary to be independent, you are not going to criticize the fact of giving them tenure. They will not have independence if they have no tenure.
>
> **Miss Mahoney:** No, I am not criticizing the tenure or the independence of the judiciary. I am saying it is much better if you had the elected representatives making that decision.

Perrin Beatty, p. 68

> **Mr. Beatty:** […] I was very much interested in Senator Goldenberg's exchange with Miss Mahoney. I think, if I understood Senator Goldenberg correctly, the position that he was taking is that the courts do not make law, that in fact they simply interpret the law, and asking the courts to do so does not undermine the responsibility and the role of the legislatures.

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December 18, 1980, Nick Schultz (Associate General Counsel, Public Interest Advocacy Centre), 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. 29, p. 20 (click HERE)

> **Mr. Nick Schultz (Associate General Counsel, Public Interest Advocacy Centre):** […] Moreover, special provisions are necessary to instruct judges in the Charter's interpretation.
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> By deleting Section 1 of the Charter, there will be removed an obvious peg for argument designed to thwart the Charter's purposes.
>
> But the Charter must still contend with a legal tradition steeped in the notion of Parliamentary supremacy.
>
> There must be clear statement, firstly, that the Charter confers substantive, not merely procedural rights.
>
> Secondly, there must be a clear statement that the Charter is to be interpreted as an entrenched constitutional Charter and not as an ordinary statute.

Thirdly, there must be a statement that the Charter has primacy over all other statutes.

Fourthly, there must be a statement that doubts as to the interpretation of any provision of Charter should be resolved in favour of the individual and not of Parliament.

Fifthly, there must be a statement that courts be authorized to examine the background to the constitutional acts in interpreting them; namely, that courts be authorized to examine the debates of Parliament, the reports to Parliament, and so on, so that our courts will understand fully the context in which the acts were drafted.

Finally, in this regard, individuals must be assured an inexpensive, quick and authoritative remedy when their rights are infringed.

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December 19, 1980, Allan Blakeney (Premier of Saskatchewan), 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. 30, p. 38 (click HERE)

Mr. Blakeney: […] I know that some people believe it is a good idea to state our aspirations in a constitution and to allow the judges to make all the qualifications. I think the essence of government is making a fair number of these qualifications and I say that the judges are not well qualified to do this. They do not have the expertise or the staff. They cannot set up task forces and they cannot find out what the problems are. They may not be terribly sensitive to what the public wants.

[…]

Let me make a couple of statements. First of all, I do not want anything that I say to be interpreted as meaning that I am not in favour of rights or a Charter of Rights, and a Charter of Rights which has an over-riding

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provision, over-riding all other laws. I think the Canadian Charter of Rights, without meaning to be abrasive, could be strengthened in that regard. We tried to do that with the Human Rights Code in Saskatchewan, and we have a piece of litigation before the courts saying that we have overlooked the over-riding provision and we are being sued and my colleague, the Attorney General is the defendant.

It is the question of entrenching that we are addressing. I could certainly go along with entrenching and with a non obstante clause, because basically the courts are good places to decide individual cases of human rights issues, but bad places to decide broad social policies in the guise of deciding issues of human rights.

> Therefore what we need is some basis whereby the legislatures can over-ride if, in the course of deciding an issue about a single citizen, they have made a decision which affects broad public policy.

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January 6, 1981, Coline Campbell & Graydon Nicholas (Chairman of the Board, Union of New Brunswick Indians), 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. 32, p. 94 (click HERE)

> **Miss Campbell:** I would just bring to your attention that this would be entrenched, if it was entrenched in the constitution the courts would have to look to this new document and would that not make a difference if there was an entrenchment of aboriginal treaty rights in that document, would this not give a new direction to the courts? It is still up to the courts to interpret, but…
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> **Mr. Nicholas:** I would say before the courts were given that particular notion, arguments would have to be submitted as to what constitutes aboriginal rights, where they start or emanate from.
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> This is one of the dangers of entrenching aboriginal rights. If, in fact, it is entrenched and such a concept is interpreted by a future court not to our satisfaction or the satisfaction of the government, then disputes may arise.
>
> That is why there must be clear discussions and dialogue on this notion of what the aboriginal concept is. But if the Committee were to accept that aboriginal rights exist, then I think you have gone a long way.

Grant Devine (Leader, Progressive Conservative Party of Saskatchewan), p. 116

> **Mr. Grant Devine (Leader, Progressive Conservative Party of Saskatchewan):** [...] 4. We support human rights but reject the suggestion that those rights be enshrined in the constitution. Entrenchment will mean courts legislate human rights but courts are not the proper vehicle-the legislatures and parliament are. Human rights are not negotiable and should not be traded for rights over resources.

Grant Devine, p. 128

> **Mr. Devine:** Well, I appreciate your argument, sir. I guess all I am suggesting is that people have been before this Committee many times, and probably much more capable than I am, and talking about the advantages and disadvantages of enshrining rights in the constitution. From the people that I have talked to, and even visiting Americans that I have talked to about it, there are several problems in dealing with the courts all the time when we have dynamic social and economic change all the time among us, and certainly the Premier of Manitoba and the Premier of Saskatchewan can ably argue that.

Brian Tobin, Grant Devine, & Robert Andrew (MLA, province of Manitoba), p. 133

Mr. Tobin: I am talking about what you say. What do you mean when you say rights and concepts change as attitudes change? Are you suggesting that we should wait until people become more human and that there is a greater understanding of their fellow man?

Mr. Devine: The problem as I see it is that the courts are not as sensitive to the change in social modification and economic change as you are, as someone in Parliament or a legislator to deal with that-the problems which have resulted in the United States because it is enshrined; maybe we cam have a better system than that.

Mr. Tobin: Excuse me, but we are short of time. You talk about the courts. But at the bottom of page 18, you said that entrenchment would mean irregular and many calls upon the court to legislate human rights. The courts are not the vehicle, you say, but the legislatures and Parliaments are.

You are saying that I am better qualified than the courts to protect human rights.

I say to you that it was Parliament and the legislatures, not the courts, that interned the Japanese during World War II. I think that is a striking, shocking and a shameful example and we should not allow that type of thing to happen again. So how do you square that with your position on human rights?

Mr. Devine: Let me say one thing and then I would like to turn it over to my colleague.

I believe in the United States the rights are enshrined in the constitution and there were similar problems with the Japanese.

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Mr. Tobin: With one big difference: the Japanese in the United States were released much quicker, four years quicker; their property, their houses-and this is an essential difference, and if you were listening to the delegation who were here representing the Japanese and Asian peoples of this country you would have heard that they pointed that out during their representations, that in the United States—and it does not excuse what happened—but in the United States the Japanese people were released much quicker and their property, lands and wealth were returned to them very quickly, based on the rights enshrined in the United States constitution.

Now, in Canada there was no provision, and it took years, and in many cases people's property was never returned to them.

I think that is an example we cannot ignore. History tells us that Parliament is not perfect and may not be in the future.

Mr. Devine: That may be true.

Mr. Robert Andrew (MLA, province of Manitoba): The only comment I would make on that with regard to the American situation is that it strikes me that the analogy with the Japanese people in the United States is a good one. If you want to carry the American constitution and what it has

done lor the American people, it strikes me that perhaps for the first 170 years of that constitution or perhaps even longer, the discrimination against the coloured people was far worse than any discrimination you have ever seen in Canada.

It strikes me that the Canadian people whether through their legislatures or through the people, brought a much more meaningful Human Rights legislation, much more human rights attitude than clearly the Americans do or the American courts have delivered.

And the simple point that he is trying to make is that we somehow get an idea from a lot of people that by enshrining this and allowing the courts to lead the way in human rights, quite frankly I do not accept that.

Mr. Tobin: I just would simply point out that every organization that has been here, while not agreeing with the present proposed charter in many respects, nevertheless, everyone in principle very strongly supported, whether they were representing minorities, special interest groups, civil liberties groups, human rights groups, strongly supported the entrenchment of human rights.

One other question on the whole human rights question.

You said just a few minutes ago that there were problems in enshrining human rights which have already been explained to this Committee.

I want to know what you personally, Dr. Devine, perceive as the problems which are involved in entrenching a charter of rights in the constitution, aside from the fact that you say the constitution as a whole would be divisive?

What are the particular problems that you envisage? You talk about the courts and the package as a whole being

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divisive. What can be so wrong with entrenching human rights?

Mr. Devine: I can refer to a couple of examples of the kinds of situations you can get into when you are having it dealt with by the courts as opposed to the legislature. One is strictly economic.

I come back to my previous experience in the realm of anti-trust and anti-combines legislation.

If you were to look at what it takes to be charged or convicted for monopoly practices before the courts—and I see some members of the Committee smiling—you have to be proved to be entirely in control of everything, a perfect monopolist, and you can do everything up to that point as interpreted by the courts, but you are not guilty.

That is the inflexibility of interpreting the law by the courts as opposed to the flexibility and sensitivity that you have as an elected member in dealing with social change.

> Now, that principle il it is applied to rights enshrined, would cause me some concern, because people would judge those rights within the law, looking at the letter of the law. They may be right legally, but they may be wrong in a just sense because they are out of step with the times.

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January 8, 1981, Gwen Landolt (Legal Counsel, Campaign Life—Canada), 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. 34, p. 121 (click HERE)

> **Mrs. Gwen Landolt (Legal Counsel, Campaign Life—Canada):** […] Our present system of parliamentary supremacy has, during the past 113 years of confederation, served us well.
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> [Page 122]
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> Individual rights and freedoms have been, with few exceptions, preserved.
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> It is our view that under an entrenched charter of rights, many of our fundamental rights and freedoms, such as the denominational schools which we now take for granted, and which have long been established in this country, may be lost, if not permanently, at least until they are restored by the onerous procedure of the constitutional amendment. It would seem to be both a retrogressive and undemocratic step to entrench a charter of rights in Canada as we had into the 21st Century.
>
> However, we understand from practical points of view it may well be that Parliament may subsequently decide that is its final decision in spite of a very strong and ardent protest that the charter of rights be entrenched in the constitution. If that is the case then it is absolutely necessary to the profile people in Canada that the present proposed charter or rights must be amended for us to provide protection for the unborn child. It is our view that the present charter is inadequate to provide this protection. In particular we would like to draw attention to two sections of the proposed charter which give us grave concern.
>
> The first is Section 1 of the charter. I know this has been discussed by many lawyers beforehand but the Section 1 is that
>
> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.
>
> That is a wide opening and it is our view that that section would give the Supreme Court of Canada unprecedented wide and sweeping powers to make political decisions. The court need only to decide what in its opinion was generally accepted in a free and democratic society, and that would be that. It is tremendously wide and opens the door to all sorts of ramifications. Also that wording of Section 1 will have the effect of rendering the remaining sections of the charter meaningless since it would override any of the rights and freedoms including that of the right to life allegedly enshrined in the charter.

Gwen Landolt, p. 124

> **Ms. Landolt:** […] Recommendation one, that the Charter of Rights should not be entrenched in the proposed Canadian constitution. We do not want the final power to go to a handful of individuals appointed by the government in power. The final say on any legislation should be had by the members of parliament who represent the voice of the people of Canada.
>
> However, if this Parliament should, contrary to our wishes and against our protest, ultimately make the decision that the Charter of Rights be entrenched in the constitution, then we make the following two recommendations:
>
> We would like Section 1 of the Charter of Rights and Freedoms be eliminated. Section 1, as already mentioned, gives total and complete power to the Supreme Court of Canada to do what it likes, when it likes and how it likes. And no democracy can survive with a Supreme Court given the great power it has by Section 1 of the proposed Charter.

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January 12, 1981, Jean Chrétien, 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, p. 19 (click HERE)

> **The Honourable Jean Chrétien (Minister of Justice):** […] The Canadian Civil Liberties Association, the Canadian Jewish Congress, many members of this Committee and other witnesses expressed the strong view that the Charter requires a remedies section. This would ensure that the Courts could order specific remedies for breach of Charter rights.
>
> I would be prepared to see a new section stating that:
>
> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers just and appropriate in the circumstances.
>
> This would ensure that an appropriate remedy as determined by the courts would be afforded to anyone whose rights have been infringed whether through enactment of a law or by an action of a government official.

p. 31

> **Mr. Chrétien:** The position is that the list enumerated there is not exclusive and any other rights on discrimination the court could intervene.
>
> The problem is we say that these rights have to mature in the Canadian society. For example, we will still have a Human Rights Commission and we will still pass legislation on different groups to make sure that their rights are protected, but they have to mature and this list that I have enumerated, excluding the others, we have opened up that clause so that other types of

discrimination can be taken care of by the courts, if Parliament and legislative assemblies do not intervene.

But to start to enumerate more in that category where their rights are starting to be protected by legislation and so on, and if there is discrimination against handicapped and so on, we say that the court can intervene even if we do not want to enumerate them at this time because many of those rights are difficult to define. It is in the process of maturing, that is why it is not there.

But before, the clause was limiting the element of discrimination. Now it is not limiting them; other types of discrimination can be covered by the courts too.

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January 15, 1980, Eymard Corbin, Jean CHrétien, Roger Tassé (Deputy Minister, Department of Justice), & Svend Robinson, 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. 38, p. 38 (click HERE)

Mr. Corbin: […] Another point which the editorialist of Le Devoir ignored is that we added a clause to the charter, giving the courts the power to decree remedies, not just to decide that discrimination has occurred, but to decree a remedy.

[…]

Mr. Chrétien: Let us say that In Vancouver, where there are probably 50 times as many French speakers as there are English speakers in Shawinigan and Grand-Mere—for us, it takes 20,000 to make up a school—a French school is requested. The defending lawyer could say, "Listen, if it is possible to have two English-language schools in Shawinigan for a few hundred students, how can you, the Vancouver School Board, refuse to offer a French school?" So the court orders you to provide that school.

This was not included in the original charter, and it is extremely important. So it is incorrect to claim that we reduced the scope of our action, when in fact we did the exact opposite, and radically; you will remember the comments, people saying that the courts would make decisions but the government would not act. Clause 25 resolves this problem; it gives the courts the power to decree solutions.

[…]

Mr. Chrétien: Besides, if when setting up school board limits, the courts find that there is clear discrimination because a French speaking community has been shared out to

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four different school districts in such a way that the number is not then sufficient, the courts will take the example of New Brunswick or Quebec and decree that it was a trick used by the government of the province in question to avoid facing up to its constitutional responsibilities.

Mr. Corbin: Finally, Mr. Minister, Mr. Chairman, could you specify what you mean by a competent court? In Clause 25 mention is made of a competent tribunal where school questions could be appealed.

Mr. Chrétien: Those cases will go before Canadian tribunals depending upon the origin of the problem and there will be an appeal process, according to the normal rules of procedure, up to the Supreme Court.

I could ask Mr. Tassé to be more specific about that.

[…]

Mr. Roger Tassé (Deputy Minister, Department of Justice): […] In fact, that clause which sets up a recourse before the courts could be used in any case where the charter of rights is violated. Those violations could be …

Mr. Corbin Not only language rights.

Mr. Tassé: All legal guarantees or democratic freedom deemed to be granted by the charter can be argued before the various court levels. These could be argued within the framework of civil procedures, criminal procedures or could even be done within the framework of obtaining redress. For example, in a school case, the main thrust of the action undertaken might be to ask for redress.

The competent tribunal is therefore mentioned so that those seeking justice might have the possibility to invoke the guarantees granted by this charter in any debate. It might be before a county court, a provincial court or whatever court is competent to hear the case set before the tribunal.

[…]

Mr. Robinson: The remedies clause is located in Section 24, and certainly, as I have indicated in my initial questioning, I am pleased with the extent and the scope of the remedies clause as I read it and what I am wondering specifically is, Mr. Tassé, you indicated that for violations of legal rights the court can grant an appropriate remedy. I assume that that would include the remedy of exclusion of evidence which has been obtained in violation of, for example, Section 8 or Section 9 of the

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proposed Charter, or indeed that there could be remedies granted for violation of the refusal to remain, to grant or to declare to a person that has been detained that they have a right to counsel?

Mr. Tassé: That is correct, Mr. Chairman. In effect the Charter, as the Minister has indicated in his main statement the other night, the Charter is silent on the question of admissibility of evidence

but in effect Section 24 is drafted in such a way that in an appropriate case it would be possible for the court to decide that in effect the just remedy that the section refers to here would require that the evidence that has been illegally obtained be declared inadmissible in the proceedings before it.

I mean, that is something that the court will have as a possible remedy.

Mr. Robinson: And in addition the court could award compensation in appropriate circumstances?

Mr. Tassé: Yes, it could, Mr. Chairman.

Coline Campbell & Jean Chrétien, p. 45

Miss Campbell: Thank you, Mr. Chairman.

You were discussing Section I, the amendments to Section 1, and in particular the reasoning behind it. I have one fairly quick question that can perhaps be answered.

I must inform the Minister, if he is not aware, that of the 19 bodies who perhaps asked us to do away with Section 1 or to improve Section 1, I do not know of any group that appeared before us who asked us not to entrench the Charter of Rights before patriation, because they felt that we would never reach an accord on the Charter of Rights once the constitution and a new amendment formula was founded.

However, of the two groups that were mentioned this morning, the Civil Rights and Mr. Fairweather, I think that you came to a just compromise on that section. I was against the original section and I am sure that was made evident from some of the questions that I did with some of the witnesses, and I am interested in that once we get into a true discussion of Section I, but in my view you changed the preferred Section 1 of Gordon Fairweather by saying, instead of "reasonably justifiable" in a free and democratic society, to "demonstrably

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justifiable", which I think Professor Tarnopolsky felt it should be stronger, it should be demonstrably justifiable it it was going in, and I wonder if there is a difference in your view in onus between a reasonably justifiable onus on the person before the courts to show that their rights, let us say that the legislatures have not infringed upon the rights of the person, or demonstrably justifiable.

To me it seems there might be a heavier onus on the legislature to show they have not.

Mr. Chrétien: I have explained this morning the policy of why we have done it, and that it was to find an equilibrium between the rights of the citizens to be protected by the courts and the power of the legislature or Parliament to pass law […]

Jean Chrétien, p. 48

> **Mr. Chrétien:** […] We are giving the Canadians some rights and the limits are mentioned in Section 1 and the courts can intervene and if the rights of the citizens have not been respected in the piece of legislation or any regulation, they are illegal and the court will decide that they do not meet the test that they can be demonstrably justified in a free and democratic society.

