must give some consideration to what caused the government to avoid doing in this case what it did in the Senate case, why it did not exercise its right to make a reference in this case.

I suggest that the answer is contained in the subsection entitled "Legal Strategy" on page 52 of the leaked Privy Council memo, which reads as follows:

(6) There would be a strong strategic advantage in having the joint resolution passed and the U.K. legislation enacted before a Canadian court had occasion to pronounce on the validity of the measure and the procedure employed to achieve it.

Some hon. Members: Shame, shame.

Mr. Clark: The advice to the government then continued:

This would suggest the desirability of swift passage of the resolution and the U.K. legislation.

This has clearly been the purpose throughout, to try to bull this through the Parliament of Canada.

Most of us have focused on what it has done to our institution, the institution in which we work. We know the damage it has done to Parliament; I will not repeat those arguments. But the point is that there was also an attempt made to get around the Supreme Court of Canada. It was not simply an attempt to get around the Parliament of Canada but to get around a second major and central Canadian institution. I suggest that was done with absolute deliberateness. The fact that it was done deliberately is a matter which will have to weigh upon Madam Speaker's decision as you consider whether or not the interests of justice, of fair play and of the importance of prejudice to the courts have been respected in this case. That is the Kirby document.

Another matter Your Honour will want to consider—and we are dealing with new ground here—is the questions upon which some authorities have written but on which no legal or parliamentary authorities have yet decided. I am sure Madam Speaker will want to consider such commentary upon questions of sub judice as has occurred in learned writings, such as the book entitled "Judicial Review of Legislation in Canada", the author of which is Mr. Barry Strayer, who is presently the deputy minister of justice of the Government of Canada. I should like to quote from two sections of Mr. Strayer's book. The first appears on page 188 after a review of the practices concerning the relation between courts and Parliament. He said:

From this brief historical review of the reference system two facts emerge which place it in an interesting perspective. First, it may be seen that at both the federal and the provincial level this device was looked upon as an integral part of the functioning of the Constitution.

It was not something incidental; it was at the very base of the functioning of the Constitution. He continued:

After several years of experience with the reference power under the Supreme Court Act, unsatisfactory as it had been, both government and opposition in the House of Commons were agreed that it should be retained.

In other words, when the question had arisen before in this institution, both government and opposition decided that the principle, which the government decided not to exercise for its own partisan reasons, was sufficiently important to the system that it should remain a part of the system. He continued:

The debates in 1890 and 1891 primarily reveal a concern that the system should be made to operate properly.

I want to emphasize the following sentence:

There was a general assumption that this is an important device for ensuring that neither Parliament nor the legislatures exceed their constitutional powers. Similarly, the resolutions at the 1887 interprovincial conference show that the provinces placed great emphasis on this device, their concern being that they should be equally entitled to resort to it.

I raise the question, that if they are to be equally entitled to resort to it, they should be equally entitled to all the consequences of a resort to the reference. One of the consequences of a resort to the reference, when it is exercised by the federal government, is that this Parliament cannot debate the question. What I am arguing is that it has always been the understanding in relation to references to the Supreme Court of Canada that wherever the reference arose, so long as it arose legally from a province or the federal government, the consequences should be the same. If a federal reference would have stopped Parliament from debating the matter, then a provincial reference should stop Parliament from debating the matter.

● (1540)

Some hon. Members: Hear, hear!

Mr. Clark: This device, then, has always been seen as a protection of the Constitution. It has always been seen as being a guarantee against excesses by one level of government or the other. There are many cases which come to mind. I can think of some cases in my own province where, in the past, actions were taken by the provincial government of the day which seemed to be excessive. We can all think of cases where those excesses have been taken. We all know the need to have some protection in a federal system against those kinds of excesses being taken. The reference device is there precisely to provide that kind of protection, as Mr. Strayer said in his authoritative and respected work.

I want to quote one last reference from Mr. Strayer's book because it specifically deals with one kind of excess. On page 193 he says:

Finally, references provide a flexible means for each level of government to police the constitutional excesses of the other level of government.

I emphasize, Madam Speaker, "to police the constitutional excess."

We have been arguing, and it is a matter of argument in this House, whether or not there is a constitutional excess being practised now. The point is that the question whether there is a constitutional excess has moved beyond this institution into the Supreme Court of Canada. As Mr. Strayer points out in his authoritative work, the reason for the reference provision is precisely to provide either level of government—the provinces in this case and the national government in other cases—a means of protection against that kind of excess. That, I suggest, Madam Speaker, is something you will want to consider very carefully in coming to your decision.