Jean Chrétien, p. 77

> **Mr. Chrétien:** We have decided that we were going to proceed with the entrenchment of Canadian rights in the Constitution. That is the government's decision. Why are we doing that? Because we made commitments to make fundamental changes in Canada and the dream of being able to do things unanimously in Canada, using the rule of unanimity, is a dream that has been shown to be tragically ineffective during the last 531/2 years and you are asking us to do the same thing anyway? Well, you know, in theory before we get an amending formula in Canada it will take two or even five years.

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January 27, 1981, Svend Robinson & Jean Chrétien, 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. 46, p. 126 (click HERE)

> **Mr. Robinson:** The B.C. Civil Liberties Association, the Canadian Civil Liberties Association, and the Canadian Federation of Human Rights and Civil Liberties Association all called, Mr. Minister, through you, Mr. Chairman, for specific reference to the right to remain silent and not just from the moment from which a person is charged, but from the moment of arrest.
>
> […]
>
> **Mr. Robinson:** Mr. Minister, perhaps you could clarify, or one of your officials, what remedy you might envisage being applied under Clasue 24 of the proposed Charter of Rights if the right to be informed of one's right to retain and instruct counsel without delay were abrogated? What possible remedy might there be applied by the courts if that right were violated?
>
> **Mr. Chrétien:** We say that the court has the discretion to apply the appropriate remedy. It is up to the court to decide, I am not a judge. We gave the rights to the person to apply to the court and the court can grant a remedy. What kind of remedy I do not know what it might be, it is up to the courts to
>
> *[Page 127]*
>
> decide. I do not want to speculate at this moment. We can come back on Clause 24, perhaps, but not now.
>
> **Mr. Robinson:** Do you envisage that remedy including, for example, the right to have evidence which is obtained in violation of this right excluded?

> **Mr. Chrétien:** It might be one of the remedies. It is up to the court to decide that the evidence has been gained against this, in spite of this provision in the constitution. They might decide, the judge might decide, that the evidence obtained that way is illegal.

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January 28, 1981, Svend Robinson, 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. 47, p. 35 (click HERE)

> **Mr. Robinson:** […] I would like to remind honourable members of this Committee— and I am sure that Mr. Ewaschuk and the Minister would agree—that this qualification of "promptly" is subject to the overriding test in Clause 1, as are all clauses in the Charter—of demonstrable justifiability. If it can be shown to be demonstrably justifiable that there is a problem in complying with this position of "promptly" then there is no difficulty: that Clause 1 limitation applies to this, and secondly, that the remedies clause in Clause 24 leaves a very wide discretion in the courts and one of the factors they can consider in coming up with the appropriate remedy would indeed be the kind of practical difficulty Mr. Ewaschuk has pointed to. I would oppose the amendment and join with my Conservative colleagues in doing so.

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January 29, 1981, Serge Joyal, Ron Irwin, John Fraser, Eymard Corbin, Svend Robinson, James McGrath, Jake Epp, Coline Campbell, E.G. Ewaschuk (Q.C., Director, Criminal Law Amendments Section Department of Justice), Senator Austin, 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. 48, p. 120 (click HERE)

> **The Joint Chairman (Mr. Joyal):** So I understand that there is an agreement to stand Clause 24 and the amendment thereto until further agreement that that amendment be called.
>
> Clause 24 allowed to stand.
>
> **The Joint Chairman (Mr. Joyal):** I would like, then, to invite honourable members to move to the next amendment, which is an amendment numbered G-28, new Clause after Clause 23, page 7. It is an amendment moved on behalf of the government party and I would like Mr. Irwin to move the proposed amendment.
>
> **Mr. Irwin:** Thank you, Mr. Chairman. Before I get into the amendment there has been one change of words on the form that has been distributed. On the fourth last line of Subclause (2) the word "may" has been deleted and "shall" has been inserted at the request of the NDP, to which we have consented.
>
> **Mr. Fraser:** Mr. Chairman, through you, could I please ask Mr. Irwin to repeat that.

Mr. Irwin: In subclause (2), the fourth last line, second word from "may" to "shall" which is probably better wording.

In other words, the net result is if there is a finding that it would bring justice into disrepute then the evidence shall be excluded rather than the permissive may.

[Translation]

The Joint Chairman (Mr. Joyal): Mr. Corbin, would you like to make the correction in the French text?

Mr. Corbin: Perhaps I could do so when it is read?

The Joint Chairman (Mr. Joyal): Fine.

[Text]

Mr. Irwin: Thank you, Mr. Chairman. I wish to propose that the Constitution Act 1980 be amended by adding immediately after line 22 on page 7 the following heading and section:

24.(1) Enforcement. Anyone whose rights or freedoms as guaranteed by this Charter, have been infringed or denied may apply to a court or competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances

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(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[Translation]

Mr. Corbin: Mr. Chairman, I would like to point out that there are two changes to the French text of the proposed amendment. In subclause (2), the words "au cas ou" should be replaced by the word "lorsque". and would read as follows:

[Text]

(2) lorsque dans une instance visee

[Translation]

and in the same subclause, line 6, which reads:

[Text]

éléments de preuve peuvent être écartés

[Translation]

the words "peuvent être" should be replaced by "sont" to read:

[Text]

éléments de preuve peuvent être écartés

[Translation]

If that is quite clear, I will move the amendment to the French text.

[Text]

Que le projet de loi constitutionnel de 1980 soit modifié par adjonction, après la ligne 39, de la rubrique et du passage qui suivent:

Recours 24. (1) Toute personne victime de violation ou de négation des droits et libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal competent pour obtenir la reparation que le tribunal estime convenable et juste, eu égard aux circonstances;

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuves ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

[Translation]

Thank you.

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

I realize that there is a sub-amendment to this main amendment, number N-30, *[Text]* new clause, following Clause 23, page 7.

N-30, new clause following Clause 23, page 7. That is the number of a subamendment in relation to the main amendment. It is a subamendment moved by the NDP party and I would like to invite Mr. Robinson. I will repeat the number of the subamendmentn to make clear that everybody has it, N-30, new clause following Clause 23, page 7, Mr. Robinson.

Mr. Robinson: Thank you, Mr. Chairman. In view of the fact that the government has agreed to accept our proposed change to revise proposed Clause 24 to change the original word may to shall and in view of the fact that the Minister has confirmed and I believe that he is right that under new Clause 24(1) there would clearly be jurisdiction n the court to award compensation. I am prepared to withdraw proposed amendment N-30.

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[Translation]

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

We will now comme back to the main amendment proposed by Mr. Irwin.

[Text]

Mr. Fraser: Mr. Chairman, through you, as the government knows the Conservative Party has also an amendment to this clause and that is on CP l0, Clause 26, page 8.

The Joint Chairman (Mr. Joyal): Mr. Fraser, I have it.

Clause 25 allowed to stand.

On Clause 26—Laws respecting evidence.

Mr. Fraser: I wonder if my honourable colleagues have the amendment in front of them. and what I propose to do, Mr. Chairman, is to withdraw this amendment. I would ask your indulgence to explain why.

First of all this amendment which we filed was designed to remedy the mischief which we felt was in the original draft of the government and was to make sure that there would be the exclusion of evidence which would bring the administration of justice into disrepute.

Mr. Chairman and others will remember the concerns of witnesses that appeared in front of us in this regard.

I also want to point out that Mr. Irwin said that he wished and he just did this this moment to change the word "may" in the government amendment to "shall" and I point out, Mr. Chairman, that our amendment had already taken that into account and our amendment read:

Notwithstanding subclause (1) in any proceedings evidence shall be excluded if it is established that it was obtained under such circumstances that the use of it in the proceedings would tend to bring the administration of justice into disrepute.

Mr. Chairman, you will forgive me for indicating that I think that this is now the third time that our view has prevailed although, this case perhaps in not such formal terms. I am corrected by my Chairman. This is the fourth time after several months and we are of course absolutely ecstatic that all parties around the table have seen the wisdom of our representations.

Having said that, Mr. Chairman, I will withdraw the motion because the mischief we were trying to address has now been remedied and the word shall is in so it is now mandatory, and we are very pleased with what has happened.

The Joint Chairman (Mr. Joyal): Honourable John Fraser, if all parties agree suddenly to the same idea I think it is a new pentecostal.

Mr. McGrath: You notice the Minister is not here.

The Joint Chairman (Mr. Joya): So the Chair is very happy to see that all the virtues are now within the honourable members, and I am in a position of course to accept your suggestion.

Mr. Fraser: It may be a fear of purgatory, Mr. Chairman.

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The Joint Chairman (Mr. Joyal): Mr. Robinson, yes, on the proposed amendment.

Mr. Robinson: Mr. Chairman, in view of the fact that the representative of the government has not spoken on this, I just wanted to indicate perhaps, Mr. Chairman, prior to commenting briefly on the proposed amendment I would like to indicate that we have unconfirmed sources who stated to us that Mr. Epp and Mr. Austin were seen on a bus discussing these amendements and I not that their track record is better than ours, as Mr. Fraser has proudly pointed out, so I see that those discussions were apparently fruitful.

The Joint Chairman (Mr. Joyal): The honourable Jake Epp.

Mr. Epp: Mr. Chairman, I want to indicate If I was on a bus with Senator Austin only he would be aware of it, and secondly I want to point out to Mr. Robinson that when we move amendments we also work on success.

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

Miss Campbell: Yes, Mr. Chairman, I have a number of questions on this. I am certainly in favour of the new Clause 24(1) and I do have a couple of questions that I would like to bring up to the officials while they are here.

It seems to me by using the term shall instead of may you are extending the tainted fruit doctrine. Is there anything that refutes that, or not? In other words. you are giving to the courts a narrowly defined interpretation of that.

Mr. E.G. Ewaschuk (Q.C., Director, Criminal Law Amendments Section Department of Justice): Yes, what in effect it means is that there may be an area where you have a constitutional violation which may be unreasonable in the sense that it is inadvertent, but there may not be something willfully reprehensible. On the other hand, you get to a certain level where it is in fact very willful and very reprehensible.

If you hit that level, the judge having considered, an example may be a police officer stole the gun because he just did not go down to get a search warrant, he broke in, he stole the gun, it was tested for ballistics and fingerprints and it turns out that in fact this is the murder weapon. Now, the judge will have to weigh all those circumstances, the fact of the conduct of the police officer, it may have been unreasonable but it may not have been willful. In my example it was willful, but it is a murder charge. He is going to take all those circumstances into consideration. If he comes to the conclusion that the admission of the evidence would bring the administration of justice into disrepute,

considering the seriousness of the case, the seriousness of the breach by the police, the manner in which the evidence was obtained, then having made that determination, yes. the evidence must be excluded.

Miss Campbell: My other question is that this definitely looks very similar to the first clause of the Law Reform Commission report but they added a second clause because they were so concerned with the actual direction that the court should take in interpreting evidence, and you are probably well aware that they gave specific directions in determining whether evidence should be excluded under this clause: all the

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circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted willfully or not and whether there were such circumstances justifying the actions, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.

In other words, the may seems it seems to me would be more in line with what the Law Reform Commission was alluding to in that second paragraph for the direction of the court, but perhaps your explanation covers that.

My question, not having read the second clause of the Law Reform, and we are limited as to time, is does the reference in this Clause 24(2) to the Charter and the Rights and Freedoms extended in there, would that do you think go a long way in eliminating some of the concerns that were in that second clause of the Law Reform Commission.

Mr. Ewaschuk: I think that certainly they will be taken into consideration. They are there for reflection. They are academic writings as to what the administration of justice means at least as far as the admission of evidence, whether or not it would bring it into disrepute, and we have the celebrated Wray case in 1969 when the Supreme Court of Canada said that real evidence, if it is more than of tenuous value must be admitted notwithstanding that its submission would bring the administration of justice into disrepute.

So what this clause in effect is doing is taking the dissent in Wray, it was a 5-4 judgment. and would say no, in relation to constitutional violations if the court finds that the admission of the evidence, having regard to all of the circumstances, would bring the administration of justice into disrepute, then they shall exclude it.

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

Senator Austin: Mr. Chairman, one question of Mr. Ewaschuk, could you provide the Committee with a general definition of that test "bring the administration of justice into disrepute". Is there a general principle that you could articulate that would give us a dividing line?

Mr. Ewaschuk: Well, somebody told me today—I am on a task force to revise the rules of evidence—and Doctor Tellefson from the federal Department of Justice is the head of it and he says the test is as articulated by the former Justice Black in the United States that the admission of this evidence would make me vomit, it was obtained in such a reprehensible manner. I said to Doctor Tollefson, it might be a little tough writing that in, but that is the type of case, he is saying. where the conduct is very blameworthy, repugnant, very reprehensible. what the police did in the circumstances and therefore although, and this is the other argument, they being law breakers allow another lawbreaker, an accused, to go free, that once it has reached this certain level of reprehensibility it should be excluded.

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The Joint Chairman (Mr. Joyal): Thank you, Senator Austin. I see that the honourable members are ready for the vote.

[Translation]

The amendment is carried.

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January 30, 1981, Jim Hawkes, Roger Tassé, & Jean Chrétien, 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. 49, p. 28 (click HERE)

Mr. Hawkes: […] Are the courts a body or authority? The courts themselves, the Supreme Court, is that a body or authority?

Mr. Hawkes: What about the clause of the constitution that we passed, I believe yesterday. that dealt with the remedy clause and in particular, you brought up the issue of Clause 23 and I thought in our discussion yesterday, the courts could in fact require a school board or a school district to establish a school facility which you would not consider that as a legislative function, an increase in the powers of the court? The whole remedy clause does not increase the power of the court to, in effect, legislate.

Mr. Tassé: I do not think, Mr. Chairman, it would be proper to describe these powers that the courts would have under Clause 24 as being legislative powers. The courts would adjudicate when remedies are sought under the constitution. But they would just be interpreting this under the constitution and they would ensure that its intent and spirit are carried through, but i do not think that we can say that in effect they would be, in so doing, exercising legislative powers.

Mr. Hawkes: Do the American Courts legislate?

Mr. Tassé: Oh, I think that there are some people that would argue in the loose sense, that perhaps in coming to some decision, in the interpretation, in perhaps a political sense that they may be exercising powers by refining the constitution powers that may look like the exercise of legislative

powers, but our Supreme Court in Canada, for example, has been over the year interpreting the constitution. They have been saying, for example, that Parliament has the power to legislate in

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matters of radio and aeronautics. I do not think anyone would say that in a strict sense, that when they were so doing, they were exercising legislative powers. They were just adjudicating matters that were before them under the constitution.

Mr. Hawkes: But surely, when you hand them this charter, you hand them new powers and new responsibilities that will make our system very much like the American in that as you call it, loose sense of legislating powers.

Mr. Chrétien: What we are doing Mr. Hawkes, is we are giving rights to the Canadian citizens.

Mr. Hawkes: You are giving rights to the courts.

Mr. Chrétien: No, the right . . .

Mr. Hawkes: And powers to the courts. . .

Mr. Chrétien: The courts interpret the right. The rights belong to the Canadian citizens. When you go in front of the court, you say I have this right. Not only yes or no.

Mr. Hawkes: You give them the power to enforce. The courts have the powers, not the people.

Mr. Chrétien: Yes, but you know the courts, you know, are there. This is a segment of our society. They are there to interpret the law and, of course, they have to play the role. Otherwise you know, you will have a system where the citizens have no recourse to the court. And the laws, you know, that will be the arbitrary system absolutely, from the legislature.

Mr. Hawkes: In other words, you are telling me this is no restriction on that increased power on the courts; that this clause cannot be interpreted even by the courts themselves, as limiting their powers.

Mr. Tassé: I think, Mr. Chairman, the powers of the courts under the constitution will be, under that charter, is spelled out in clause 24. In clause 24 it spells out precisely what the role of the court will be under that charter, in adjudicating matters coming before it. So I am not too sure that I see the significance of your question, because even if one were to assume that in effect the courts might be covered by that clause, I do not know whether it would have any significance at all, because the role of the courts under the charter is set out in clause 24.

Mr. Hawkes: I think something that is bothering me is the frequency that we have had of "I do not know". I think the most bothersome part of this whole exercise is that we are restricted in time, restricted in witnesses and far too often we get the response "I do not know". I will turn it over to Senator Tremblay.

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October 6, 1980, Debate in the House of Commons, p. 3306 (click HERE)

Mr. Epp: Surely that is not acceptable. I should like now to deal with the charter of rights. There will be a debate, sometime, as to better ways in which we might protect our rights, whether through a charter or through a convention such as the British parliamentary system. One thing we have to keep in mind is that regardless of our viewpoint on how rights are best protected every one of us holds the position, first of all, that we have basic fundamental rights, that these have been respected in Canada and that in each case, every party and every member intends to uphold those rights. That is not the issue. The issue is a fundamental one, honestly held, and that is, how best do you protect them?

For example, at the first ministers conference the Prime Minister made the point, I believe sincerely, that because we did not have a charter of rights, Canadians of Japanese descent were relocated, primarily from British Columbia, to other regions of the country. I have in my riding members of the Canadian Japanese community and I have discussed with them the period of turmoil through which they had to go. The point I want to make is that the Prime Minister leaves the inference that had a bill of rights been entrenched, this would not have happened. That is not so, because in the United States where they had a charter of rights and a written constitution, the same action took place. I am not justifying the action of the United States at that time nor of Canada at that time. That is not my point. They were both wrong. As we examine this question in committee, however, let us be careful to address the fundamental point-not that we have not got rights, but how the rights we have can best be protected.

Some hon. Members: Hear, hear!

Mr. Epp: This raises, obviously, the objection to my argument – that we do not trust the judicial system. That is not the case, Mr. Speaker. I am not for a minute suggesting that the courts do not have an important role to play in the protection of individual freedoms. Under a bill of rights which functions properly, the courts do make many of these decisions but their judgment is advisory. The ultimate responsibility rests here, in Parliament, and in the legislatures. When rights are constitutionally entrenched, when the final decision rests with the courts, the judiciary must be cautious lest il should be charged with partiality or misinterpreting the intentions of the draftsmen and setting a precedent with which none of us can live. So long as the judge's role is advisory, as it is under the Bill of Rights of the Right Hon. John Diefenbaker, the courts do feel more free to be clear and forthright in their judgment.

The real value, as I see it, of a bill of rights, is that it reflects those goals toward which we all must strive. What I have tried to say is that when we entrench a charter of rights, it is not just a symbolic act. It significantly alters the very nature of political responsibility in our parliamentary system.

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October 8, 1980, Debate in the House of Commons, p. 3409 (click HERE)

Mr. Speyer: Mr. Speaker, there are a number of areas to which I would like to address my attention. The first is with respect to the charter of rights, which the Minister of State for Multiculturalism (Mr. Fleming) spoke about at great length. There seems to be an innuendo, certainly from the speech given by the Minister of Justice, to which I listened attentively on Monday, that to oppose or to doubt the value of entrenchment of some of these rights is to doubt or to oppose the rights themselves. This is an absolute distortion of the truth. The Minister of Justice in his speeches this summer and in the speeches he has given in the House respecting this matter, has told us about the nobility of the values espoused in the charter of rights. What I think needs assessment in this House and what the public needs to understand are the implications of entrenchment and the implication of special entrenchment of these rights.

Essentially, members of this House and members of the public must come to grips with and must understand that there is going to be a major shift of power from Parliament and from the legislatures to our courts. We must recognize that fact, and we must understand what its implications are.

The Minister of Justice has quite accurately outlined the antecedents of the codification of rights since 1947 with respect to the bill of rights in Saskatchewan. Isle has passed on to the Bill of Rights which Mr. Diefenbaker introduced in 1960, which was accepted by this House, but there is certainly nothing new to this. We know that with the Magna Carta there was the desire of the people of England at that time to have an acknowledgement, to have written down and to have a codification of what rights did exist. That same principle and policy prevailed with respect to the petition of rights in England in 1689. We know what happened in France as the Minister of Regional Economic Expansion (Mr. De Bané) pointed out in his address to this House. We certainly know that it happened in the United States. But, what are the implications of entrenchment and what are the implications of a bill of rights?

Let us just juxtapose the rights which are in the Bill of Rights with those that are in a charter of rights, and let us compare them. Surely there is no difference in the Bill of Rights between freedom of religion and freedom of religion within the charter of rights. There is no rational impact in terms of difference.

The point is what consequences flow as a result of putting them in a charter of rights which do not exist in a bill of rights? It seems to me the question to which members of this House must address themselves is: are we enlarging the rights of citizens by including them in a charter of rights? Or, are we in effect giving better protection to the people of Canada by embracing them in a charter of rights than that which now exists within the Bill of Rights? What are the implications of this?

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There is no doubt that many people view the Bill of Rights on one level as a great success because it did codify the essential beliefs which Canadians have. But on another level, and this is something that one probably does not sec except maybe hear front law school professors or in decisions of the court, the Bill of Rights in some ways has not been successful. That is the fault of Parliament, and it was the fault of Parliament at the time it was passed. What members of Parliament did not do was state clearly, as was their duty, what implication follows as a result of a violation of one of those rights, what consequences will flow in circumstances where there has been a denial of some of these rights.

In particular, I would like to address my attention to that question in the context of certain examples. I think it is very important, in terms of the legal consequences that may flow, that before we choose a preference—and that is what we are doing here—we understand exactly what those results are.

Let me give this illustration. Under a charter of rights there can be no doubt, certainly on the basis of the speech which has just been given by the Minister of State for Multiculturalism, nor on the basis of the paper which the Right Hon. Prime Minister (Mr. Trudeau) gave when he was attorney general of Canada in 1966 with respect to codification and a charter of human rights—I have that document, which is public: nor can there be any doubt that they wish an American type of system. What are the ramifications of such, and are they desirable?

First of all, if we had a system in which the primacy is given to the Bill of Rights or to certain legal implications arising from these rights, what happens in circumstances where a man is charged with possession of stolen goods and a police officer makes a technical mistake in a search warrant? A raid occurs with respect to certain premises where, let us say, ten pounds of cocaine are found. The search warrant is defective, the search and seizure are unlawful and, under the charter of rights, because there was an unlawful invasion of rights which we wish to entrench, that man will go free. What were the circumstances of common law? The circumstances of common law were that even though the search warrant may have been technically invalid, that evidence of finding the cocaine docs not become inadmissible; it does not in any way exonerate the offender. The choice we have to make is do we give Primacy to these types of rights? Do we understand these types of matters? Say, for example, in a case where a man is charged with an offence and gives a voluntary statement acknowledging the commission of the offence but he is not accorded by the police officer at the first reasonable opportunity his right to counsel—should a man be able to walk the streets and to be exonerated in those circumstances because a police officer has neglected to give that warning, which is a person's constitutional right under the charters of rights?

These are very difficult choices, because there are two rights and there always have been two rights. We have had to balance them. We have had to balance the right of liberty and the expectation that a person's rights are going to be afforded to him on the one hand, and the right certainly that a guilty man should not necessarily go free because the constable blundered. Those are the choices that we have.

There are certain rights that I expect will be entrenched with respect to questions on freedom of religion and freedom of conscience. It may well be that those rights ought to be entrenched. But there are other rights which are contained in these resolutions which cause me a great deal of alarm. I heard mention made of Premier Lyon. I happened to be in attendance on the day when he gave his exposition of his point of view with respect to it. I was very impressed by the reality and the practicality of the submissions he made at the first ministers' conference. Let us make no mistake about it, there will be a major shift out of this House and into our courts. It will be the courts that will be deciding social policy. ln this regard, maybe our leading constitutional expert, certainly in the twentieth century, Mr. W. P. Kennedy, in terms of how the British North America Act was interpreted by the courts, said: "Seldom have statesmen more deliberately striven to write their purposes into law, and seldom have they more singularly failed before judicial technique of statute interpretation."

If we are going to entrench rights, if we are going to entrench legal rights, let us at least have the courage to give the courts a proper sense of direction. Let us tell them within the charter of rights what we expect when there is a violation of those rights. We did not do that adequately in the Bill of Rights, unfortunately. This charter of rights is absolutely silent on the point. Certainly the courts have the right to expect that we will give them a sense of direction. If they are to have judicial review with respect to these matters, do we not have the duty to tell them, to argue among ourselves and to vote on whether they are in the circumstances, for example, legal rights?

Are they to take the primacy of those legal rights and knock out the whole tradition of common law, that evidence which is relevant to the commission of a crime may very well be inadmissible on the ground of a violation of some of these legal rights? These are difficult questions, but they absolutely must be addressed.

Resolutions have been put forward without any discussion so far of the implications. This is dangerous. We must at least say what we expect to come out of these resolutions. I find them totally inadequate in that regard.

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October 15, 1980, Debate in the House of Commons, p. 3693 (click HERE)

Mr. Nowlan: […] I know my time is moving very quickly. However, there are many things I would like to say in terms of the bill of rights. While the language of a bill of rights is something I can accept, I have real apprehension about the dangers of entrenchment. There is a snare and delusion along with entrenchment.

I have here the constitutions of the U.S.S.R., Cuba, Chile, the German Democratic Republic and East Germany. If I had the time to read the sections I have outlined, you would hear beautiful prose about the rights of people, equality, no eavesdropping, judicial systems that are perfect and so on. The most beautiful bills of rights are in these constitutions. However, there is the strange paradox that you more often see an entrenched bill of rights in the constitutions of totalitarian governments than in other parts of the world.

Some hon. Members: Hear, hear!

An hon. Member: Just like Idi Amin.

Mr. Dionne (Northumberland-Miramichi): As in the U.S.

Mr. Nowlan: The hon. member refers to the United States. Did that bill of rights help the Japanese Americans any more than Japanese Canadians who did not have any? Not at all. Take our bill of rights, so called. Fifty-one years ago this month, women in this country finally received a constitutional status. When Nellie Murphy was appointed to the Senate, a woman was finally acknowledged to be a person and could therefore be appointed. Until that time there were no women in the Senate. They were not persons.

> The Supreme Court of Canada refused to acknowledge that women were people and could be appointed to the Senate. It was the Privy Council of England which made the final decision. Now that right of appeal has been taken away. She was not a person and they made her a person.
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> Imagine if that situation had arisen with an entrenched bill of rights in 1929. The last real constitutional change was in 1927. We would be in the snare that is troubling the United States right now with their ERA amendment, trying to amend a constitution to make women people. Thank goodness we were able to make that appeal to England. But even without such recourse we could have done it by our own statute.
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> My time is very limited, so I will conclude even though there are many other things I would like to say. In terms of the bill of rights, what bothers me most is that another level of government is being established which will interpret the rights. I do not have time to review the rights. Capital punishment will be affected as will the rights of unions. Will there be boys and girls mixed basketball teams, because there is no discrimination between the sexes? Will retirement still be compulsory in many cases at certain ages? Will the Senate go on in perpetuity? There are many questions which arise.
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> What is important is that you cannot revise the constitution unless you reform this House of Commons. It would take a long time to convince me to go for entrenchment because under our system at the moment, we do not have the other ingredient that comes with entrenchment, a legislative sanction or review of judges. Do we want to go the American way and elect our judges? Will judges at least come before some committee of this House for questioning? Unless we start to hammer this out, we will see a real mutation take place.

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> **Mr. Bill Blaikie (Winnipeg-Birds Hill):** […] This is not to say, upon reflection, that at the very least we should not also be aware, if only for the sake of knowing what we are doing, that perhaps entrenchment of human rights as such may not be the best way to establish a charter of rights. I have read some persuasive arguments distributed by a professor at Carleton University about a preference for a bill of rights with "priority status" as opposed to "entrenchment", etc., so that elected representatives would still have the final say.
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> Entrenchment without fundamental changes in our judiciary, in its self-understanding and in its accountability, could be a serious mistake but only time will tell, because it appears that the government is committed with a certain amount of passion to this concept. Let us hope that in the future we will have the freedom to adjust accordingly, if we need to, the Supreme Court and other affected areas.

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October 22, 1980, Debate in the House of Commons, p. 3954 (click HERE)

> **Mr. Crombie:** […] Sixth—and I raised this just the other day in a question, because it is a serious matter—if we adopt the charter of rights as it currently exists in the government proposal, we will run into the same problem that the United States have been coping with for the last 25 years; that

is, they increasingly have to phrase their legislation to take into consideration problems that are raised by the courts.

Just the other day I mentioned the Bakke case. In June, 1978, the Supreme Court of the United States—and I think quite rightly—ruled that a black student should not have preference over a white student merely because there was an affirmative action program in the University of California. This has thrown into jeopardy and doubt many social programs, particularly affirmative action programs, in the United States. Anyone who does not believe that can call the Health Education and Welfare Department in Washington in the United States and ask what the effect of the Bakke case was on the development of policy in relation to social programs. By their very nature, Mr. Speaker, social programs are discriminatory.

We have had affirmative action programs for years north of 60, without calling them that, in relation to the hiring of native people. We do not know what is going to happen to those programs. I am not raising idle fears or threats, Mr. Speaker. The problem is real and it must be dealt with before we adopt the principle.

In that connection, Mr. Speaker, when it comes to social programs, when it comes to legal rights, non-discriminatory rights, democratic rights and human rights, there is going to be a massive shift of power to the courts, as the hon. member for Cambridge (Mr. Speyer) said the other day. In all sincerity, I say that may not be an unfair or bad thing, but it must be understood that it is change. It cannot be assumed that there is not going to be a change. We will not become more Canadian as a consequence; we will become more American.

An hon. Member: That is what he always wanted.

Mr. Crombie: It rankles me to hear the nonsense spoken on the other side when they ctaim that somehow they are being more Canadian. There is nothing more Canadian than the understanding that the common law protects our rights and that ultimately people operating on the principle of consensus will arrive at appropriate opinions.

Some hon. Members: Hear, hear!

Mr. Crombie: That is the Canadian system, but the charter of rights changes that. Some people may like the change, but it cannot be denied that it is just that—a change. That is why people are saying, “Ah, I see. We are now going to have to worry about what the Supreme Court says." That means we may have to find another way to get judges. In the United States, where judges make more law than ours do, they have made things more democratic by electing judges. We have not felt the necessity to do that. Indeed, we have always felt that our judicial system was superior because we do not elect our law. If we are going to hand judges the power to make law for people, then we will have to find a better way—as the United States had to—to obtain judges.

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On this sixth point with respect to the charter of rights, I say that we are taking a giant step toward the Americanization of this country. That bothers me, particularly when it is done in the name of Canadianism.

Mr. Clark: True Brit.

Mr. Crombie: Yes, using the British to do it.

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October 23, 1980, Debate in the House of Commons, p. 4024 (click HERE)

Mr. John Gamble (York North): […] Today we heard a statement from the hon. member for Nepean-Carleton (Mr. Baker) which might initially have stunned some of the members. It was to the effect that should this resolution be passed, the Supreme Court of Canada, the highest court in the land, will no longer be that. What fundamental difference does that make to me as a member of Parliament? Am I indeed robbed of some great right? True, that would happen, but it does not concern me. The fact that this will no longer be the high court of justice for Canada is not as significant as the effect it would have upon the democratic process in Canada, because what we are doing here will destroy democracy.

Some hon. Members: Oh, oh!

Mr. Gamble: The hon. member who has never looked at the resolution laughs. That does not surprise me. What we have here is a proposition which will place in the hands of the Supreme Court of Canada—not the one that is here today that we all know, but the one that will be there 100 years from now and whose members we do not recognize because they have not yet been appointed–the right to determine the laws of Canada and legislate those laws because the process of legal interpretation includes legislation.

For a perfect example of that process we need only look to our southern neighbour where the laws passed in a constitutional form have been changed over the years as a result of judicial interpretation. The natural result of that, they say, is that there has been progress. The court has made those changes necessarily. But the fact is, there is a danger in adopting the process they have adopted to our situation with- out the safeguards they enjoy. There is not a judge of the Supreme Court of the United States who is not appointed without the sanction and approval, after due scrutiny, of the Congress of the U.S. There is no provision for such scrutiny in this resolution. In the United States, lower court judges are elected by the people. The people, directly or indirectly, control the administration of justice. Our system, simply put, is that one man, the Attorney General of Canada, will make the appointments. Whom does he appoint? We do not know, but I will tell you what the people do not know–that once appoint- ed, no one can ever get rid of them. The people can get rid of ~ my friends across the way, they can get rid of me, they can get rid of all of us, but they-cannot get rid of the judges, and it is the judges who will legislate in Canada if this resolution is passed. The public should be made aware of it, but the government members opposite do not bother. They talk about the rights of the minorities. I heard the comment of the Solicitor General (Mr. Kaplan). He is in the House tonight. "The minorities must be protected," he said. That is true, but so must the majority. Who is protecting the democratic process? Who is speaking for the system that has evolved and from which we derive our right to be here and from which the people derive their right to get rid of us? No one does, because it does not concern them. That is the fundamental problem which the Liberal government does not address because it is something

> they do not want the public to know, and the sooner they can get this matter before the committee where it can be whisked away in the dark, the better they will like it.

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December 1, 1980, Debate in the House of Commons, p. 5208 (click HERE)

> **Hon. Ray Hnatyshyn (Saskatoon West):** […] There is no question that we are very much involved in an era of increased litigation, increased access to the courts with respect to matters of serious concern in our country. i need only point to the fact that we in Canada are involved in a very serious constitutional debate. One of the proposals involves the entrenchment of a charter of rights by which there will be a departure from what the situation has been up to now with respect to a matter of basic and fundamental human rights. It is going to mean that the courts will be taking on an even more important role in terms of the interpretation of the fundamental rights of Canadians.
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> Not only the highest court of the land, the Supreme Court of Canada, but indeed every level of court federally appointed will be involved if the government's intention to proceed with this entrenched bill of rights takes place and will be involved with serious considerations of a constitutional nature. So it becomes absolutely essential that we attract to the bench members of the Bar of the highest competence and the highest capacity. As a result I think—there will be sympathy with the desire on the part of the government, as stated by the Minister of Justice, to make sure that there is adequate and reasonable compensation so that there will not be a significant deterrent to people of competence coming forward and offering themselves-after the appropriate solicitation, of course, by the Minister of Justice or his amanuensis-and serving on the bench.
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> It seems to me that we will be entering into a very different kind of judicial activity with respect to an entrenched charter of rights. I do not want to be drawn into that debate. I was previously denied the opportunity to participate in the debate on the constitution on the floor of the House, but let me just smuggle in an observation. There will be a greater responsibility placed upon the judiciary with respect to these questions, and the final charter of rights we bring about and entrench in our constitution will call for a significantly more important role for the judiciary generally.
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> As an aside, I read with interest recently a book published in the United States, written by Messrs. Woodward and Armstrong, entitled "The Brethren", which is an interesting treatise on the activities of the Supreme Court of the United States. We in politics are sometimes known by the press to have a tendency to exaggerate or occasionally to make a mistake of fact, but if one-fifteenth of what is written in that book is accurate, we can see that the whole question of the interpretation of constitutional matters by the judiciary is not clearcut or a matter of precise and distinct judicial interpretation. There are other considerations which enter into these deliberations.
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> If I may be permitted to say so, there is a certain amount of politicking in the courts. There is a very important consideration as to the backgrounds of judges with respect to appointments. It becomes important, when we deal with constitutional matters, to know what is the philosophic outlook of judges. That in itself is a very important aspect with regard to the appointment of judges.

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Mr. Robinson (Burnaby): […] Mr. Speaker, we are talking about the Judges Act and about the role of Parliament in dealing with the federal judiciary. We know that as a result of the proposals by the government—proposals with respect to an entrenched charter of rights which we support-the role of the courts will be substantially enhanced. We welcome the principle of an entrenched charter of rights, a charter which says no Parliament and, indeed, no provincial legislature at any given time, can through a transient majority, take away fundamental rights which many Canadians thought they had yet which could be swept away at a moment's notice, as we have seen in this country on too many occasions. We saw it in 1970 with the proclamation of the War Measures Act; we saw it in 1942, and following that the scandalous treatment of Canadians of Japanese origin who were interned and whose property was confiscated. To this day they have not been adequately compensated. We recognize and we support the increased role of the judiciary. In interpreting a charter of the fundamental rights of all Canadians, we recognize there are very serious flaws in the proposal which is presently being studied by the Special Joint Committee on the Constitution. We do accept, as I say, that our judiciary will have a more activist role, a broader role in interpreting this charter of rights.

For example, the very first section of the proposed charter of rights as it is now worded, is a section which is being condemned by every group which has studied it and which has appeared before the constitution committee. This means it will be up to the courts to decide what the appropriate limits are on the fundamental rights and freedoms of Canadians.

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.

But I must say there is another section of the proposed charter of rights which would take away any discretion our courts should have. It is with respect to that section we hope the Minister of Justice will listen carefully to the representations which have been made by many groups. We hope

he will listen to amendments which we shall be proposing. What section 26 of the proposed charter does is tie the hands of our federal judiciary and say they have no—

Mr. Deputy Speaker: Order, please. Is the minister rising on a point of order?

Mr. Chrétien: Yes, Mr. Speaker. I would like to ask the hon. member if he has anything to say about the salaries of the judges. He seems to have avoided it since he started his speech. He is dealing with the bill of rights and other matters, to which I have no objection, but i would like to know how his party stands on the pay increase and if he has any intention of voting for it.

Mr. Robinson (Burnaby): I know that members of the judiciary and others will read with great interest the eight-minute speech of the Minister of Justice. If that is all he had to say about the judicial system in this country then I think it is a rather sorry commentary on his understanding, knowledge and recognition of the importance of the judiciary in this country. I intend to take the full 40 minutes which I have been allotted. I hope the Minister of Justice will perhaps give more serious recognition later on in the course of this debate to the role of the federal judiciary and not merely talk for a few

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minutes about the salaries and pensions. Mr. Speaker, I will certainly be dealing with those. I am sorry to hear that the federal justice minister, unlike his three immediate predecessors, said not a word about the important role of the judiciary in this country. We on this side of the House recognize that role and respect it.

I was talking about section 26. Since we recognize the importance and competence of our judiciary, I am urging the government to give very serious consideration to permitting a discretion in our judiciary to exclude evidence which has been obtained in a way that would bring the administration of justice into disrepute. Surely, if we are to have confidence in our courts and confidence in the federal judiciary, it is not good enough to say to them they must accept evidence no matter how it is obtained, whether illegally, through the use of force or duress or, the use of illegal search and seizure. It is incumbent upon the government to say, "We trust you. We trust the judiciary to exercise its discretion wisely" Indeed, they should have that discretion. We hope the government will recognize that in dealing with the charter of rights.

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February 17, 1981, Debate in the House of Commons, p. 7375 (click HERE)

Mr. Chrétien: […] Third, the charter guarantees legal rights of Canadians. It sets out protections against arbitrary arrest, against unreasonable search and seizures. It enumerates the rights of an accused to be defended by counsel, to have a fair trial, not to be forced to testify against oneself. It ensures that where evidence is obtained illegally it shall not be used where, by so doing, the administration of justice would be brought into disrepute.

p. 7391

Mr. Broadbent: Madam Speaker, the point has been made that such a charter curtails the legislative power of federal and provincial governments. Well, we in this party have said since the Regina manifesto back in 1933 that this is, of course, true and it is, of course, desirable. That is one of the central purposes of a charter of rights. And if it had existed around 30 or 40 years ago, a number of the injustices that I have just listed would probably not have taken place.

However, in making this point about the limitations on both federal and provincial jurisdictions that results from a charter of rights, I want to stress the findings of our legal experts, those who know that the effect of bills of rights in other countries is not the curtailment of legislative authority; the most beneficial effect that charters of rights or bills of rights have had in other lands is the protection of individuals in the administration and enforcement of laws. That is the prime benefit from a charter of rights, and we must always keep that in mind.

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February 18, 1981, Debate in the House of Commons, p. 7439 (click HERE)

Mr. Roberts: […] What we have here is a safety net, an added protection, so that in case provincial legislatures or the federal government do not respect those rights, there is a recourse to the courts. An entrenched charter of rights makes assurance for Canadians doubly sure. I am sure Canadians want that kind of protection. If one were to ask the people of Nova Scotia whether they would like to have their rights protected by the majority government headed by Mr. Buchanan or by the courts, they would say, the courts. If one were to ask Quebecers whether they would like to have their natural rights protected by the Parti Québécois led by Mr. Levesque or by the courts, they would say, the courts. If one were to ask the people of Ontario whether they wanted their basic rights protected by Mr. Davis and the Conservative government or by the courts, they would say, the courts. If one were to ask the people of Manitoba whether they would want their rights protected by Mr. Lyon and his majority or by the courts, they would say, the courts. And if one were to ask the people of Canada whether they wanted their basic rights protected by our Prime Minister (Mr. Trudeau) and his Liberal government or by the courts, they would say, the courts.

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February 19, 1981, Debate in the House of Commons, p. 7477 (click HERE)

Mr. McGrath: […] Also the hon. member for Hochelaga-Maisonneuve talked about the importance of the charter of rights in protecting human rights and fundamental freedoms. I happen to hold very strongly the opposite view. I would say, with respect to my hon. friend, that the entrenchment of a charter of rights in

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the Constitution will not by and of itself protect human rights and fundamental freedoms. I give him proof of that statement. What about the Japanese Americans who were the first to be interned? What protection did they have under the United States constitution with its entrenched charter of rights? They were the first to violate and take away the civil and human rights of the Japanese

citizens of that country. Indeed, it was pressure from them which forced Canada to do the same thing.

My colleagues have talked about the constitution of the Soviet Union and the rights enshrined in it. I should like to give a better example. India is one of the few countries in the Commonwealth which has maintained the parliamentary system and entrenched a charter of rights. We can take a look at the record of civil rights and fundamental freedoms in India. At the present time it has suspended its constitutional rights for a year. We know what happened during the previous regime of Madam Gandhi when people had no fundamental rights or freedoms, notwithstanding the glowing terms of the entrenched rights contained in the constitution of India.

Then I look at the few countries in the Commonwealth which have not entrenched charters of rights and I find they have one significant thing in common. These are the countries which have the best record of protection of fundamental rights and freedoms of all the countries in the world, I will name them: the United Kingdom, Australia, New Zealand and Canada.

Some hon. Members: Hear, hear!

Mr. McGrath: I believe we will live to regret what we are doing here today. When the fathers of our country 113 years ago put together the present Constitution—in its written form, the British North America Act—they opted for the British tradition. As we know, there are two traditions for constitutions. There is the written tradition. For example, after a bloody civil war or a revolution, the Americans decided to sit down and write a constitution, as did the French. Then there is the British tradition where there is an evolution of a constitution based on the historic rights and privileges of a people as they develop and are transgressed. The ultimate protection of fundamental rights and freedoms is contained in the Parliament of the United Kingdom or up to the present day in the Parliament of Canada.

We are setting up in this country a parallel legislature because the Supreme Court of Canada, as it is faced with questions based on the charter of rights, will eventually have to legislate; we all know what happened and what is happening in the United States of America. I personally think that will be a regrettable day for Canada. But that is not the majority view and, in a democracy I prescribe to the majority view, and will reluctantly go along with the charter. I believe it is a better charter because of the deliberations of the committee. I do not want to suggest that because I participated in that committee, because we participated in that committee, or because we were successful in getting six or seven amendments, I do not want to suggest for a moment that in any way legitimizes the process. We were merely carrying out our responsibilities as legislators. How often do we deal with bills in the House upon which there is fundamental disagreement? As parliamentarians what do we do? Do we wash our hands and merely walk away? That is not the tradition of Parliament. We must sit and try to make a bad bill into a better one. That was the attitude we took in the committee. We had to sit and try to make a bad charter into a better one. As a result, I believe we have a better charter of rights today.

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February 20, 1981, Debate in the House of Commons, p. 7529 (click HERE)

> **Mr. David Berger (Laurier):** […] One of the main criticisms of the constitutionally entrenched charter is that Parliament and not the courts should be the final arbiters in matters relating to human rights. ln the British tradition this function belongs to Parliament. However, every Member of Parliament knows that on a day to day basis courts can best protect an aggrieved individual. Parliament has little time to concern itself with the personal problems of the man or woman at the corner of Peel and St. Catherines, or Portage and Main for that matter. It is true that at the allotted time a Member of Parliament can put a question to the government in power, which may result in an investigation, or even in new legislation. But what guarantee do you have that you will be able to catch a minister's attention or that he will listen to you? An individual acting alone has very little clout, and even less if he happens to belong to a minority. He has a much better chance of bringing his case before the courts, and if he has a good case he will obtain a remedy, a remedy which may not only benefit him but all others in the same situation.
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> Entrenching a charter of rights does not mean that Parliament can then sit back and do nothing. The committee was reminded of this by Dr. Noel Kinsella, chairman of the New Brunswick Human Rights Commission. I will loosely paraphrase what Mr. Kinsella said. He said that the courts are but one institution for the protection of human rights and that there are many others. The other two major institutions are the legislatures and Parliament, and also the people through public opinion and the voluntary sector. He said that we in Canada, in terms of the enhancement of human rights, must not come to the conclusion that a bill of rights in the Constitution is the final guarantee of human rights, since the great advancements in race relations in the United Kingdom have been made following upon the race relations act, in the United States following upon the civil rights act, and in Europe following upon the European convention.
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> The courts, the public, the press, Parliament, the legislatures—each and every one of us has a vital role to play if we are to continue to enhance human rights in modern Canadian society and to meet the needs of a modern Canada. That is the message we heard in the committee and that is why I urge this House to adopt the resolution.

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February 23, 1981, Debate in the House of Commons, p. 7573 (click HERE)

> **Mr. Jim Peterson (Willowdale):** […] The charter would seem to improve upon the existing legislation which, in most cases, allows the production of illegally obtained evidence. Therefore, this new provision strikes a balance between the individual's rights and the collective need for an effective enforcement of the law and for an equitable judicial system. Consequently, a piece of evidence which is considered relevant, even though it may have been obtained illegally, will be allowed unless its production might bring discredit upon the administration of justice.

p. 7574

> **Mr. Peterson:** […] A major argument against entrenchment is that it will leave questions of interpretation, and thus the application of rights and freedoms in specific cases, to the determination of our courts. Some say this will deny the supremacy of Parliament. To this argument, our only response can be: "So be it." The courts now determine which of our powers are federal and which are provincial. Every day, the courts are called upon to dispense justice and to

interpret the rights of individuals. It is merely a logical progression to give them additional authority to interpret our fundamental rights and freedoms as individuals.

I would rather see the courts charged with this responsibility than leave a free hand to legislators, legislators who have in the past shown themselves capable of enacting laws which disenfranchised Chinese Canadians, which abolished the use of French in Manitoba, which denationalized the citizenship of Japanese Canadians, which suppressed freedom of religion and speech in provinces, which restrained public assemblies and which limited the use of English in the province of Quebec. Life has changed considerably since the nineteenth century when doctrines such as Parliamentary supremacy were adumbrated. We no longer fear the power of a monarch. What does concern us is the incredible multiplicity of regulations, rules, orders and directives that are not debated in Parliament and which can infringe basic rights. These regulations emanate from the numerous bureaucracies and regulatory agencies created at the federal level, the ten provincial levels and at thousands of municipal levels.

Some hon. Members: Hear, hear!

Mr. Peterson: While the task force on regulatory reform made many recommendations that would open up the regulatory process to public scrutiny and to accountability of legislators, we believe entrenching the fundamental rights contained in this constitution bill will help to avoid abuses of the rights of individuals when they arise.

In 1976, with the agreement of all provinces, Canada ratified the universal declaration that has now become the international bill of rights. In both drafting and amending our charter, the international bill served as a touchstone. It would bother me were we not prepared to take every step here in Canada to implement, foster and protect those rights which we have agreed to by international treaty.

To summarize, entrenching a charter is a declaration to Canadians and others that we believe first in protecting human rights and freedoms. We believe these rights and freedoms should not be brushed aside by a transient majority in any legislative body.

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February 26, 1981, Debate in the House of Commons, p. 7744 (click HERE)

Mr. Lewis: […] I am also bothered by the fact that my rights as an individual are to be determined by a judge, not an elected representative. As a lawyer, I have great respect for the judicial system, the judiciary and the rule of law, but I do not want to tell a citizen that a constitutional amendment is required to assert the rights which he thought he had. Government should be of laws, not of men. Rights not defined in the Charter of Rights and Freedoms should be capable of definition or improvement by elected representatives, not judges.

I appreciate that the point I am now about to make is not constitutionally fine tuned. I ask the government to consider some method whereby the charter of rights and freedoms could be amended by a vote in Parliament, improving and expanding the rights contained in the charter by

a simple majority of Parliament. But if rights or freedoms are being reduced, they must be subject to the amending formula.

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February 26, 1981, Debate in the House of Commons, p. 7753 (click HERE)

Mr. Dan McKenzie (Winnipeg-Assiniboine): […] Senator Cook went on to say:

I quote from Professor Peter Browne, a distinguished member of the Department of history of Carleton University:

"Most of the witnesses before the Special Joint Committee on the Constitution concentrated their criticism on the provisions of the proposed charter of rights. As a result, some of the ambiguities, contradictions, restrictions and omissions have been identified, and may be remedied. What has still not been adequately discussed, however, is the underlying question of whether the ultimate responsibility for defining our basic social values should be transferred from the federal and provincial parliaments to the Supreme Court."

As a matter of fact, I was just discussing this very subject with my colleague, the hon. member for Qu'Appelle-Moose Mountain (Mr. Hamilton) who happened tonight to be in the company of some judges who gave him a real insight into the dog's breakfast we will get into if this is left up to the courts. That is the point Senator Cook made in his speech. He went on to say: There are, indeed, many good and sincere people who seem to fell that if we have a charter of rights, and pass over to the courts the duty and responsibility of enforcing and interpreting it, this will prove to be a panacea, a universal remedy or cure for all our ills. Furthermore, they feel that the charter of rights must be placed beyond the power of Parliament, a legislature or the elected representatives of the people to repeal or amend. Those who subscribe to this theory argue that the court can and will do all that is necessary to protect and safeguard all our rights. Will this indeed be the result?

He gives an example of a Supreme Court case of a number of years ago. Canadian people do not realize what will be involved to protect their rights. People will have to fight in the courts for years. It will be great for the legal profession. Mr. Justice Berger in the United States has pointed out that because their bill of rights was entrenched in a charter the United States judicial system today is an absolute jungle. Lawyers are getting smarter and smarter all the time and are finding more and more loopholes in the law. It goes on and on and on, and lawyers are making hundreds of thousands of dollars handling these cases. It does absolutely nothing at all for the person on the street. I shail now read the example which Senator Cook gave in the Senate of February 24. It just goes to show how involved and complicated it is when these things get into the courts. He said:

The last time there was a case before the Supreme Court of Canada dealing with human rights under the Constitution was in the year 1928. At that time the Supreme Court of Canada was asked to decide the meaning of the word "persons" in section 24 of the British North America Act, and whether "persons" includes women. The court ruled unanimously, with not one dissenting voice, that "women are not 'qualified persons' within the meaning of Section 24 of the BNA Act, 1867, and, therefore, were not eligible for appointment by the Governor General to the Senate of Canada.

> Did the court endeavour to reflect public opinion in 1928, and did it look to the future in order to decide this question, or did the judges look to the past to find some legal precedent on which they could hand their hats? Did they look at the state of public opinion in 1928, and did they endeavour to decide what should be the best decision for the future? A reading of the judgment indicates that they searched the past, and Chief Justice Anglin quoted with approval the words of Lord Esher of England, spoken in 1889.
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> Lord Esher had quoted with approval the words of Mr. Justice Willes, which Mr. Justice Willes had written in 1868, as follows:
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> I take the first proposition to be that laid down by Willes J., in the case of Chorlton v. Lings. I take it that by neither the common law nor the constitution of this country from the beginning of the common law until now can a woman be entitled to exercise any public functions. Willes J. stated so in that case, and a more learned judge never lived.
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> Can you imagine an ordinary person going into court, fighting for his rights and having to listen to a legal harangue like that in order to explain his rights. I look after people's rights every day of the week, as do all members in this chamber, without having to hire lawyers and go to court. I can take a matter up with a cabinet minister, speak on someone's behalf here or in committee. I do not have to go to court and have a bunch of judges deal with it.
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> Senator Cook went on to say:
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> In view of this record, why should we think that the courts will be pioneers in safegarding human rights?
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> We need to keep the Senate, at least for the time being. As long as we have this group of Liberals and New Democrats, we need some responsible Liberals in the other place to look after our rights. Thank heaven a few more of them are speaking out. Senator Cook went on to say:
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> Fortunately, the women's rights case had a happier outcome. The judgment was appealed to the Privy Council in London and the court held:
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> Of course, that went on for years and years in the courts. […]

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March 2, 1981, Debate in the House of Commons, p. 7785 (click HERE)

> **Mr. Nickerson:** […] By trying to commit an exhaustive list of rights and freedoms to paper, we run the risk of two dangers, both of which are so evident in the proposed resolution before the House at the present time. First, we have omissions made either deliberately or inadvertently. As Canadians, under our existing and largely unwritten Constitution we enjoy all the basic rights and freedoms which free people should have. In codifying these, even if some catch-all phrase is inserted, some are bound to be excluded; and in future, the courts of the country, which will, under this Liberal proposal, become the ultimate arbiters of our rights and freedoms, will surely hold that

it is the letter of the law that counts, and any rights not properly delineated in the written form in all probability never existed in the first place.

I think it might take some time for that frame of mind to come upon the courts; but there is always a danger that it might. As an example of a deliberate exclusion in the proposal, we can cite property rights. A number of members have already spoken on the property rights issue. I think it is so important that it bears repeating. We are talking about the right to hold and freely enjoy our own property, and not to be deprived thereof except through due process of law. Of course, our socialist friends opposite and to my left do not believe in this.

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March 3, 1981, Debate in the House of Commons, p. 7832 (click HERE)

Mr. Nelson A. Riis (Kamloops-Shuswap): Mr. Speaker, yesterday at the close of the sitting I was referring to the section of the charter dealing with human rights. I believe that Canadians generally have the feeling that their basic rights and freedoms are very well protected in Canada. Although our record is certainly far better than that of most nations, it is not beyond reproach. Our past, and indeed even our present, has witnessed many instances of gross and blatant discrimination where groups and individual rights and freedoms were viciously abused and in some extreme cases were eliminated completely.

Recall, for example, the total genocide of the Beothuk Indians of Newfoundland where in some cases the Indians were considered as being less than human and shot for sport. Consider the thousands of Chinese who were brought into British Columbia during the 1880s and were, for all practical purposes, slaves. This was clearly demonstrated in the Dominion Elections Act of 1885 in which Chinese people were categorized as not being persons.

We have been reminded many times in the past number of weeks of the 23,000 Canadians of Japanese origin who were forcibly moved from their homes along the west coast under the War Measures Act. Many of us today shudder at the recollection of the smashing of the Woodworkers' Union during their efforts to represent working people in Newfoundland.

There was the social political force of the Ku Klux Klan during the 1930s in Canada, again lifting its ugly head today. Under the Duplessis regime there were numerous examples of both religious and political discrimination and persecution. In recent times the government of Alberta attempted to manipulate the free press in that province and pass legislation abusing the rights and freedoms of the Hutterite people. In British Columbia, there was blatant racial discrimination against the Sikhs since arriving in that province at the turn of the century and, unfortunately, it still remains today. As was indicated in today's question period, the federal government still maintains discriminating provisions regarding native Indian women under the Indian Act.

These practices must not be allowed to continue or to occur again, as the case may be. That is why we support the principle of an entrenched charter of rights.

To those who say, "You're not giving rights to the people, you're giving them to the courts", I can only reply, "What legal system worthy of the name in providing for rights doesn't leave the

> interpretation and enforcement of these rights to adjudication?" If we are serious about protecting minorities and protecting against discrimination, of course the courts will have to provide protection. Who protected the Hutterites or the Japanese Canadians? Who protected freedom of the press in Alberta or religious or political freedoms in Quebec? Not the legislatures. The dialectical tension between courts, citizens and legislatures is a permanent feature of our democratic way of life, and those who say "keep the courts away from protecting our rights" surely misunderstand the importance of the legal and judicial process in defining liberty itself.
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> In any case, there is nothing in the package before us that we are presently debating which prevents provincial legislatures and the federal government from respecting the rights of their citizens. What we have here is a safety net, an added protection, some extra security that in case provincial legislatures or the federal Parliament do not respect those rights, there is recourse to the courts.

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March 4, 1981, Debate in the House of Commons, p. 7899 (click HERE)

> **Miss Jewett:** […] Another argument one sometimes hears is that, with a charter of human rights and freedoms, we are replacing legislative supremacy by judicial supremacy. There is no doubt there will be more litigation, but may I remind the House—I am sure that members do not need this reminder, but may I do so anyway—that the courts have been interpreting our rights and freedoms under the common law, or under the civil law in the province of Quebec, for years and years. It is not a matter of the courts not interpreting our rights and freedoms all this time; they have been doing so under common law or under statutory law. As I pointed out a moment ago, even under the BNA Act, in a few monumental cases they have been interpreting our rights and freedoms. We are not going from something called legislative supremacy to judicial supremacy. There will be more litigation, there is no question, but the important thing which this charter has made a major effort to do since the people of Canada were heard from is to ensure that a clear signal is given to the courts about what freedoms and rights we want to have protected, and, above all, in the area in which I am particularly interested, a clear signal has been given now, I think, that we want equality for men and women in the very substance of the law itself.

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March 5, 1981, Debate in the House of Commons, p. 7942 (click HERE)

> **Mr. Hawkes:** […] I think of this resolution we are debating today as a secret revolution. That it is a revolution, I have no doubt; and I will expound on that later. The fact that this is being done with a measure of secrecy, though not total secrecy, I also have no doubt; and I shall expound on that also. The revolution occurs in two ways. One way has been talked about a little, but the other way is seldom talked about. The revolution in the way we will be governed in the future will hit anyone who gives this measure serious study. It is a revolution related to the power of the people and to the supremacy of the voters of this country. This resolution will take away those powers from the people. That in itself is a revolutionary concept in its magnitude and repercussions.
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> It is also a revolution in both its process and its substance which attempts to dismantle the federal system. I wish to deal

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with both of these in what I hope might be understandable ways, not only for members of this House—and I have found it helpful in achieving my own degree of clarity—but also for those who watch our proceedings from time to time through the medium of television. What I say may help them.

The principle on which this nation was founded, one which continues to this day, is that the voters are supreme. When we elect our school boards, municipal and county councils, our provincial legislatures, or this House of Commons, what we do is elect juries or peers to represent us in a decision-making process. In these forums the majority rules and we are governed. But critical to that is the notion that periodically, every three, four or five years, the voters of this country for each of those bodies have the power and the responsibility to decide whether or not the same people shall continue to govern in their areas of jurisdiction or a different group of people shall govern.

For instance, in the recent municipal elections in the city of Calgary, the latter course was chosen. The entire public school board was changed; half of the separate school board was changed, half of the city council was changed and a new mayor was elected because the voters of the city of Calgary had that democratic right and power to change the jury. I think for those who care about freedom there is nothing more important to protect than that power which lies in universal suffrage in the ballot which all of us enjoy.

Some hon. Members: Hear, hear!

Mr. Hawkes: The Liberal Party, aided and abetted by some members of the New Democratic Party, is attempting in secret to take that power away from the people and to give it to a jury of nine people, of which five of the nine shall rule. The government is not changing the process of the selection of the nine. That process today, and in the fine print of this resolution, which will be continued, is the selection of those nine people, largely in secret and chosen essentially by one person. That is the nature of the revolution.

There may be value, and l would assert there is value, in handing over to the courts some additional responsibility. But I think that should be matched by a great deal more care and attention. As we increase those responsibilities, then we need to deal with the mechanism of selection to ensure that we, as free people, retain control of that jury as well. Certainly when we attempt to take away from Canadian voters the power to choose who shall govern them, we should do it with a great deal more care, attention and time than we are devoting to the way we are doing it now.

Do I find this denial of the supremacy of voters to be discrepant through the last 12 or 13 years? I do not. There is a school of thought in philosophy and political science which must be described as an attitude portrayed by those who believe in oligarchies, those who believe that somehow there is an elite class of rulers who somehow have more wisdom and knowledge than others, and that this elite class shall rule. If we look back over the last 12 or 13 years, those years which bring us to this point in constitutional revision, we can see that mind set in operation. The growth to 400 Crown corporations in its basic element represents the fact that we have turned over jurisdiction in 400 areas of our lives to small boards of directors who are not chosen after public examination but are simply appointed.

p. 7946

> **Mr. Ian Deans (Hamilton Mountain):** […] I listened with interest to my friend from the Conservative Party who spoke before me as he said that going to the courts was such a terrible thing. Yet every single Member of Parliament knows that every piece of legislation we pass will, at some point, be interpreted by the courts, and the court interpretation will set the precedent which will be the benchmark against which the legislation will be applied. Every Member of Parliament knows that the legislation which we will pass from this day forward, as on any other day, will be subject to amendment in the House of Commons.
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> The one thing that has not been said by those who suggest that what is happening destroys democracy is that until today, and until this bill finally becomes law, if we wanted to make any change to the existing Constitution of Canada, we could not have gone to the courts of Canada; we had to go to Westminster and ask another Parliament, far removed from the concerns of Canada, with little, if any, interest in the day to day activities of our country, to approve or disapprove of the changes we would like to make. Frankly, I do not think it is all that bad to have the court in your own land, appointed by your own Parliament, make the final decision.

p. 7952

> **Mr. Siddon:** […] On the question of minority rights, and I have alleged that this is a sham perpetrated on all of the special interest and underprivileged groups in our nation, I believe these groups are being deceived into believing they will get certain rights which they do not already enjoy. However, in so far as the rights of minority groups are concerned, many of those rights as set out in the resolution are qualified by a limitation clause which empowers the Supreme Court of Canada to restrict those rights in any way it deems to be proper. Once those rights have been delineated and interpreted by a ruling of the Supreme Court of Canada, minority groups will have no further recourse to this Parliament, to their provincial legislatures or to seek redress in any other way for a perceived injustice arising out of a misjudgment by the Supreme Court of Canada.
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> In spite of the fond notion which comes from one or two of the members opposite, that Canadians should have the opportunity to litigate rather than to lobby, in fact they will not have the opportunity to litigate because once those decisions are rendered by the Supreme Court of Canada it will be virtually impossible to have them altered. It is not a matter of litigating or lobbying. Canadians will not be able to lobby because we Members of Parliament will not be able to help them. Neither will they be able to litigate, even if they had ample financial resources at their disposal, because the court will have made its determination.

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March 10, 1981, Debate in the House of Commons, p. 8080 (click HERE)

> **Mr. Blaine A. Thacker (Lethbridge-Foothills):** […] I believe that an entrenched charter is unwise within the context of our Canadian society and particularly in relation to our system of representative, responsible parliamentary government and our judicial system. I sense that an entrenched charter will change dramatically the process by which our own unique Canadian

society has evolved and will continue to evolve in the future, particularly with respect to human rights.

It seems to me that the great value of our present system of responsible government is that it permits each generation to strike a new balance which is appropriate to its particular time and place. The focus of that process in Canada has been provincial legislatures and this federal House. The agencies of enforcement have been the human rights commissions and the judicial system. On balance, and especially if we contrast the position of human rights in 1867 with today, we see an enormous change which I think all would agree has been progressive.

For example, in 1867 women were denied the vote which they now have. Men without property were denied the vote which they now have. The poor of 1867, the mentally handicapped of 1867, the physically handicapped and the native peoples of 1867 all were viewed in an entirely different light compared with now. In 1867, we did not have electricity, cars, airplanes, TV, stereo, or satellites. Our view of the world, science and religion has changed incredibly since then.

I submit, Mr. Speaker, that had the Fathers of Confederation entrenched their view of human rights, of democratic rights and of legal rights in a charter, we would be labouring today under a very different type of society and possibly would have had change only by civil violence.

In fact, under our system of responsible, representative parliamentary government we have been able to change and adapt our institutions quickly enough to preserve the whole. I am of the opinion that an appointed judiciary slows the process of change and also, by virtue of its past Canadian mandate restricting it to legal interpretation and enforcement, will impair the process of future change. There is also the potential problem of an appointed judiciary which decides to become activist and political, as in the U.S.A. If they make a mistake it cannot be easily corrected. If Parliament makes a mistake, it can be changed by future parliaments. An entrenched charter will change our attitudes and practices to the point where we will be narrow, technical and legalistic in our attitudes rather than fair, reasonable, tolerant and open. We will be adopting the minimum legal standard required rather than the much higher moral standard under which we should all operate.

Therefore, before entrenching a charter of human rights we should take a serious look gt our method of selecting judges in the context of federal-provincial relations, in the context of their sex and even their ethnic balance. To impose suddenly and unilaterally an entrenched charter on our existing system with no genuine examination of the probable effect on other systems is most unwise. Mr. Speaker, just as the huge deficit of $137 billion piled up by past parliaments is now seriously hampering this Parliament, so will our present action of entrenching a charter based on today's values hamper future generations. Better to leave rights in a statutory bill of rights, like that of John Diefenbaker.

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In fact, we are displaying an enormous ego to believe that we have the answers for all time. Several members have argued that our treatment of the Japanese during the Second World War and the Chinese before that justify an entrenched charter. The treatment of both was a tragedy, but in reality they were also treated badly in the U.S.A. with its entrenched charter.

In Russia and many other countries with beautifully written, entrenched charters we find the most barbarous and vicious tortures ever designed by mankind. On the other hand, here in Canada with our representative, responsible democracy with no entrenched charter, we have a sense of fairness and justice and, on balance, a rapidly improving sense of human rights.

The reality of human rights is that they exist in people's minds and are protected by individuals standing up and insisting on the value of human dignity. Right from the beginning people in this nation stood and spoke against the treatment of the Japanese Canadians and, earlier, the Chinese Canadians.

If our government was oppressive and putting people in jail without trial, or if our police or military forces were out of civil control, then I would be arguing strongly for a change. But they are not, and the reason they are not is that we are individually and collectively committed to being a civilized society with a system of government that has grown and adapted as our sense of human dignity and rights has grown and adapted. The focus of that change and the changes which should occur in the future should be in the provincial legislatures and in this House where we are subject to review by the people every four years.

The beauty of John Diefenbaker's Bill of Rights is that it sets out the basis for our values. Mr. Speaker, let me read those values, and I quote:

The Parliament of Canada, affirming that the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions:

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a bill of rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

Therefore—

It then goes on to enumerate specific rights. But, Mr. Speaker, in this proposed entrenched charter did the Liberal-NDP coalition accept the PC amendments to include the right to own and enjoy property? No, they did not. Did they accept the PC amendment referring to the dignity and worth of the human person? No, they did not. Did they accept the PC amendment referring to the family? No. Finally, the Liberals voted against a PC amendment acknowledging the supremacy of God. Shame! The NDP sent a member to speak against the amendment, then sent others to vote for the amendment, but I submit only when they knew the Liberals intended to defeat the amendment.
Since then, has the Leader of the NDP insisted on the supremacy of God clause? Of course not. Their philosophy does not accept the concept. What hypocrites! They make the pharisees lock like angels.

Under the proposed entrenched charter, an aggrieved citizen will have no choice but to engage a lawyer and go to court; and if that citizen loses, there will be no remedy except a constitutional

change, which will be virtually impossible. Also, Mr. Speaker, I wonder if ordinary citizens genuinely realize the enormous legal cost involved in the use of our judicial system. An entrenched charter will do for us lawyers what the Liberal government tax reform did for chartered accountants. We will be creating a new class of high priest, the constitutional lawyer, This will concentrate wealth in still another level of privileged class. It is ironic that the NDP members who purport to stand up for the ordinary Canadian are in fact injuring those very people they purport to protect. The same argument applies to their stand on energy and fiscal policy.

p. 8098

Mr. McKinnon: Yes. I wish to comment on the process regarding the entrenchment of a charter of rights, that is, the process that is being followed to entrench it.

On November 7, 1980, the Prime Minister said:

I am convinced that there would never be an entrenched charter of rights. Particularly, there would never be entrenched educational language rights if it weren't done now by the national Parliament the last time, as it were, that we had a possibility of proceeding in this way to amend the Constitution. ln other words, once we have a constitution in Canada, whether it be with the Victoria formula or any other formula, we will never get anything saying that all Canadians are equal—

So instead of having long philosophical discussions about a charter of rights, we are being subjected to what one man considers to be right. The heck with the rest of the country! We are to be treated like little children who do not know what is good for us. Well, I for one hope I know what is good for me, and I can tell you, Mr. Speaker, that I do not need the Prime Minister or his sycophants in the Langevin Building to give me instructions in morality.

The essential function of a charter of rights is the protection of every citizen from injustice, and it should result from a calm, unhurried discussion. Instead, in Canada we are having an emotional, partisan, hasty argument involving pressure groups which are trying to gain a privileged position by having their particular interests entrenched. A charter of rights is intended to provide common rights for each and every individual citizen. lt is not intended to protect special groups. If equality for all citizens is the essence of a charter of rights, how can the wishes of some groups be approved and others denied?

I would like to quote the testimony given by Professor Peter Russell of the University of Toronto to the special joint committee which reads as follows:

I suggest to you that there are three qualities which should characterize the process of defining the rights and freedoms which are so fundamental to Canadians to enlrcnch in the Constitution.

The process should be considered, it should be reasonably popular and it should be as unifying as possible. The process of entrenchment should have those qualities because it involves the creation of a higher law, the law of the Constitution which will limit all Canadian law-makers in the future, and those who fashion constitutional guarantees designed to limit the powers of transient majorities must express and try to express the enduring will of our nation. They must not themselves be simply, and no more than, a transient majority.

By these standards, I judge the means being used now to entrench a charter of rights and freedoms in our Constitution as seriously deficient. The charter has been drafted, I say, in haste, at least pretty quickly, by some government officials. It is being put through this federal Parliament, sometimes closure has been used, deadlines have been and are being applied without permitting the Canadian people sufficient opportunity to consider and discuss all of its important implications. It is to be made part of our Constitution not by a constitutional act of Canadians but by a foreign legislature and in the teeth of some bitter opposition front a majority of provincial governments.

By entrenching a charter of rights in our Constitution, we are handing the protection of citizens over to the courts. That is another problem. As the Hon. James Richardson, a former Liberal cabinet minister, told the special joint committee:

The essential weakness of written constitutions is that they are inflexible. The courts that interpret a Constitution must look at what the Constitution says, and not at the political and social reality of the times in which the judgment is being made.

[Page 8099]

—Parliament responds to social and political realities. Parliament responds to human needs in a way that a court can never do, because a court is not being directed by human needs but by the dead hand of a written constitution.

As more senior members of the House will realize, it was not often that I agreed with the Hon. James Richardson during his tour here, but I do agree with that quotation.

The Ontario royal commission's inquiry into civil rights— the McRuer Report of 1969—supports this view. The report said:

We do not think it is consistent with a true concept of democracy for a court of appointed judges to be able to make a law with far-reaching effects touching the lives of everyone in the country with no power in Parliament to alter it. In the last analysis, in such cases the power of final decision may rest on one man casting the deciding vote in the court of last resort.

Canada already has an Official Languages Act passed in 1969 with support from all parties. As Gordon Leckie has stated:

Which will seem more legitimate—a 'constitutional right' foisted on us reluctantly by the United Kingdom, or an act passed by our own Parliament? Obviously, Canadians will not feel bound by a rule, technically 'entrenched' or not, which has never been approved in a mandate front the whole people.

I agree with Mr. Leckie. Entrenchment will not achieve the protection of human rights. One has only to look at the Soviet Union's entrenched bill of rights to understand this fact.

An hon. Member: We are tired of the Soviet Union.

Mr. McKinnon: Do you know it off by heart, gentlemen? Just think what wonderful rights they must have because they are entrenched in a bill of rights which says:

Citizens enjoy in full social, economic, political and personal rights and freedoms proclaimed and guaranteed by the Constitution… citizens are guaranteed inviolability of the person—

An hon. Member: You are the fifteenth person to say that.

Mr. McKinnon: Human rights flow from the fact that we are human. The government does not confer them upon us. And when we take it upon ourselves to write down what rights we have, we must remember that by any omission, we are also establishing what rights we do not have. For example, property rights. They have been omitted from this resolution and thus from the rights of Canadians. The legitimacy of even those rights that have been included is in doubt because they impose obligations on the provinces in fields within their jurisdiction- for example, minority language rights.

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March 11, 1981, Debate in the House of Commons, p. 8141 (click HERE)

Mr. Huntington: […] As I mentioned, aur parliamentary system has great flexibility. It has built-in safeguards for second looks. Historically it has allowed for the farces ai change through legislative debate and law. This resolution on the Constitution attacks the heart of these safeguards. It turns this duty and function over ta the courts. Our courts and legal system address words, not issues. Our legal system is operating at the extremities of reasonable interpretation. Why should we turn over this vital function ai aur legislative assemblies to deal with issues ta the word merchants in the courts?

There is a Machiavellian morality to this resolution on the Constitution. It delivers us into a structured society. It removes power from the people and delivers that power to the state. It uses the language of totalitarian societies in the wording of its rights. The state gives the rights to the people—it is not a Constitution by the people and for the people. […]

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March 12, 1981, Debate in the House of Commons, p. 8182 (click HERE)

Mr. Rose: […] While I know there is not complete congruity between the experiences of Canada and the U.S. in this issue of civil rights and protection of those rights, the parallel is certainly not a weak one. Ask an oriental citizen in Canada or the native peoples if a statement in the BNA Act would have been helpful in their achieving the right to vote much sooner than when it was finally accorded to these minorities as recently as the fifties and sixties. Ask Franco-Manitobans if a statement of linguistic rights would not have made some difference to their culture's survival in the long years between Laurier and Trudeau. We know the charter is far from perfect, but due to the diligence of committee members on all sides of the House it is a vast improvement from the first time we saw this charter.

p. 8186

> **Mr. Louis Duclos (Parliamentary Secretary to Secretary of State for External Affairs):** […] Mr. Speaker, it is a rather subtle move on the part of the present government to change the nature of our federal system
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> [Page 8187]
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> through enshrining a charter of rights and freedoms. It then becomes possible to cast aspersion on avowed opponents of the proposed resolution by inferring they are opposed to giving a better protection to human rights and freedoms. We feel it is highly desirable that the basic freedoms listed in the United Nations Universal Declaration of Human Rights be constitutionally guaranteed all over the world. Yet let us not overrate the importance of the passing by the Canadian Parliament of a charter of rights and freedoms and make it at any cost an absolute prerequisite for the future happiness of our people, even if it means tampering with the basic principles of Canadian federation. The fact remains that in a federative system one level of government cannot compel the other to surrender part of its sovereignty even if it is to hand it over to the judiciary. Yet in many respects it is precisely what is being achieved by the Charter of Rights and Freedoms included in this proposed resolution. If the federal Parliament wants to hand over part of its own legislative powers to the courts, it certainly is its privilege but it is intolerable that it should try to force the provinces to cede part of their constitutional jurisdiction to the courts and more particularly to the Supreme Court of Canada whose judges are appointed exclusively by the federal government.

p. 8202

> **Hon. Don Mazankowski (Vegreville):** [...] I should like to speak briefly about the charter of rights. Again, there are deficiencies There has been much misleading rhetoric by members on the other side. If we listened to them, we would be led to believe that all of a sudden Canadians will receive a host of new freedoms and rights. That is nonsense. Quite the opposite is true. I submit that the charter will probably limit our freedoms. It will place a new emphasis on the courts, without any changes in the selection process, without any modification of the checks and balances. It will be the judiciary rather than the legislatures who will have the final say.

p. 8206

> **Mr. Bill Domm (Peterborough):** [...] Now, as far as the principle of a charter of rights is concerned, I agree entirely with the hon. member for Rosedale who said that one of the things "our forefathers learned about rights was their rights lay in the common law, that they did not need to have their rights listed; that the only listing came when those rights were reduced, that if they can write it down then they can take it away."
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> I also agree entirely with Professor Russell of the University of Toronto, who said in January that "I am not one that sees a need for a great deal of change, we have one of the oldest Constitutions in the world (dating back to I215) and I think we have done pretty well by it—." As Professor Russell said later, "I have not heard any strong, good, clear reasons why the entrenchment of rights has to take place now and through the British Parliament."

I consider this to be very sound reasoning, notwithstanding the tedious and, at times, hysterical screams from across the floor about the need in Canada for a charter of rights. What members opposite constantly fail to point out in the midst of their high-blown speeches on equality and so on, is that it is not so much that these rights are new and will be newly protected on the passage of this charter, as that the process of interpreting these rights will be new. Make no mistake that in the aftermath of the passage of this bill, if it occurs, and for literally centuries afterwards, the Supreme Court of Canada will judge the validity and extent of these rights and will stamp their interpretation on them for all time. These rulings will be binding.

Now this means essentially that the function of interpreting human, civil and democratic freedoms in this country is to be taken out of the hands of the 282 elected representatives to the House of Commons and put in the hands of the government-appointed judges to the Supreme Court of Canada, This is the devolution, or should I say the centralization of power that we are talking about, and the people of Canada should make sure they are fully aware of this before this bill goes through.

What we are doing is Americanizing our judiciary and imposing upon the Supreme Court a political burden of great weight, one that they have never had before. Who knows how, in future decades, the Supreme Court will interpret these marvellous and noble rights that everyone is going on about?

As was said in committee, this charter does not guarantee rights or freedoms, what it does is guarantee a change, a very significant change, in the way in which decisions are made about rights and freedoms.

Can members on both sides of this House be assured that Canadians want to Americanize their system of government? Are they being given that clear choice? The Prime Minister, quite simply, is taking away from Parliament the power and the process of democratically discussing fundamental principles of freedom and is putting that power into the hands of a few, a very few, members of the judicial branch of govern-

[Page 8207]

ment, members who will be appointed by the government in power. I want to inform the people of Canada that their rights and freedoms presently protected and advanced by Parliament will in future be manipulated and interpreted for them by the imaginations of lawyers, as one expert witness said, and the size of an individual's bank account, for that shall be their only recourse.

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March 13, 1981, Debate in the House of Commons, p. 8243 (click HERE)

Mr. Lachance: […] Both arguments are valid. The fact is that we are studying a resolution which calls for entrenching our rights and, to the extent that it gives more to Canadians than it takes away from them, I endorse it. That being so, it must still be pointed out that Canadian courts have not

been unduly favourable to the existing Canadian Bill of Rights. After the spectacular Drybones decision our highest court went through a legal desert.

This conservatism of our courts, particularly the Supreme Court of Canada, brings two things to my mind. On one hand, those who claim that Canadian courts will become overly active should rest easy, that is not in the traditions of our courts. On the other hand, those who claim that the courts should not be involved in politics can be reassured by the tradition of legal interpretation of those same courts. In this respect, the Pratte report in Quebec highlighted the difficulties in interpreting Clause I of the resolution, particularly its allegedly very vague terminology, more especially Clause I of the charter which reads as follows, and I quote:

1. The Canadian charter of rights and freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Well, Mr. Speaker, this supposedly vague language can be found in a number of Canadian statutes, for instance in the Criminal Code as it relates to search and seizure. So our Canadian courts will not be breaking new grounds when they interpret such a provision. That same provision will undoubtedly enable the courts to carry out the full intent of the legislative will of Canadian legislators within provincial legislatures or within the federal legislature of the Canadian Parliament. But a number of objections have been raised about

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the charter of rights and I would like to consider now two of the main objections from a Quebecer's standpoint.

First, the restrictions that the charter would impose through the mobility rights which it confers upon the regulations and the statutes of Quebec which govern, particularly in the construction field, the entry of a worker from another province, and second, the transfers between regions within the same province. I would like to say that this provision would apply, of course, only in cases of interprovincial mobility problems, and here I make a digression. I would not want anyone in this debate to accuse me of showing my centralizing or decentralizing inclinations, because as I see it the debate does not fit into that context. I think the debate can be set in the following context by answering three questions. First, what is the desirable balance between, on the one hand, the wish of the provincial units, of the provincial entities, of the provincial partners to develop their own territory and, on the other hand, the need for the central entity to ensure a certain co-ordination of the policies? Second, what is the linguistic balance? And third, which government is best qualified to provide service to the people?

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March 19, 1981, Debate in the House of Commons, p. 8433 (click HERE)

Mr. Malone: Yes it was a charter of rights, but it said the people have all the power whereas this charter of rights takes that away and gives it to government and delineates—

Some hon. Members: Oh, oh!

Mr. Malone: The Minister of Energy, Mines and Resources is laughing. He does that because he is nervous. He did not have the courage to put into the charter the right to ownership of property. He followed exactly what they have in the communist countries and the military dictatorships of Africa.

An hon. Member: He has no guts.

Mr. Malone: I heard that last heckle. I defy anyone to say I have no guts.

If we were to lock a random group of Canadian citizens into a room and give them copies of constitutions from around the world, it would not surprise me one bit if they chose as their favourite constitution that of the Soviet Union. It is a guarantee of an extended set of rights that is unparalleled by any other nation in the world. The Cuban constitution is similar as are those of most of the military dictatorships of Africa and Latin America.

The principle in every one of those dictatorships is the fact that property rights are not included in their bills of rights. That is extremely fundamental. It means that communist countries can give you all the rights they want because they know if you own nothing, nothing else matters. What use is freedom of assembly when the government owns every place you can assemble? I quote from page 114 of the communist manifesto:

In this sense, the theory of the communists may be summed up in the single sentence: Abolition of private property.

Some members opposite say we need a charter of rights because of the horrible thing that was done to our Japanese brothers and sisters on the west coast during World War II. They give other examples of why they think we need a charter of rights. However, in every example they give the changes have already been made. The people of this country made them through their House of Commons.

Had we had a charter of rights in 1867, we may not today even be considering women as persons, or as being able to vote or sit in this chamber. I would ask why? It is because the courts of the land interpret charters, not politicians.

Mr. Orlikow: What about the United States?

Mr. Malone: The people of the United States do not want busing in their education system. They have it because their courts are powerful. Their elected representatives cannot change this because the courts made those decisions.

Canadians should know that when decisions are made in the courts, when there is a charter of rights, power is stripped from the people. Members of Parliament can say what they want, this will not be changed because the courts will have become all powerful. This institution will be less valuable in serving democracy.

[Page 8434]

The courts become more powerful as they adjudicate the rights of people, as shown by the United States which has a charter of rights. Little children are bused 30 or 35 miles in one direction while children of another race are moving in the other direction in order to achieve some racial equality in the schools. The people of those communities do not want nor do they see any purpose in having their young children travelling that distance on buses. They have complained and complained to their elected representatives, but it is the courts which make the decisions. This government is asking that Canada adopt such a system. I tell you, sir, it defies democracy.

For over 700 years, since the signing of the Magna Carta, all rights in our democratic system have been presumed. What this government is trying to do is pluck out certain rights and say: These will be yours. And the people will look at them and say: Gee, those are great; we have the right to assemble. They do not recognize that when you start to codify rights, when the government pretends it is all powerful and gives you rights, you only have the rights it extends, not those left off the list.

Going down this long list we ask: What about the handicapped; what about the right to a job; what about the question of presumed rights? Obviously they cannot be put in a charter of rights so the only way it can be handled is to give them back to the people and leave the concept of the charter of rights.

p. 8439

Mr. Fretz: [...] I would like to indulge in an hypothesis. Suppose that the Prime Minister goes ahead with the charter and imposes it on the provinces. Suppose that the people and the premiers soon forget the method of the charter's imposition, although I do not believe that could be true. What will happen then? Even if this turns out to be like the flag debate—all smoke and no fire —Canada will still be left with a charter of rights that can only be interpreted by the Supreme Court. The Supreme Court of Canada is an appointed body-appointed by the Prime Minister. I fear that if we let the Supreme Court be the final arbiter, we will be erasing some of the traditional separation between the legislature and the courts. The separation was devised for a purpose, and it will be blurred if the charter goes through as proposed.

The question we must ask ourselves is this: Do we, as Canadians, really want the court to play a significant role in policy-making? This is what the court will be doing if we leave the final interpretation of the charter to it. This is how matters have evolved in the American system. But, in the United States, appointments to the supreme court must be ratified by the members of the Senate. This is a safeguard which was built into the American constitution so that power would not be concentrated too much in the hands of one person—the person making the appointments. We have no such safeguard in our constitutional proposal. I think that we must consider very carefully just what we may be doing to the future of Canada, if we do not change the way that appointments are made to our Supreme Court, should this constitutional proposal go through.

Some of us in this House have come to Canada to escape despotism in other lands; and others of us have travelled enough throughout the world to see the ravages that unbridled power can bring to bear on a nation. What guarantees are there in this resolution which can allow us to relax and say, It cannot happen here? It has happened in other nations which were complacent, where

democracy was wrenched from the people. Other people have said, We trust those we put in power to use that power wisely. They have our best interests at heart. To their grief, other people have learned that sometimes their interests and the interest of their rulers do not always overlap. But the rulers have had so much power invested in them, unchecked power, that the rulers were able to have their way over the wishes of the nation.

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March 23, 1981, Debate in the House of Commons, p. 8503 (click HERE)

Mr. McKnight: […] The constitutional resolution takes from Parliament and from the legislatures of the provinces the ability to protect citizens' rights and places it directly in the hands of the courts.

[Page 8504]

It removes the supremacy of Parliament and establishes the supremacy of the courts and of the governor in council in the lives of Canadians.

There are two reasons for having entrenched rights, Mr. Speaker. The first is to entrench those rights so that they may not be removed; the other reason for having them entrenched in the charter is so that the people of Canada may know what their rights are and therefore may continue to demand them.

The resolution before us achieves neither of those objectives, however. It does not entrench rights and it does not educate the people of Canada about their rights. We on this side believe that there should be a charter of rights, but it should be one that is permanent and should ensure that the rights will not be changed in any way.

We should like to have Parliament supreme, as it should be, and we should like to have the courts supreme, as they should be. The people of Canada must be represented and it is only in the Parliament of Canada that this can be properly done.

The Supreme Court is not responsible to anyone; it is appointed by the Prime Minister. According to the constitution of the United States, the President may appoint members to their supreme court but the appointments must be ratified by the senate. This will not be the case in Canada. I feel this goes against the parliamentary democracy on which our country was founded and which, we hope, will continue to exist.

I should like to speak for a moment about what happens when the Supreme Court rules on a question that is political, not legal. I think all hon. members are familiar with the Dred Scott or the Scott Sanford case in the supreme court of the United States. Mr. Scott was a black descendant of slaves who had asked to be declared free by the supreme court. The court ruled that because of his ancestry he could not be set free. That decision went against the will and wishes of the majority of people in the United States. What followed in the United States was a civil war, before they made their twelfth amendment. I am not trying to say that there will be civil war in Canada; I do not want to go that far.

An hon. Member: Then don't.

Mr. McKnight: An hon. member opposite says "Then don't". If the government will not listen, if it is not receptive to the opposition which is trying to assist it draft this resolution, then why do we have what we call a parliamentary democracy in this country?

Some hon. Members: Hear, hear!

Mr. McKnight: We may not have civil war in this country, but we will have communities and large groups of people who wish to withdraw their support, remove themselves from this country and perhaps form a different country. We will have people who will reject the fabric of the Supreme Court and of the judicial system, because a judicial system making a legal decision on a political question will spread distrust and animosity throughout the country.

I should like to put forward two examples of a situation where the proposed constitutional resolution could cause the courts to be asked to rule on a political question in a legal manner. Capital punishment is an obvious example, Mr. Speaker. What will the consequences be when the Supreme Court rules against the use of the death penalty and the majority of the Canadian people believe, as they do now, that it should be imposed? What will happen when the Supreme Court is asked, as it could be under this constitutional resolution, to rule on the right to life of the unborn child? If it rules against the right to life and in favour of abortion on demand, how will the people of Canada who believe rights were given by God and cannot be taken away by courts feel about the judicial system of our country?

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April 2, 1981, Debate in the House of Commons, p. 8898 (click HERE)

Mr. Nowlan: […] This is the other element which has not been mentioned yet, Madam Speaker. Let us assume that this House makes a determination on the resolution. What is to prevent the government of the day, or of the next day, bringing in an amendment to the Supreme Court Act to change the composition of that court, doing what Franklin Delano Roosevelt tried to do in the "new deal" process—he wanted to stack the court?

It is fundamentally wrong for this House to be placed in the invidious position of putting, in perpetuity, fundamentals into a new Constitution when the next day the Prime Minister could change the whole composition of the court to make sure he gets the proper interpretation from the court. The other point is, we do not know what is before the court. By Parliament ruling and voting now on the resolution, we could be prejudicing other—

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April 6, 1981, Debate in the House of Commons, p. 8987 (click HERE)

Mr. Gamble: […] The Prime Minister has indicated that other leaders of this party have said in the past that Parliament is indeed the supreme court and that this House is the supreme court of Parliament. Will the Prime Minister acknowledge that after his constitutional resolution is adopted,

that state of the law will cease to exist when the Supreme Court of Canada alone will legislate, as a consequence of its interpretation judgments, in dealing with an interpretation of the resolution which he has before this House?

Mr. Trudeau: […] As to the question itself regarding the role of the courts and Parliament, it seems to me that the hon. member is under a misapprehension. What I have said is that both branches of government should be autonomous and should operate autonomously. It is our job to legislate. It is the court's job to judge whether the legislation is intra vires or ultra vires. That is the law of the land and that is the basis of Parliament. That is true in a federal system and it is even true in a unitary system, where it is obvious that parliamentarians do not go around asking themselves if the courts are going to give an okay to what they do.

Mr. Baker (Nepean-Carleton): They don't?

Mr. Trudeau: They don't; no.

Mr. Baker (Nepean-Carleton): In a federal system, they do.

Mr. Trudeau: Madam Speaker, I have several interruptions

[Page 8988]

Madam Speaker: Order, please. In order to facilitate matters, the Prime Minister might simply answer the question posed to him.

Mr. Clark: You have insulted the premiers.

Mr. Trudeau: Madam Speaker, it is basic to our system that three judges, five judges, or nine judges, cannot tell us what is right. We are elected by the people. We are answerable to the people.

Some hon. Members: Hear, hear!

Mr. Clark: What about premiers?

Mr. Trudeau: It is our job to pass laws.

Mr. McGrath: What about the premiers?

Mr. Trudeau: It is the job of the courts to judge whether these laws are intra vires or ultra vires. What the opposition has been doing is saying "We are timid fellows-"

Some hon. Members: Oh, oh!

Mr. Trudeau: -" because three non-elected officials have told us that such a thing could not be done."

Some hon. Members: Oh, oh!

> **Mr. Trudeau:** And these some 90 elected members are saying "We will wait until we get permission from the courts."
>
> **Some hon. Members:** Oh, oh!

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April 21, 1981, Debate in the House of Commons, p. 9343 (click HERE)

> **Mr. W. C. Scott (Victoria-Haliburton):** [...] This concern has been expressed by other members who have taken part in this debate, namely the concern that our parliamentary system of government and the British common law will be replaced by something that the average Canadian does not even fully understand. There is a deep and legitimate concern that the role of Parliament and the powers presently conferred on Parliament will be gradually assumed by the Supreme Court of Canada.
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> We are all reasonably familiar with the basic difference between our constitutional monarchy or parliamentary system of government, and the republican system in the United States. The United States system is based on the Roman triangle, with the executive, legislative and judicial powers at each of the three corners. The Supreme Court of the United States has the responsibility of interpreting the U.S. constitution. However, in the final analysis, the voice of the people is expressed in the House of Representatives; the House of Representatives has the final voice. The final voice of the Canadian people is vested in their Parliament, and that voice and that power must remain here if we are to survive as a parliamentary democracy.
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> Several months ago when these debates first began, the concern was expressed that if we follow the government's present course with this resolution, the Supreme Court will not only interpret and rule on law, but will also be allowed to make laws. In my view, that would subordinate Parliament to the courts.
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> For over 300 years, Mr. Speaker, the courts and Parliaments of Canada and the United Kingdom have resisted pressure to introduce some elements of the United States jurisprudence, in particular their rules with regard to the types of evidence allowed to be introduced into criminal trials. As recently as January of this year the present government attempted to introduce the U.S. exclusionary evidence rule into the body of Canadian law. Happily they were forced to back down.
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> I have with me a letter from the vice-president of the Ontario Association of Chiefs of Police on the subject of law enforcement which reads as follows:
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> Dear Sir:
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> Further to our conversation of last night, I am enclosing a copy of a news release issued by the Canadian Association of Chiefs of Police, January 27th, 1981.
>
> At an Executive Meeting held by the Ontario Association of Chiefs of Police on January 28th, 1981, the news release by the Canadian Association of Chiefs of Police in reference to the recent amendments to the Charter of Rights and Freedoms was reviewed.

The members, who represent the entire police community of Ontario. were unanimous in their decision to support the stand taken by the Chiefs of Police of the Canadian Association of Chiefs of Police of which we are members. The fears expressed by our fellow chiefs are not imaginary. You might say we are confused and wonder why this sort of legislation would be introduced which would destroy the fine justice system we have in this country today.

Knowing your background and the stand you have taken in issues involving the safety of the citizens of Canada, I am sure that you would agree that if the American exclusionary rule, commonly known as the "fruit of the poisoned tree rule" were introduced in law in the Dominion of Canada, the quality of law enforcement in this country would degenerate.

[Page 9344]

We, in law enforcement, and indeed as citizens, are extremely concerned and solicit your co-operation and support in changing or amending the Charter. Yours in matters of mutual interest.

Yours truly, J. G. Wales, 1st Vice-President, Ontario Association of Chiefs of Police.

This matter of law enforcement is causing a lot of concern not only to the police forces throughout my area but, as stated in the letter, to the Canadian Association of Chiefs of Police.

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April 23, 1981, Debate in the House of Commons, p. 9454 (click HERE)

Mr. McCauley: […] One would expect western Canadians in particular to sup- port the charter for its guarantees of civil rights. The west, in large part, was settled by people from eastern European countries who fled the arbitrary and oppressive actions of totalitarian governments. If anyone knows the value of a charter of rights, westerners do.

Opponents say that the charter of rights is unnecessary and our present system of common law is good enough. They figure a charter of rights is an instrument of a republican type of government, foreign to our parliamentary system. But other members of the Commonwealth have bills of rights: India, for example, and the United Kingdom itself which has the Magna Carta, a bill of rights, and an act of settlement. Britain also helped draft the European convention of human rights and is subject to adjudication by the European court of human rights.

Other critics fear the courts will use the charter to declare legislation unconstitutional. They say it would be usurping Parliament's supremacy to have judges rather than legislatures deciding what is law and what is not.

First of all, the courts can already declare legislation ultra vires, in conflict with our present Constitution, the BNA Act. Since Canada is a federal state, the Constitution is the immutable law of the land and the courts must become the interpreters of the Constitution.

In the experience of other countries like the United States, courts rarely find legislation unconstitutional. That is because most legislators keep in mind their obligations under the charter of rights when drafting laws, the same way as now they keep in mind the limitations the BNA Act places on their powers.

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April 23, 1981, Debate in the Senate, p. 2342 (click HERE)

Hon. Daniel A. Lang: […] Today we have a federal Bill of Rights, and provinces have Bills of Rights. These are ordinary statutory enactments subject to judicial interpretation, but also subject to relatively easy amendment in the event of hardships resulting from judicial interpretation. Many cases before the courts in this area are hard cases, and hard cases make bad law, but that bad law can be quite readily changed by statutory amendment. However, it is a different matter when a Charter of Rights is entrenched in a Constitution. Constitutional change to rectify hardships will be almost impossible, for practical purposes, and ameliorations will have to await possible further adjudication, either through appeal or subsequent litigation in the same subject area.

Of necessity, a Charter of Rights must be cast in words of vague generalities, incapable of exact meaning until judicial interpretation is given to a specific section and with respect only to the specific set of facts then before the court. The accumulation of jurisprudence under this Charter of Rights will take years and years.

The proposed charter will remove fields of jurisdiction from both the federal and provincial governments and place that jurisdiction with the courts.

To give you an idea of the types of litigation we can contemplate, it is interesting to note the kinds of cases currently running through the United States legal system under the U.S. constitutional Bill of Rights. I shall name a few just to give you examples: Pro- and anti-abortion cases; affirmative action cases, the most well known being the Baacke case; sex discrimination cases, particularly in the armed forces and sports; the rights of a suspect in search cases; discrimination in hiring practices, particularly in government hiring practices; cruel and unusual punishment and the death penalty; obscenity, pornography and freedom of speech; rights and responsibilities towards the mentally ill; pro- and anti-birth control cases; group rights to public support of its schools and allocation of taxes for that; union and management rights and hiring practices; environmental lawsuits; jurisdiction in interstate commerce; cases alleging police brutality; welfare investigatory practices; zoning by-laws and discrimination exemplified in single family dwelling requirements; confidentiality of press sources; and use of religions in the schools.

This is going to be a mammoth load for our judicial system to assume. I remind honourable senators that the heavy legal costs in the United States involved in the cases I listed above, apart from those borne by the United States governmentthat is, the costs to a litigant himself generally against the state–are underwritten by the special interest groups who thereby promote and sponsor their cause.

It is well to bear in mind that judicial interpretation under the proposed charter will, as often as not, involve the interpretation and even negation of federal or provincial legislation.

In this regard it is interesting to note that judicial decisions in the United States under their Bill of Rights and, particularly, in the sphere of interstate commerce, have produced a very pronounced swing in their constitutional balance towards Washington. Perhaps for interstate commerce here in Canada you could read "mobility rights".

One other matter that should be borne in mind is how this expanded role for the courts will affect each individual judge. The courts will, for many years, be in uncharted waters and, until a whole new body of judicial precedent accumulates, judicial decisions being in the amorphous area of rights will be highly subjective, and the social background, preconception and moral suasion of each judge will come into play. Judges will not be determining the law, but making it. Their decisions will not only be judicial, but will also have legislative effect and, indeed, political overtones, and with, as often as not, a federal bias, or provincial or regional bias.

Our courts can quite easily become politicized. We are standing into danger on that score in the current references and appeals arising over this resolution. As in the United States, we may see emerge activist judges and courts, liberal judges and courts and conservative or traditionalist judges and courts. This trend can eventually polarize even the members of a single court, as it has done from time to time in the Supreme Court of the United States.

Bearing in mind that the appointive power over Supreme Court judgeships is entirely federal, it would seem probable that eventually somebody, such as the Senate in the United States, will be required to vet judicial nominees to assure that they meet the political and ideological criteria of the government of the day. I suggest the distinction and reputation of our judges will suffer accordingly.

Recently the Chief Justice of Canada spoke out against choosing judges of the Supreme Court on a geographical basis rather than on the basis of excellence. To that concern will be added a concern that the selection of individual judges will become affected as much by the presumed constitutional and political effects of their supposed interpretations of the charter as by the excellence of their legal and personal qualifications.

I will conclude this by saying that, to my mind, the motivation of the government in pressing for the entrenchment of this charter in a Constitution, a charter that encompasses not only

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areas of federal jurisdiction but also provincial jurisdiction, does not primarily arise from concern for people's rights. We already have a federal Bill of Rights, albeit confined to areas of federal jurisdiction. To my mind, the primary motivation must be to entrench a centralist bias in our judicial system using the interpretative process now to be expanded into the new fields of federal and provincial constitutional responsibility encompassed in this charter. Such a bias will not be impeded by the exclusive federal prerogative over judicial appointments.

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May 28, 1981, Debate in the House of Commons, p. 10031 (click HERE)

Mr. Lorne Nystrom (Yorkton-Melville): […] We have seen that the constitutional resolution takes powers away from the province and gives them to the courts. This was done against the wishes of the four provinces in the west

[Page 10032]

and against eight provinces in Canada. […]

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May 28, 1981, Debate in the House of Commons, p. 10055 (click HERE)

Mr. John Gambie (York North): […] My supplementary question dealt with the acknowledged legal concept that in the event the charter of rights is established as contemplated by this resolution, the Supreme Court of Canada will in fact, as is the case in other jurisdictions, legislate through its interpretive judgments dealing with what the words in this charter mean. That is a simple principle of law and one which surely must be recognized by the Prime Minister who, I understand, was called to the bar, although I doubt he bas ever practised. At least I do not think he has ever practised.

Instead of dealing with the issue which was raised in the question, the Prime Minister dealt with the myth that for 54

[Page 10056]

years we have been trying to obtain a consensus. Nothing is further from the truth. The alleged charter of rights and freedoms with which we are presently concerned and which gives rise to most of the dispute throughout our nation was first presented to the people of Canada, to this Parliament and to the provincial premiers in October of 1980. October of 1980 is the fall of last year, and 54 years never enters into a determination of the time within which we have been concerned about this issue.

Then the Prime Minister went on in answer to my substantive question to say the following:

As to the question itself regarding the role of the courts and Parliament, it seems to me that the hon. member is under a misapprehension. What I have said is that both branches of government should be autonomous and should operate autonomously. It is our job to legislate. It is the court's job to judge whether the legislation is intra vires or ultra vires.

That is not the question I was asking, Mr. Speaker. I know it is the court's job to determine whether legisiation is intra vires or ultra vires, but that was not the question. The question was very simple: does the court not in fact legislate, having determined that it is intra vires, and thereby preclude this Parliament and all subsequent parliaments from ever determining whether they may change the words in the charter.

That was the question.

> Now, Mr. Speaker, a prime minister who responds in the fashion this one has does no service to the public or this House. Very clearly this Parliament is the supreme parliament of all parliaments because it has fixed the basic law of the country, if this package goes through, and no subsequent parliament under any circumstances will be able to change the law as this Parliament has enacted it. Now that is the death blow to the democratic process, Mr. Speaker.

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November 23, 1981, Debate in the House of Commons, p. 13137 (click HERE)

> **Mr. Wright:** […] At present, if the government wishes to restrict our rights, it must enact legislation. Section 24 of the new resolution reads as follows:
>
> Anyone whose rights or freedoms, as guaranteed by this charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. I always thought our rights were guaranteed, Mr. Speaker, but now it seems they are to be turned over to a court. The government is giving us those rights, and the courts can only interpret them. In other words, if the government takes those rights away, the courts are bound to interpret that, not to guarantee our rights.

p. 13146

> **Mr. Jean-Robert Gauthier (Ottawa-Vanier):** […] So this is in the charter of rights, a serious flaw that makes it in my view both unacceptable and utterly incomplete. Minorities are granted certain rights but not the tools needed to have them enforced. Even the Ontario Premier has no hesitation in recognizing that the charter of rights gives nothing more to French speaking residents in his province, and I refer you to a report published no later than today in the Montreal Paper La Presse, where Mr. Davis is quoted as making the statement utterly shocking to us Franco-Ontarians that there was nothing new there, the charter did not change much in the Ontario situation.

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November 24, 1981, Debate in the House of Commons, p. 13216 (click HERE)

> **Hon. Ray Hnatyshyn (Saskatoon West):** [...] There is a third point I wish to make concerning the government's approach to this matter. I am concerned that, in its passion to sell a charter of rights and freedoms to Canadians, the government has created misapprehensions and misunderstandings about the effect of an entrenched charter. Much as I favour an entrenched bill of rights, I do not see it as a great and shining panacea for the problems of civil rights and freedoms in this or any other country. I was interested in listening to the Minister of National Health and Welfare (Miss Bégin) when she listed the great and glorious things which would automatically flow by the mere passage of this particular resolution. We must be careful that we do not lull the public into a state of complacency by speaking of the concept of a charter in terms that are too glorifying or too glowing.

There are several factors which must be kept in mind. We must not delude ourselves concerning the power of the courts to act contrary to the sentiments of the general public. At some point, a decree from the courts will be simply nullified by the force of public opposition. For example, in the United States, there was a violent reaction to the bussing orders which followed Brown v. the Board of Education. Some American jurisdictions have flatly refused to comply with the school prayer decision. The courts simply cannot move too far from the general views and values of the public.

Even though the Prime Minister appears not to like it, at least the notwithstanding clause in the resolution recognizes the reality that the courts are not necessarily more in tune with public opinion and morals than are legislative bodies. At least in this country we will have a mechanism for adjusting court decisions which fall out of step with public opinion. Some may view this as the charter's downfall; but the argument is that, particularly in the early years of a charter and because of our federal nature, we need a route which will allow Parliament and the provinces to deal with judicial pronouncements without having to resort to a constitutional amendment.

My point is that, important as the entrenched bill of rights is, let us not woo the Canadian people into believing that it is the final solution. The price of freedom is vigilance by individual citizens. We do our country a great disservice by failing to stress that particular responsibility.

My fourth concern is one relating to the role of the judiciary in interpreting the new charter. We have a charter which will affect the lives of all Canadians. A good deal of authority has now been handed to the courts, authority to determine the application and parameter of our rights. It will take several years of litigation before the words of the charter will have full discussion and are given a certain meaning. We have, however, a bench that is trained in the common law practice of relying on precedent to reach a decision. Now, however, judges will be called upon to rule on every aspect of social and political life in a sweeping fashion. They will be called upon to make these vast pronouncements with major sociological and political implications.

[Page 13217]

Canadians will be faced with a judiciary which will be obliged to exercise a quasi-legislative role in interpreting the new Charter of Rights and Freedoms. We will soon realize that the composition of the courts and the political and social beliefs of our judges will be an extremely important factor in the determination of the rights and prerogatives of citizens and institutions in the country. Indeed, the power of appointment of judges from time to time will be of immense importance in the ultimate determination and interpretation of fundamental rights in Canada.

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November 25, 1981, Debate in the House of Commons, p. 13291 (click HERE)

Mr. Fred King (Okanagan-Similkameen): […] I can do no better than to refer each hon. member here to the speech in the House yesterday by the hon. member for Saskatoon West (Mr. Hnatyshyn), whose factual and comprehensive review of the resolution should be compulsory reading for all hon. members, most specifically those hon. members opposite whose euphoric description of the Charter of Rights and Freedoms and what it offers to Canadians is based on a

> distortion of the present reality in Canada with regard to individual rights and freedoms. No country has a better record of respect for the individual than has our Canada. My analysis is that the charter mainly marks a new day for rights in Canada to the extent that the charter's provisions put into the hands of the courts, rather than the elected legislatures, the future direction of social policies in Canada. The hon. member for Saskatoon West said last night:
>
> We will soon realize that the composition of the courts and the political and social beliefs of our judges will be an extremely important factor in the determination of the rights and prerogatives of citizens and institutions in the country. Indeed, the power of appointment of judges from time to time will be of immense importance in the ultimate determination and interpretation of fundamental rights in Canada.
>
> I concur in that fully.

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November 26, 1981, Debate in the House of Commons, p. 13365 (click HERE)

> **Hon. W. Bennett Campbell (Minister of Veterans Affairs):** [...] The Charter of Rights and Freedoms removes the prospect of the exercise of arbitrary political power interfering with the basic rights and freedoms of individuals, just as the entrenchment of the principle of equalization ensures that provinces such as Prince Edward Island will continue to play their legitimate role in the context of a strong federal system of government. On those grounds, I repeat that the resolution makes an assumption about the essential federal character of the country, which I fully endorse and support.

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November 27, 1981, Debate in the House of Commons, p. 13426 (click HERE)

> **Mr. Munro (Esquimalt-Saanich):** [...] I have other concerns with the substance of the Charter of Rights and Freedoms that is before us, Mr. Speaker. Some relate to the wording but most relate to the risk that we are running in handing over to the courts the task of interpreting this document and, in consequence, of making the laws that Parliament should be making. In our tradition, Parliaments are our legislators. In this particular document we are about to hand over a large portion of that legislative responsibility to our courts. That worries me, Mr. Speaker, as it should worry not only parliamentarians but all Canadians.
>
> Judicial interpretations of entrenched items in this charter will be, if I understand matters correctly, alterable only through the application of the amending formula. That will not be easy. The Charter of Rights and Freedoms will hand over to the courts much that was once within the power of Parliament to consider. This I consider regressive, Mr. Speaker.
>
> […]
>
> [Page 13427]

[…]

I have serious misgivings about charters and codes of right. They stem from my intellectual upbringing, relying on precedent, practice, convention and common law to determine the four corners at any given time within which I may exercise the rights I believe I possess.

Mr. Chénier: Oh, oh!

Mr. Munro (Esquimalt-Saanich): I cannot understand why the hon. member is giggling. The hon. member for Surrey-White Rock-North Delta (Mr. Friesen) intervened on the original resolution. He expressed much the same thoughts, particularly as they referred to the inherent nature of our rights. I commend his speech to all within hearing distance of my voice. It can be found on page 7497 of the February 19 edition of Hansard.

As I have already said, it will be impossible to escape from the strait-jacket of entrenchment without recourse to the amending formula. This is a frightening concept. Perhaps I am repeating myself, but I think it is worth doing so. By my understanding of this term and its application, judicial interpretations are just as entrenched as the sections that are being interpreted. This gives judges the role of legislators which they were never intended to be.

I notice Mr. Speaker is becoming somewhat jittery; perhaps he is suggesting that I should sit down soon. I should like to refer to Section 24(2) which deals with the enforcement provisions. It rules out evidence in a proceeding for remedy against an infringement of an entrenched right or freedom, if it is established that "having regard to all the circumstances", which is a phrase that is surely open to judicial interpretation and appealable beyond the court where such a ruling was given, the admission of that evidence would "bring the administration of justice into disrepute". Again this is an open-ended phrase. What do those words mean? What will the judges say about them?

In the few minutes remaining I should like to examine the preamble because I think it is defective as well. There are three whereas clauses. Between the second and the third there is need for amendment. It overlooks the fact that there was an agreement in conformity with the ruling of the Supreme Court of Canada. I suggest that the following two additions be made:

And whereas it is constitutionally required that this resolution have a substantial measure of provincial consent.

An hon. Member: Are these amendments?

Mr. Munro (Esquimalt-Saanich): I am suggesting that there are defects. I am not proposing amendments, but I think the entire document is a sham. The second addition would read:

And whereas provincial consent to this resolution has been signified by the governments of the provinces of—

And the provinces ought to be listed. It would fulfil the requirement of the Supreme Court of Canada. We cannot rely on the British Parliament or on Her Majesty the Queen to follow our

newspapers. It should be part of the document which is going to them. It should indicate that substantial consent is required and has been obtained.

Some hon. Members: Hear, hear!

p. 13428

Mr. Ian Waddell (Vancouver-Kingsway): […] The fourth flaw is that the charter has been somewhat emasculated. The principal concession that the premiers won from the federal government in the November 5 accord was the provincial override on fundamental freedom, legal rights and equality rights in the charter.

The purpose of an entrenched charter is to give the courts, in an open and direct manner, the authority they need to protect our basic freedoms if legislative and government restraint should fail. If legislatures are given the power to cancel that judicial authority, as they now have been, they are most likely to use it when there is a failure of restraint. Canadian history shows that it has been, by and large, the provincial legislatures and their creatures, the municipalities, that have most often violated fundamental rights.

I am a lawyer, Mr. Speaker, and I have appeared in every level of court in Canada on civil liberties cases and I have seen this pattern emerge very clearly. It is in our history, from Mr. Roncarelli's liquor licence to the Alberta press laws, most recently to the anti-parade by-laws in some of our cities which affect freedom of assembly. It is a sorry picture.

There have been violations of civil liberties in this country and if the legislatures are given an override, they may use it some time when restraint is called for.

A great lady who once represented my riding of Vancouver-Kingsway in this House, Grace MacInnis, told me that her husband, Angus MacInnis, stood up against a tidal wave of public opinion when it was proposed to confiscate the homes and property of Japanese Canadians and move the people away from the west coast during the war. I am afraid that could happen again and that is why I think it is unfortunate that we do not have an entrenched charter. We will have to live with that, however. We expected that some concession would be made to the premiers and this is it. I just want to express my disappointment about that, Mr. Speaker.

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November 30, 1981, Debate in the House of Commons, p. 13505 (click HERE)

Mr. David Kilgour (Edmonton-Strathcona): […] The concept of an entrenched Charter of Rights and Freedoms enjoys wide support in all parts of Canada, certainly among the majority of my constituents, according to a poil that I conducted. However, as a lawyer and as someone who hangs John Diefenbaker's Bill of Rights in his office, I have, like many others, been saddened by the way that our courts have judicially extracted most of the vitality of that Bill of Rights on the premise that it is just another federal statute applicable only in the federal spirit. To my knowledge, it has been applied to override part of another measure only in the Drybones case in 20 years.

> Paradoxically, the courts will no longer be able to ignore an entrenched Charter of Rights and Freedoms because the Charter of Rights and Freedoms in the most basic sense stands above the courts, albeit subject to their interpretation.

p. 13510

> **Mr. Gordon Towers (Red Deer):** […] I bring this to the attention of hon. members because Canadians are very concerned as to what is happening to their security. I am sure that all members received a brief on the Canadian Constitution from the Canadian Police Association. I quote:
>
> The Canadian Police Association wants it clearly understood that we are not opposed to Canada having its own Constitution, whether by patriation or otherwise, or to a Charter of Rights and Freedoms with stich fundamental legal principles as can be capsulized in constitutional language, as long as Parliament and the legislature can at least share with the courts the function of evolving Canada's criminal law and procedure in future years.
>
> We do, however, strongly object to the dangerous wording of the Charter of Rights and Freedoms as presently proposed which, in aur opinion, would dramatically affect aur criminal justice system and abdicate Parliament's authority and responsibility as the primary guardian of the rights of Canadian citizens.
>
> In supporting the position taken by the Canadian Association of Chiefs of Police and the Canadian Association of Crown Counsels, the Canadian Police Association, on behalf of over 50,000 members, hereby expresses its grave concern regarding certain provisions of the Canadian Charter of Rights and Freedoms which forms a part of the proposed Canadian Constitution and relate directly to legal and/or law enforcement issues—
>
> The wording now before Parliament invites the courts in Canada to adopt the United States exclusionary rule, which has never been the law of Canada, England or the rest of the Commonwealth.
>
> Let me impress that there has never been as good a force in the world as the British rule of law and British justice. The quote continues:
>
> The rationale of the United States approach is that courts can supervise and discipline police by the after-the-fact sanction of excluding evidence and thereby protect the civil liberties of individuals. The Anglo-Canadian experience is that the function of the courts is to search for truth by having all relevant evidence and the best way to supervise and discipline police and thereby protect the civil liberties of Canadians is by before-the-fact direction ta police and by subsequent prosecution and/or disciplinary hearings for police to act illegally or improperly.
>
> I feel the Liberal government bas let the RCMP down very badly because of its mishandling of the police under the McDonald commission inquiry. We live in an imperfect society. We are being asked to sanction an imperfect document. Stephen Leacock once wrote that the only place one is likely to find perfection is in a socialist commonwealth of angels. He is probably right.

> I cannot accept an imperfect resolution which is bound to create more problems and more division than it will solve. There will be court case after court case. It will be a gold mine for lawyers. It will create a tremendous workload for the courts. Many of the issues will be taken out of Parliament and placed in the courtroom.

p. 13517

> **Mr. Ron Stewart (Simcoe South):** […] I think perhaps it was John Stuart Mill who said literally that every man has the right to go to hell in the manner of his own choosing so long as he does not bother his neighbour. I would prefer to take my chances with the courts interpreting my rights. I do not subscribe to the doctrine of legislative supremacy in all cases. If you prefer to go the route of legislative supremacy, maybe you should talk to, the Japanese-Canadians whose rights were overridden during World War Il, or talk to the Jehovah's Witnesses in Quebec.
>
> I do not favour any loosely worded protection of basic rights which will permit the passage of discriminatory legislation. It has been written by others that the "notwithstanding" clause is a "watering down," a "gutting" and a "disembowelling" of the Charter of Rights and Freedoms. The "notwithstanding" clause weakens the charter, it does not strengthen it. Freedom of religion means just that—no "ifs", "ands" or "buts". The same goes for our other fundamental rights and freedoms.
>
> Will we be better off with a Charter of Rights and Freedoms? Will we be more united? Will this proposed charter divide us? Those are interesting questions.
>
> The United States bas an entrenched charter, but its charter was wrestled, fought for an bled for. It was a declaration of independence from another country. That is a vast, vast difference.
>
> On the other side of the Atlantic the United Kingdom does not have an entrenched charter of rights. In fact, the U.K. does not have a formal constitution. The U.S.S.R. has one of the broadest and most humanitarian charters for the protection of civil liberties that exists anywhere in the world. Need I say any more? So much for entrenchment.
>
> We have existed for 114 years without an entrenched charter of rights and freedoms, and I think that, with a couple of obvious exceptions, we have done remarkably well. Most Canadians want an end to this debate, but I do not believe they wish an imperfect charter as the price. I do not believe they want an imperfect Constitution. I would again like to quote from, Senator Forsey who said:
>
> —if we get an entrenched charter of individual and minority linguistic rights, putting them out of the power of Parliament or the provincial legislatures to touch ... Such a charter would give the courts wholly new, and vitally important, powers over a vast new field of subjects; and the history of the United States shows how courts can interpret an entrenched bill of rights to block social progress. So the drafting of such a bill, or charter, will be both delicate and crucial.
>
> For example; a constitutional guarantee for parents to have their children educated in their mother-tongue (French, English, or native) would not protect the freedom of choice which the United Nations has declared essential. An English-speaking Canadian who wanted to have his children educated partly in French, or a French-speaking Canadian who wanted to have his children

educated partly in English. or an Indian or Inuit who wanted to have his children educated partly in French or English, would have no constitutional protection whatever.

I do not believe that the people of Canada wish to trade parliamentary law for constitutional law. I feel somehow this evening that my remarks here are redundant. The dye bas The Constitution already been cast. We are all aware of it on this side of the House.

The government is determined to proceed hastily with this inferior product while we suffer the consequences later. It may be news to the government but Canadians do not rate the Constitution very highly in the pecking order. As Canadians perceive it, I am told that it ranks about fifth. It rates below the economic issues.

p. 13522

Mr. Nystrom: […] A Charter of Rights and Freedoms is enshrined in the Constitution but the final arbitrator will be the legislatures and Parliament on the one hand or the Supreme Court of Canada on the other hand. But the Supreme Court is appointed by the Prime Minister of this country and judges are appointed by the federal government without any input whatsoever from the provinces. Yet, the Supreme court is the referee in federal-provincial conflicts.

In federations such as the United States, Switzerland and others, in cases where national institutions affect the jurisdiction of the provinces and the federal government, both the provinces and the federal government must have a say. Until we have that reflection of the regions in the centre, we are going to have strains in this confederation, we are going to have things that pull us apart instead of bringing us together. We are going to have greater and greater institutionalizing of something which I do not like. which is a federal-provincial

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conference and all the power that it has gathered to itself. The premiers' conferences and the cabinet ministers' conferences are accruing greater and greater power because of a vacuum in our system. There are no places in our country where the regions can be reflected equally, where the voice of the region can be reflected and heard and felt in terms of power.

Because of the lack of this possibility, the provincial Premiers and cabinet ministers become the spokespersons for regionalism in Canada. I do not blame them any more than I blame members of the House. I blame the lack of a truly federal system that reflects, on the one hand, "rep by pop" but not on the hand, "rep by region or rep by province". I think we need both if this country is to stay together.

My final comments are about this institution itself, Mr. Speaker. I think we need a really serious reform in Parliament. I think we have to make the member of Parliament a legislator with some real power and real clout over what is happening in the country. All too often parliamentarians are nothing more than a rubber stamp for the executive or cabinet in Canada. I think that is dead wrong. I think we should be strengthening the power of committees and giving Members of Parliament a lot more power and a say.

I will just use one example of this, Mr. Speaker. In the United States the President can only nominate Supreme Court justices but the Senate, which reflects the states, has to approve those nominations in the judiciary committee.

An hon. Member: Do you want our Senate to pick them?

Mr. Nystrom: We cannot have our Senate pick them because our Senate is appointed solely by the federal government. It does not reflect the regions, federalism or the political reality that is out there in the country. These things have to change, Mr. Speaker.

Another thing is that the Prime Minister appoints all ambassadors. Perhaps we should look forward to a time when the Prime Minister would nominate ambassadors, and the External Affairs Committee of the House of Commons, representing the people of the country, could either accept or reject the nominations.

Many of our central institutions, such as the Prime Minister's office and the Privy Council office, have too much power. That is an immense distortion of the democratic system and it is repugnant to the idea of democracy. I am not reflecting on any individual here. We as Canadians have allowed this practice to develop over the years. I think the time has come to democratize this place. The time has come to give members of Parliament real power as legislators, not just rubber stamps for an executive. The time has come for us to make sure we federalize our institutions and, if we are to keep the Senate, to make sure it is federalized. Otherwise, let us abolish it. We have to federalize the Supreme Court of this country and many of the other federal institutions, and if we do that, I am sure that the country will remain strong and happy forever.

For a country to survive, its constitution must reflect the reality of the country. Our reality as a country is one of diversity, one of regionalism, one of provinces and one of duality with our aboriginal peoples and the people of the French language or the people of Quebec.

Some hon. Members: Hear, hear!

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April 27, 1982, Debate in the House of Commons, p. 16687 (click HERE)

Mr. Benno Friesen (Surrey-White Rock-North Delta): […] Crown Prerogative simply means that it is the power by which the Prime Minister can do what he thinks necessary in what is deemed to be an emergency. I realize that the customs and statutes have somewhat limited those particular powers of the Crown prerogative, but it is a very loose and easily misunderstood term. That is why I rose in my place in the House on March 31 to, ask the Prime Minister, as reported in Hansard on page 16005:

—what the limits of Crown prerogatives are in this context. Does he have a legal opinion regarding the limits of this power under the new constitution?

The Prime Minister said, among other things:

Certainly I am on sound ground in saying that any prerogative, royal or otherwise, can be limited by statute. That would be the position I would take.

He said, "can be limited by statute". At the outset, it is ominous for him to say, "can be limited by statute". I have to ask why he did not say, "will be, should be" or even "may be".

The letter from the President of the Privy Council is much more specific. That letter, dated March 19, reads as follows:

If Parliament were dissolved, or if the pace of the prices at hand did not allow the time to assemble Parliament, the government would be forced to act in reliance on the Crown prerogative to the extent that it provided a legal basis for authority to act.

What is the legal basis for the power to act? I was concerned about that particular provision and, therefore, went to the government research branch of the Library of Parliament to ask them to conduct a study of that provision. I would like to read a short segment of that study. Page four of the study indicates:

By far the majority of crises in British history were met by parliamentary action; with strong cabinet and a majority government, necessary legalisation to delegate powers can be quickly passed without resort to arbitrary action without the authority of Parliament. However, the possibility of independent executive action always exists. As noted, such actions may be found to be legal as an exercise of the royal prerogative or by virtue of a common law duty to protect the realm. The courts would determine the legality of such actions.

In other circumstances, there may be no legal basis for executive action, and yet the courts may be prevented from considering the issue. Under the British constitutional system in which Parliament is supreme, executive acts can be rendered legal *ex post facto*, by passage of an indemnity act. Such a statute protects officials from prosecution or civil proceedings, and this precludes judicial determination of the legality of the actions.

It then refers to invocation of the law of necessity. I know that this Prime Minister (Mr. Trudeau) loves to, invoke the law of necessity; but the point is that in such circumstances the courts may be prevented from considering the issue.

That led me to the supplementary question I asked the Prime Minister at that time. He has repeatedly said that the new charter would always contain provision for resort to the courts. However, the Parliamentary Secretary to the President of the Privy Council (Mr. Smith) has indicated in this House that the procedure in relation to this emergency planning order

[Page 16688]

eliminates due process in the court, because the government has already worked out a five-step process which does not include court procedure. That bothers me.

Then I find that, according to the tradition or the convention of the Royal prerogative, it is possible to provide retroactive legality to hitherto illegal action, and that by invocation of the law of necessity the courts can be prevented from looking into a matter which would otherwise be

considered illegal. This is what worries me about the Crown prerogative. I think the people of Canada deserve a clear indication as to what the limits of the Crown prerogative would be if the government invoked these emergency planning measures.

Mr. David Smith (Parliamentary Secretary to President of the Privy Council): First of all, Mr. Speaker, I would point out to the hon. member that in his opening statement he again misstated the facts, although unintentionally, I am sure. He said that Planning Order 1981-1305 empowered the government to establish civilian internment camps. That is not correct. If the government has this authority, and it would only use it in wartime, it is certainly not because of this planning order. It may be as a result of the War Measures Act which would come into play in a wartime situation. However, what this planning order does is to allocate to various ministers the responsibility for drawing up plans. It does not give the government any authority it does not already possess. It could well be that after drawing up those plans the ministers may come to the conclusion that legislation is required and would have to be passed. However, the government is not given any authority by this order in council it did not have before.

The hon. member noted that the emergency planning order was made pursuant to the Crown prerogative. He asked the Prime Minister (Mr. Trudeau) what the limits of the Crown prerogative are in this context. The Prime Minister replied that he would have to examine the order to determine the prerogative which is involved.

We have reviewed this matter and I can inform hon. members that the prerogative authority for the emergency planning order is that which is commonly known as the prime ministerial prerogative. It is a settled convention of government that the Prime Minister may from time to time allocate, amend or clarify working responsibilities of ministers of the Crown by virtue of this prerogative. This same principle underlies the Public Service Rearrangement and Transfer of Duties Act, the act on whose authority the previous civil emergency measures Planning Order PC-1965-1041 was revoked.

I might also say that I requested the research branch of the Library of Parliament to compile a paper on the validity of the emergency planning order. I would be happy to show my friend a copy if he has not already seen it. It quite clearly confirmed that this was a legitimate order within that prerogative.

The hon. member went on to ask the Prime Minister about the recourse to the courts of those who may be interned in wartime. He noted that the anticipated internal safeguards and procedures I outlined in my statement to this House on December 17 did not make explicit reference to the right to appeal to the courts. I did not include this right because it goes, almost without saying, that an individual in such circumstances may make representations to the appropriate judicial tribunal. Since I spoke on that occasion, the Canadian Charter of Rights and Freedoms has been approved to give constitutional expression to this right. […]

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